State of Iowa
1980

FORTY-THIRD BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1980

THOMAS J. MILLER

Attorney General

Published by
THE STATE OF IOWA
Des Moines

ATTORNEYS GENERAL OF IOWA

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
Thomas J. Miller	Clayton	1979-

PERSONNEL OF THE DEPARTMENT OF JUSTICE

Main Office

THOMAS J. MILLER, 1/79- ..... Attorney General
J.D., Harvard University, 1969
MARK E. SCHANTZ, 1/79- ..... Solicitor General
L.L.B., Yale University, 1968
BRENT R. APPEL, 1/79-2/82 ..... First Assistant Attorney General
J.D., University of California, 1977

WILLIAM C. ROACH, 1/79- ..... Administrator
KAY BALLEW, 8/79-6/80 ..... Administrative Ass't
ANN BAUSSERMAN, 1/79- ..... Administrative Ass't
KATHRYN R. FOREMAN, 6/80-10/81 ..... Administrative Ass't
KAREN A. REDMOND, 10/80- ..... Receptionist
PATTI SAMPERS, 1/79-10/81 ..... Accountant
MANDA C. STUART, 7/79-9/80 ..... Receptionist
SUSAN E. POHLMAN, 1/79-9/80 ..... Administrative Ass't
CLARENCE J. WEIHS, 1/79- ..... Administrative Ass't

Administrative Law

HOWARD O. HAGEN, 2/79- ..... Division Head, Ass't Attorney General
J.D., University of Chicago, 1973
DAVID FORTNEY, 2/79-1/82 ..... Ass't Attorney General
J.D., University of Iowa, 1975
ALICE HYDE, 7/79-1/81 ..... Ass't Attorney General
J.D., University of Iowa, 1978
STEVEN G. NORBY, 11/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
FRANK J. STORK, 5/80-8/81 ..... Ass't Attorney General
J.D., University of Iowa, 1977
SALLY HIGGINBOTTOM, 1/79- ..... *Legal Secretary*

Area Prosecutions Staff 79-80

HAROLD A. YOUNG, 7/75- ..... Division Head, Ass't Attorney General
J.D., Drake Law, 1967
JOSEPH S. BECK, 11/73-8/79 ..... Ass't Attorney General
J.D., Drake University 1971
EDWARD M. BLANDO, 3/78-10/80 ..... Ass't Attorney General
J.D., University of So. Dakota, 1968
ROBERT J. BLINK, 8/79-8/81 ..... Ass't Attorney General
J.D., Drake University, 1975
CELESTE F. BREMER, 4/79-8/79 ..... Ass't Attorney General
J.D., University of Iowa, 1977
BRUCE COOK ..... Ass't Attorney General
J.D., Drake University, 1975
SELWYN L. DALLYN, 3/80- ..... Ass't Attorney General
J.D., w/honors, University of Iowa, 5/78

JAMES KIVI, 2/80- ..... Ass't Attorney General
J.D., University of Iowa, 1975
PAUL D. MILLER, 3/80- ..... Ass't Attorney General
J.D., University of Iowa, 1976
RICHARD L. RICHARDS, 6/77- ..... Ass't Attorney General
J.D., Drake University, 1977
WILLIAM K. STOOS, 8/79-9/79 ..... Ass't Attorney General
J.D., w/Distinction, University of Iowa, 1975
RICHARD A. WILLIAMS, 7/75- ..... Ass't Attorney General
J.D., University of Iowa, 1971
GARY D. WOODWARD, 10/72-7/79 ..... Ass't Attorney General
ALFRED C. GRIER, 9/72- ..... Investigator/Pilot
SCOTT D. NEWHARD, 3/79- ..... Investigator
BILLIE J. EVANS, 11/79 ..... Secretary
DEBRA L. PETERSON, 1/76-10/79 ..... Secretary

CIVIL RIGHTS

VICTORIA L. HERRING, 1/79- ..... Ass't Attorney General
J.D., Drake University, 1976
SUSAN JACOBS, 7/79-3/81 ..... Ass't Attorney General
J.D., University of Iowa, 1979
SCOTT H. NICHOLS, 1/80- ..... Ass't Attorney General
J.D. University of Iowa, 1979
RAYMOND D. PERRY, 9/77-2/80 ..... Ass't Attorney General
J.D., University of Iowa, 1975

Consumer Protection

DOUGLAS R. CARLSON, 6/67- ... Division Head, Ass't Attorney General
J.D., Drake University, 1968
KATHRYN L. GRAF, 2/78- .... Deputy Division Head Ass't Attorney Gen
J.D., Drake University, 1977
ROBERT CLAUSS, 2/78-6/79 ..... Ass't Attorney General
J.D., Drake University, 1972
PATRICIA J. McFARLAND, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
TAM B. ORMISTON, 1/79 ..... Ass't Attorney General
J.D. University of Iowa, 1974
FRANK THOMAS, 3/79- ..... Ass't Attorney General
J.D., Indiana University, 1974
TERESA D. ABBOTT, 5/78- ..... Investigator
CATHLEEN L. ANTILL, 8/78- ..... Investigator
EUGENE R. BATTANI, 5/77- ..... Investigator
SUSAN HERBERS, 6/74-6/79 ..... Investigator
JAMES R. LANGENBERG, 7/77-4/80 ..... Investigator
KAREN LIKENS, 8/77- ..... Investigator
ONITA MOHR, 4/80- ..... Investigator
NORMAN NORLAND, 1/80- ..... Investigator
LYNN M. O'HERN, 2/79-12/79 ..... Investigator
ELIZABETH ANN THORNTON, 1/79- ..... Investigator

JANICE M. BLOES, 3/78- ..... Secretary
CHERYL A. FREEMAN, 4/69- ..... Secretary
ROSIE JO KAUFMAN, 12/80-1/81 ..... Receptionist
PAMELA L. McGILVREY, 4/78-3/80 ..... Receptionist
MARTA MARIE PROCYK, 3/80-9/80 ..... Receptionist
MARILYN RAND, 10/69- ..... Secretary
DEE ANN ROCHFORD, 1/79-2/79 ..... Receiptionist
VALERIE TEED, 7/76- ..... Secretary
RUTH WALKER, 2/79- ..... Receptionist

Criminal Appeals Division

KERMIT L. DUNAHOO, 1/79-3/80 .. Div. Head, Spec Ass't Attorney Gen
J.D., Drake University
RICHARD L. CLELAND, 4/79 ..... Ass't Attorney General
J.D., University of Iowa, 1978
ANN FITZGIBBONS, 6/77-6/79 ..... Ass't Attorney General
J.D., Drake University, 1977
MERLE W. FLEMING, 7/80 ..... Ass't Attorney General
J.D., University of Iowa, 1980
JEANINE FREEMAN, 7/79 ..... Ass't Attorney General
J.D., University of Iowa, 1978
LONA HANSEN, 7/77 ..... Ass't Attorney General
J.D., University of Iowa, 1976
LEE M. JACKWIG, 7/76-2/79 ..... Ass't Attorney General
J.D., DePaul University
KATHY KREWER, 7/79-9/80 ..... Ass't Attorney General
J.D., University of Iowa, 1978
THOMAS D. McGRANE, 6/71 ..... Ass't Attorney General
J.D., University of Iowa, 1971
THOMAS N. MARTIN, 7/80-1/82 ..... Ass't Attorney General
J.D., University of Iowa, 1980
JOHN P. MESSINA, 1/80 ..... Ass't Attorney General
J.D., Drake University, 1979
JULIE POTTORFF, 7/79 ..... Ass't Attorney General
J.D., University of Iowa, 1978
ROXANN M. RYAN, 9/80 ..... Ass't Attorney General
J.D., University of Iowa, 1980
MARK R. SCHULING, 10/80 ..... Ass't Attorney General
J.D., University of Iowa, 1980
FAISON T. SESSOMS, JR. 6/77-9/79 ..... Ass't Attorney General
J.D., Drake University, 1977
DOUGLAS F. STASKAL, 7/79-11/80 ..... Ass't Attorney General
J.D., University of Iowa, 1979
SHIRLEY ANN STEFFE, 9/79 ..... Ass't Attorney General
J.D., University of Iowa, 1979
CONNIE LEE ANDERSON, 12/76 ..... Secretary
CHRISTY J. FISHER, 1/67 ..... Confidential Secretary
MELANIE L. RITCHEY, 6/77 ..... Secretary

Environmental Protection

ELIZABETH M. OSENBAUGH, 1/79- ..Div Head, Ass't Attorney General
J.D., University of Iowa, 1971

JOHN I. ADAMS, 1/69-9/80 ..... Ass't Attorney General
L.L.B., University of Iowa, 1952
ELIZA J. OVROM, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
CLIFFORD E. PETERSON, 10/68- ..... Ass't Attorney General
J.D., University of Iowa, 1951
JOHN P. SARCONE, 3/79 ..... Ass't Attorney General
J.D., Drake University, 1975
MICHAEL P. VALDE, 6/77-9/81 ..... Ass't Attorney General
J.D., University of Iowa, 1976
ROXANNE C. PETERSEN, 5/79- ..... Legal Secretary
MARGARET M. RAMSEY, 6/75-5/79 ..... Secretary
DIANA TRIGGS, 9/79-4/81 ..... Legal Secretary

FARM

EARL WILLITS, 7/79- ..... Division Head, Ass't Atty General
J.D., Drake University, 1974
TIMOTHY D. BENTON, 7/77- ..... Ass't Attorney General
J.D., University of Iowa, 1977
NEIL D. HAMILTON, 6/79-3/81 ..... Ass't Attorney General
J.D., University of Iowa, 1979
CHARLES G. RUTENBECK, 12/74- ..... Invesitgator
NANCY A. MILLER, 9/73- ..... Legal Secretary

HEALTH

BARBARA BENNETT, 10/78-7/81 ..... Ass't Attorney General
J.D., Creighton University, 1978
SARA K. JOHNSON, 8/77-7/79 ..... Ass't Attorney General
J.D., Drake University, 1977
LAYNE M. LINDEBAK, 7/78- ..... Ass't Attorney General
J.D., University of Iowa, 1979

INSURANCE

BRUCE W. FOUDREE, 3/76-2/80 ..... Ass't Attorney General
J.D., Drake University, 1972, L.L.M., University of Pennsylvania, 1975
Fred M. Haskins, 6/72- ..... Ass't Attorney General
J.D., University of Iowa, 1972

PROSECUTING ATTORNEYS TRAINING COUNCIL

RONALD KAYSER, 1/75-8/80 .... Exec Dir., Training Coord., Div. Head
J.D., St. Louis University, 1967
DONALD R. MASON, 9/80- ..... Exec. Dir., Training Coord., Div. Head
J.D., University of Iowa, 1976
BRENDA K. JOHNSON, 12/79-3/82 ..... Clerk Typist
JULIE JOHNSON, 7/77-12/79 ..... Secretary

PUBLIC SAFETY

THEODORE R. BOECKER, 6/73-8/79 ..... Ass't Attorney General
J.D., Drake University, 1973
GARY L. HAYWARD, 6/76- ..... Ass't Attorney General
J.D., University of Iowa, 1976

REVENUE

HARRY M. GRIGER, 1/67-8/71, 12/71- .. Division Head, Ass't Attny Gen

J.D., University of Iowa, 1966
THOMAS M. DONAHUE, 6/78- ..... Ass't Attorney General
J.D., Drake University, 1974
GERALD A. KUEHN, 9/71- ..... Ass't Attorney General
J.D., Drake University, 1967
SANDRA LUDWIGSON, 6/78-5/79 ..... Ass't Attorney General
J.D., Drake University, 1978
LINWOOD J. PRICE, 7/79-12/80 ..... Ass't Attorney General
J.D., Drake University, 1979

SOCIAL SERVICES

JOHN BLACK, 9/79- ..... Division Head, Special Ass't Attorney General
J.D., Northwestern, 1969
CRAIG BRENNEISE, 8/79- ..... Ass't Attorney General
J.D., Drake University, 1979
GEORGE COSSON, 10/79-7/79 ..... Ass't Attorney General
J.D., University of Iowa, 1972
JEAN DUNKLE, 10/75- ..... Ass't Attorney General
J.D., University of Iowa, 1975
BRUCE FOUDREE, 3/76-2/80 ..... Ass't Attorney General
J.D., Drake University, 1972; L.L.M., Pennsylvania University, 1975
JEANINE GAZZO, 7/79-3/80 ..... Ass't Attorney General
J.D., Creighton University School of Law, 1979
JONATHAN GOLDEN, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
MARK HAVERKAMP, 6/78- ..... Ass't Attorney General
J.D., Creighton University, 1976
BRENT D. HEGE, 9/80- ..... Ass't Attorney General
J.D., Drake University, 1973
FRANCIS C. HOYT, Jr., 10/75/80 ..... Ass't Attorney General
J.D., University of Iowa, 1974
ROBERT HUIBREGTSE, 6/75- ..... Ass't Attorney General
L.L.B., Drake University, 1963
ROBERT KEITH, 12/75-3/82 ..... Ass't Attorney General
J.D., University of Iowa
LINDA THOMAS LOWE, 8/79 ..... Ass't Attorney General
J.D., University of Iowa, 1979
BRUCE C. McDONALD, 7/78- ..... Ass't Attorney General
J.D., University of Iowa, 1978
THOMAS MANN, Jr., 1/80- ..... Ass't Attorney General
J.D., University of Iowa, 1974

JOHN R. MARTIN, 4/79- ..... Ass't Attorney General
J.D., University of Iowa, 1972
E. DEAN METZ, 5/78- ..... Ass't Attorney General
L.L.B., Drake University, 1955
CANDY MORGAN, 9/79- ..... Ass't Attorney General
J.D., University of Iowa, 1973
STEPHEN C. ROBINSON, 8/73- ..... Ass't Attorney General
L.L.B., Drake University
JOHN N. WEHR, 8/78-7/79 ..... Ass't Attorney General
J.D., Creighton University
LORNA L. WILLIAMS, 1/67-2/79 ..... Ass't Attorney General
J.D., Drake University
TAMARA J. BARRETT ..... Secretary II
CYNTHIA S. HANSEN ..... Clerk Steno III
JANE A. McCOLLOM, 10/79- ..... Secretary
D.J. MURPHY ..... Administrative Assistant II
CHERYL O'BRAZA ..... Clerk Steno III
RONNI B. SCOTT ..... Clerk Steno III

SPECIAL PROSECUTIONS

JOHN R. PERKINS, 12/72 ..... Division Head Ass't Attorney General
J.D., University of Iowa, 1968
J. ERIC HEINTZ, 12/78- ..... Ass't Attorney General
J.D., University of Iowa, 1971
NANCY D. POWERS, 3/79-9/80 ..... Ass't Attorney General
J.D., Drake University, 1976
WILLIAM F. RAISCH, 7/74- ..... Ass't Attorney General
J.D., Drake University, 1974
THOMAS L. SLAUGHTER, 7/79-11/80 ..... Ass't Attorney General
J.D., University of Iowa, 1979
GARY H. SWANSON, 4/72 ..... Ass't Attorney General
J.D., Drake University, 1964
DAVID H. MORSE, 3/78- ..... Paralegal
ROBERT P. BRAMMER, 11/78 ..... Administrative Assistant
MAUREEN E. LARSON, 11/77 ..... Legal Secretary
DIANE POLLARD, 4/78-1/79 ..... Secretary
MARSHA ANN WILLIAMS, 5/79- ..... Legal Secretary

TORT CLAIMS PERSONNEL, 1979 and 1980

JOHN R. SCOTT, 9/80- ..... Division Head, Spec. Ass't Attorney General
J.D., University of Iowa, 1969
JOHN WERNER, 6/79-7/80. Division Head, Spec. Ass't Attorney General
J.D., University of Iowa, 1973
LARRY M. BLUMBERG, 6/71-7/81 ..... Ass't Attorney General
J.D., Drake University, 1971
MARIE A. CONDON, 1/77-9/79 ..... Ass't Attorney General
J.D., Drake University, 1977
THOMAS A. EVANS, Jr., 6/77- ..... Ass't Attorney General
J.D., Drake University, 1977
PATRICK J. McNULTY, 9/77-5/81 ..... Ass't Attorney General
J.D., University of Iowa, 1977

JAMES PAUL MUELLER, 7/79-2/81 ..... Ass't Attorney General
J.D., University of Iowa, 1979
CARLTON G. SALMONS, 3/77-5/79 ..... Ass't Attorney General
J.D., Drake University, 1975
JON K. SWANSON, 10/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
ULRICH "RICK" GROTH, 11/80-1/82 ..... Investigator
THOMAS R. PATTERSON, 3/79-11/80 ..... Investigator
LOREN SNYDER, 1/73-3/79 ..... Investigator
CATHLEEN M. CREGER, 11/79-8/81 ..... Legal Secretary
ROSIE JO KAUFMAN, 12/80-1/81 ..... Secretary
PAMELA M. LIPPERT, 8/77-4/79 ..... Legal Secretary
JANICE THIEMAN, 10/78-7/80 ..... Legal Secretary

TRANSPORTATION

ROBERT W. GOODWIN, 12/70-9/81 ..... Division, Head Ass't Attorney General
J.D., Drake University, 1967
JOHN W. BATY, 9/72- ..... Ass't Attorney General
J.D., Drake University, 1967
STEPHEN P. DUNDIS, 1/77 ..... Ass't Attorney General
J.D., University of Iowa, 1976
DAVID FERREE, 4/79-9/81 ..... Ass't Attorney General
J.D., University of Iowa, 1978
DANIEL R. GOGLIN, 6/79-9/79 ..... Ass't Attorney General
CRAIG GREGERSEN, 2/79- ..... Ass't Attorney General
J.D., University of Iowa, 1978
ROBERT J. HUBER, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
JAMES D. MILLER, 12/79-4/82 ..... Ass't Attorney General
J.D., Drake University, 1976
STUART D. MILLER, 12/77-11/79 ..... Ass't Attorney General
J.D., Drake University, 1977
RICHARD E. MULL, 7/78 ..... Ass't Attorney General
J.D., University of Iowa, 1977
LESTER A. PAFF, 1/78- ..... Ass't Attorney General
J.D., St. Louis University, 1973
MARK W. LINDHOLM, 1/79-6/79 ..... Investigator

REPORT OF THE ATTORNEY GENERAL

March 23, 1971

The Honorable Robert D. Ray
Governor of Iowa

Dear Governor Ray:

In accordance with §§13.2(6) and 17.6, Code of Iowa, 1981, I am privileged to submit the following report of the condition of the office of Attorney General, opinions rendered and business transacted of public interest.

THOMAS J. MILLER
Attorney General

MARK E. SCHANTZ
Solicitor General

ATTORNEY GENERAL
OFFICE
ADMINISTRATIVE DIVISIONS

Administrative Law Division

The Administrative Law Division of the Iowa Department of Justice was created during 1979 by innovations occuring as a result of the change in administrations. Responsibilities which had been undertaken by various staff members throughout the office and by the Finance, Educaiton, and Government section were consolidated under the aegis of the new Administrative Law Division. This enables the Department of Justice to more effectively and efficiently represent its numerous and diverse state clients in similar areas of concern with procedural consistency. In particular, increasing awareness and impact of the Iowa Administrative Procedure Act upon all agency action has resulted in a need for expertise in the rapidly expanding area of administrative law.

Thus, the Administrative Law Division provides legal services which include rendering legal advice, preparing formal and informal opinions, preparing and reviewing legal documents, participating in administrative hearings, rule drafting, and defending or prosecuting litigated matters on behalf of 55 state agencies.

In addition to agency representation, inquiries to the Attorney General's office regarding county government operations, estate and escheat matters, bankruptcies, charitable trusts and private foundations are referred to the Division for response. During the last months of 1979, responsibility for inquiries and interpretations concerning the state election law was assumed by an assistant attorney general in the Division. Finally, the Division Director supervises generally the activities of the assistant attorneys general in the Health Division.

Litigation. At the close of the 1979-80 biennium, there were 95 cases in litigation pending before the Iowa and United State District Courts and 12 cases on appeal before the Iowa Supreme Court (or Court of Appeals) and the Eighth Circuit Court of Appeals. During 1979-80, 39 cases were settled or reached judgment. Litigation has arisen in almost every area of the Division's responsibilities, although the majority of cases arise as a result of a petition of judicial review of state agency action.

Opinions. The Administrative Law Division is responsible for preparation of formal and informal responses to requests for many Attorney General's opinions. While the majority of requests concern questions arising in the areas of banking and financial law, education, and county government operations, and the effect of county home rule, opinions have been issued touching on such varied topics as the courts, public hospitals, open meetings, state officers and departments, official publications, and municipalities and election issues.

During the 1979-80 biennium, 120 opinions were issued from the Administrative Law Division. Whenever possible, and when appropriate, requests for formal opinions were responded to with informal discussion, investigation and correspondence. At least 200 informal opinion requests were responded to by letter or oral advice in 1979-80.

Administrative Hearings. During 1979-80, attorneys from the Administrative Law Division were involved in representation of agencies conducting administrative hearings on the average of five to ten occasions monthly. Depending on the needs of the particular agency, such representation consisted of advice on open meetings and administratie procedures to full participation in all stages of the hearing process.

Agency Inquiries. Throughout 1979-80, as the Administative Law Division increased its representation of clients, informal agency inquiries also increased. Although the inquiries are usually by informal telephone call, they require

research, consultation and rapid response. Often the inquiry will require a more formal response,, and a letter dispensing informal legal advice is prepared.

Trusts and Estates. Approximately two hundred and fifty charitable trusts and private foundations file annual reports with the Department of Justice pursuant to federal regulations and those reports are processed and maintained by the Administrative Law Division. Pursuant to the Attorney General's supervisory powers over charitable trusts, **see** § 633.303, The Code, the Division has been involved in two cases attempting to modify trust instruments. Escheat matters, and cases involving unclaimed property turned over to the State Treasurer's office, are handled by the Division. In addition, inquiries form the general public regarding charitable solicitations and estate and trust law are referred to the Division. During 1979-80, there were approximately ten inquiries monthly.

Area Prosecutors Division

At the beginning of this biennium the Area Prosecutors became a separate division of the Justice Department. The basic function and purpose however remained unchanged from the inception of the program in 1971. The division continues to be a prosecution assistance and service delivery program supported by state funding to supplement the county attorney system in Iowa.

Specifically the area prosecutions divisions assists county attorneys in especially difficult or technical cases, or in cases where a conflict of interest situation may exist for the local prosecutor.

As of December 31, 1980, authorized personnel of the division include six general trial attorneys, three specialist attorneys, one investigator and one secretary. The specialist positions are assigned to the areas of 1) crime in penal institutions, 2) state tax prosecutions and 3) training/advisor to the department of public safety. These positions are funded by reimbursement from the corrections division of the department of social services, department of revenue and department of public safety respectively.

	1971-1972	1973-1974	1975-1976	1977-1978	1979-1980
Cases Opened	94	210	357	426	462

In addition to the increase in cases, the program has experienced a substantial increase in the level of complexity of the cases referred. One example, a joint state-federal prosecution, consumed over one thousand hours of staff attorney time. The referral of homicide and related cases, always difficult, increased nearly 50% from 1979 to 1980. Complex cases in the area of arson, sexual abuse and public official misconduct were referred in record numbers. The division was able to obtain a 92% overall conviction rate in major felony cases brought to disposition in the two-year period, despite the fact that these are usually the most difficult criminal cases in the state.

Civil Rights

The Civil Rights Division of the Attorney General's office is staffed with two assistant attorneys general. Their primary duties are to provide legal advice and assistance to the staff of the Commission, to litigate on the behalf of complainants in contested case proceedings before the Commission's hearing officers, and to litigate the Commission in Judicial review proceedings in the district court and upon appeal to the Iowa Supreme Court and Court of Appeals. In addition, they provide informal and formal Attorney General's opinions, participate in the training sessions held by the Commission for its staff and others

involved in civil rights area throughout the state, and serve as general resource personnel for citizens of Iowa who are concerned about a possible deprivation of their civil rights.

The activity of the assistant attorneys general in the district and appellate courts increased dramatically, as result of the increase in the number of appeals on both procedural and substantive points arising out of the Division's efforts in the public hearing arena. At the present time, 48 cases are pending in the district court, and over the past two years 11 have been settled or closed at that level. Sixty-eight cases have been handled in the district courts throughout the state with the Commission succeeding in 47 (69%) of these cases. The cases in the district court include original actions for injunctions pursuant to Chapter 601A as well appeals from the administrative process of the Commission. An increasing amount of time at the district court level is being devoted to cases involving housing discrimination, as the Commission has the power to seek an ex parte injunction in that area. Further, despite the case of *Estabrook v. Iowa Civil Rights Commission,* 283 N.W. 2d 306 (Iowa 79), a significant portion of our district court appeals have been appealed from no probable cause or other administrative closure findings. In virtually all of these cases, the Commission's attorneys have been successful in defending the Commission's exercise of its discretion ot close these cases.

The most significant activity with the respect to the continuing law of Iowa has been at the Appellate Court level. For the past two years, an increasing number of cases have been appealed by complainants, respondents and the Commission to the Supreme Court for its review of the case in light of the law of Iowa. Of these cases, seven have been settled or dismissed prior to any decision, nine cases have been decided and 21 cases remain pending before the appellate courts. Of the cases decided, a great number of them concerned the interface between the Iowa Administrative Procedure Act and Chapter 601A and constructions by the court of the meaning of various procedural requirements. The remaining 21 cases involve primarily matters of substantive import, calling for the court to construe Chapter 601A and render its opinion as to significant matter of civil rights law.

Consumer Protection Division

The Consumer Protection Division of the Attorney General's Office enforces the **Iowa Consumer Fraud Act,** the **Iowa Sub-Divided Land Sales Act,** the **Iowa Trade School Act,** the **Iowa Door-to-Door Sales Act** and other Iowa statutes designed for the protection of the consumer buying public of the state. Also, the provisions of the **Iowa Consumer Credit Code,** appoint the Attorney General as the Code's Administrator and establishes a Consumer Credit Protection Bureau in the Attorney General's Office. The activities of the Consumer Credit Protection Bureau are carried out by the staff of the Consumer Protection Division as part of its daily activities.

Currently, the Division's staff is composed of seventeen full-time employees and one part-time employee. These eighteen individuals are made up of five attorneys, seven investigators, four secretaries and two clerical-receptionists. The Division also through its "Volunteer Program" at any one time usually has between four and six volunteer "Complaint Handlers" and during the course of the year may have as many as fifteen to twenty college students doing such volunteer and intern work.

The years 1979 and 1980 were the busiest years ever for the Consumer Protection Division. The Division's statistical figures for the 1979 and 1980 calendar years were:

1. New Complaints Received 21,342
2. Complaints Closed 21,769
3. Complaints Pending at the End of 1980 4,441
4. New Lawsuits Filed 49
5. Lawsuits Closed 72
6. Total Number of Lawsuits Engaged In 99
7. Lawsuits Pending at the End of 1980 28
8. Attorney General Opinions 23
9. Monies Saved and Recovered $2,294,044.60
10. Costs Recovered for the State ..... $ 4,050.00

In addition to statistical figures such as the above, the Consumer Protection Division engages in many programs of "preventative consumer protection," the impact of which cannot be readily measured. The fact that the Attorney General's Office has an active Consumer Protection Division which will mediate consumer problems, investigate complaints of deceptive advertising and sales practices and file lawsuits where necessary, undoubtedly has a great deterrent effect on persons and companies who might be tempted to engage in fraudulent practices in Iowa. The office attempts to inform the public about both the specific and the common schemes of fraud and the available consumer law remedies.

During 1979 and even more during 1980, the Division stepped up its program to combat "business opportunity frauds." In addition ot screening fraudulent-appearing advertisements and making investigative contact with such advertisers, the Division has successfully induced most Iowa newspapers to run a "warning" to consumers in their "business opportunity" section. The Division has also recently been cooperating with the news media, many of whom are now sending division-recommended back-ground questionnaires to questionable advertisers before running their ad.

In the area of interpreting and enforcing the **Iowa Consumer Credit Code,** the Division had a very busy two years. A number of Iowa Supreme Court and United States District Court and United States Court of Appeals cases have clarified certain provisions of the ICCC. One major victory against Aldens, Inc., a Chicago-based mail order company, ruled that the **Iowa Consumer Credit Code** covers interest rates charged by out-of-state mail order companies. In the Aldens case, the company will be refunding approximately $90,000 in overcharges to Iowa consumers but in addition, the Office believes this decision will lower interest rates for several hundred thousand Iowans buying from such out-of-state mail order companies resulting in savings of perhaps several million dollars a year.

For 1979 and 1980 the top areas that Iowans complained about were: automobile problems, mail order purchase and delivery disputes, deceptive advertising, magazine sales and service, Consumer Credit Code problems, health spas and weight salons, travel and transportation complaints, business opportunity schemes, funeral homes and cemeteries, home improvement problems, defective appliances, food product complaints and real estate rental disputes. Generally, for any one year, the Division's top ten areas of consumer complaints constitute approximately sixty percent of the complaints received by the Division during the year and the Division tries to devote a substantial amount of its time to mediation, investigation and litigation in these top complaint receipt areas. As the work load increases each year and the Division's staff remains the same, the Division has found that it must each year focus in even more directly on cases of actual fraud and misrepresentation and to some extent limit its activities in the areas of non-fraud consumer-merchant misunderstanding. This trend is expected to continue in years to come.

In 1979, the Divison was able to assist those that complained to it 64.5 percent of the time while in 1980, the Division was able to assist 81.3 percent of the people that came to it.

Criminal Appeals and Research Division

The primary responsibility of the Criminal Appeals and Research Division is to represent the state of Iowa in (1) direct appeals in criminal cases; (2) certiorari proceedings related to criminal cases; (3) appeals in postconviction relief cases under Chapter 663A; (4) applications for discretionary review; and (5) federal habeas corpus cases. This division is responsible also for advising the governor's office on extradition matters. During 1979-1980, staff members have represented the Department of Substance Abuse, Board of Parole, Board of Pharmacy Examiners, and the Bureau of Labor. The Criminal Appeals and Research Division supplies one attorney to sit on the Iowa Liquor Control Hearing Board. In addition, this division provides advice and research to county attorneys in criminal matters.

In the years 1979-1980, 472 briefs were filed by the Division in criminal appeals in the Iowa Appellate Courts. This was a record for the office as was the yearly figure for 1980 — 251 briefs. Four hundred fifty (450) cases were disposed of without briefs. In the two year period, staff attorneys appeared before the Iowa appellate courts for 309 oral arguments.

In 1979-1980, 33 federal habeas corpus cases were disposed of in Federal District Court. In addition, six more cases were disposed of on appeal to the Eighth Circuit Court of Appeals. Certiorari to the United States Supreme Court was denied in 14 cases. During 1979-1980, The Criminal Appeals and Research Division disposed of 337 extradition cases, prepared 65 opinions for the Iowa Liquor Control Hearing Board, and authored 30 Attorney General Opinions.

Environmental Protection Division

The Environmental Protection Division represents the State in issues affecting the environment. The Division represents the Depatment of Environmental Quality, Natural Resources Council, State Conservation Commission, Department of Soil Conservation and the Energy Policy Council. Throughout most of the biennium, the Division also represented the Real Estate Commission.

During 1979 and 1980, the Division had 48 lawsuits concerning the Conservation Commission. The Division assumed full representation of quiet title actions involving sovereign lands along the Missouri River including major litigation brought by the Omaha Indian Tribe. These cases were previously handled by outside counsel. Fourteen cases were officially closed during the biennium, leaving 34 cases pending, including four in the Iowa Supreme Court and one in the Eighth Circuit Court of Appeals. The Division also issued 61 title opinions and reviewed and approved 57 title vesting certificates for lands acquired by the Commission.

There were 64 lawsuits during the biennium involving enforcement of chapter 455B. Of these 35 concerned water quality, 11 were air quality matters, and 18 concerned solid waste. Another case involved construction of the "bottle bill"; another case involved assistance of another state in a local bankruptcy proceeding. The Division closed 25 of these cases, leaving 37 cases pending. Many of the pending cases were reduced to judgment but remain open while compliance is monitored.

There were 12 cases involving the Natural Resources Council pending at the start of the biennium. Another 24 were filed in 1979 and 1980. Half of these cases involved judicial review of council orders. The Iowa Supreme Court issued a significant administrative law decision in *Iowa Natural Resources Council v. Young Plumbing and Heating,* 276 N.W.2d 377 (Iowa 1979). There are 19 pending cases.

Eleven cases involving the Department of Soil Conservation were handled during the biennium. One of these, *Woodbury County Soil Conservation*

District v. Ortner, 279 N.W.2d 276 (Iowa 1979), upheld against constitutional attack Iowa's mandatory soil conservation law. Eight lawsuits were pending at the end of 1980.

The Division also prepared a detailed comparative analysis of state and federal surface mining laws as required by the Federal Office of Surface Mining for approval of the state coal mining program.

The Energy Policy Council was not involved in litigation. This Division assumed representation of the Council in 1979. In addition to other legal assistance, the Division supervised the drafting of procedural rules for the Council.

The Division also represented the Real Estate Commission until October 1980, when this function was transferred to the Consumer Protection Division. One case, *Miller v. Real Estate Commission,* 274 N.W.2d 288 (Iowa 1979), was successfully completed in the Iowa Supreme Court. Another judicial review action was pending at the time of transfer.

The Division issued 33 formal opinions and one letter opinion. The Division also prepared comprehensive analyses of state enforcement programs for federal approval in surface mining and hazardous waste. In addition to opinions concerning state environmental and energy issues, the Division also provided advice concerning real property, Indian law, and administrative law. The Division also filed comments on the environmental impact statement and other reports of the Corps of Engineers concerning the Missouri River.

Farm Division

1980 was the first full year for the Farm Division of the Attorney General's office. The Farm Division, consisting of three attorneys, one investigator and one secretary, has a broad charge to act as an advocate within the legal and legislative arena for Iowa farmers. The Division has the following specific functions. In discussing each of these areas, 1980 figures will be given in parentheses, the 1979-1980 total. The Division was created August 1, 1979.

1. Agricultural Opinions of the Attorney General.

25 opinions were requested and written in 1980 (39 total). These included a major opinion on the constitutionality of Senate File 2378 authorizing bonding for railroad improvements by the Iowa Railway Finance Authority and several opinions on drainage matters.

2. Consumer Fraud: Complaints Relating To Agricultural Matters.

Major consumer litigation pending includes a case against *Allied Mills* on behalf of 35 farmers in which the State alleges that the defendant knowingly sold rhinitis-infected swine. Negotiations are proceeding on that suit.

1980 saw 295 new complaints filed, 257 files closed, and 237 pending files.

The Farm Divisin was involved in two major loan finding fee cases. Informal settlement was reached in a pesticide advertising case.

3. Counsel to the Iowa Department of Agriculture.

Legal work on behalf of the Department of Agriculture took a good deal of time particularly in cases such as *Pennwalt, Agri-Seed, SNCorps* and *Andrews.*

4. Counsel to the Iowa Family Farm Development Authority.

A major effort of 1980 was the passage and implementation of legislation creating the Iowa Family Farm Development Authority to use tax-free industrial development bonds to assist beginning farmers. The Division was instrumental in shepherding this proposal through the General Assembly and answered literally hundreds of inquiries on this program. Since June 1980, considerable time has been spent in general counsel activities for the Iowa Family Farm Development Authority.

5. 172C and House File 148 Enforcement.

The monitoring of corporate and non-resident alien farm activities and reports is a continuing responsibility. Letters and informal pressure resulted in settlement of one case involving a non-resident alien corporation. The corporation filed its report as required. We also have many informal inquiries concerning these laws.

6. Agricultural Litigation: For Other Departments In State Government.

The financial collapse of the *Prairie Grain Company,* an elevator in Stockport, Iowa, consumed considerable effort in the first half of 1980. The Division filed suit on behalf of the State alleging consumer fraud asking for appointment of a receiver, in order to get control of a situation in which feelings were running, understandably, very high. Eventually, a stipulation was entered into between the State and the bankruptcy trustee staying our suit with the agreement that the trustee pursue similar actions.

Other litigation includes a suit on behalf of Iowa State University for damages from aerial spraying adjacent to the horticultural farm.

7. Legislative Proposals on Behalf of Farmers.

The major accomplishment was passage of the Beginning Farmer Loan Program. Other legislative efforts included drafting the submission of legislation to help prevent future *Prairie Grain* type problems. We have consulted with appropriate legislators, committees, and interest groups on several other pieces of legislation.

8. Informal Advice.

The Division also spends time answering requests for informal advice from farmers, attorneys, governmental bodies and the general public. This is impossible to quantify but does provide a valuable service to the Agricultural sector in our state. In summary, we believe that the Farm Division has become a smoothly functioning and important part of the Iowa Attorney General's office.

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, the Health Facilities Division administers a system of issuing citations and levying monetary fines against health care facilities not in compliance with the law or governing departmental rules and regulations. The assistant renders advice to the department with respect to the investigation and prosecution of complaints received against health care facilities. If citations are issued, the assistant represents the department at informal and formal administrative hearings arising from said citations and in judicial review actions taken from final agency action on these citations. In addition, this assistant represents the department in cases involving licensure revocations and denials occuring pursuant to the provisions of chaptes 135B and 135C of the Code. Because the department has actively sought to inform the general public on how to register a complaint about a health care facility, complaint actions and legal proceedings resulting therefrom are increasing.

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 Law and the department's administration of the federal 1122 program (Section 1122 of Title XI of the Social Security Act.) Both the Certificate of Need Law and the section

1122 program are health planning concepts. Under section 135.61 *et. seq.* of the Code of Iowa, health care facilities seeking to offer new or changed institutional health services must first obtain a certificate of need. Pursuant to 42 U.S.C. §1320-a *et. seq.* and implementing state regulations, I.A.C. 470-201, health care facilities may not receive federal reimbursement for section 1122 capital expenditures without first receiving review and a recommendation of approval for such expenditures from the state. The assistant assigned to this division offers legal advice to the department's certificate of need staff, to the Health Facilities Council which hears applications for certificates of need and 1122 approval, and to the Commissioner of Public Health. The assistant represents the department in any administrative actions or hearings arising pursuant to these two laws and in judicial reviews and appeals to higher courts taken by parites dissatisfied with action on the agency level.

Both assistants further provide advice and consultation on a daily basis to health department officials regarding statutes, judicial decisions, and state and federal laws and regulations as well as in the administration and enforcement of laws and regulations within the jurisdiction of the department and in the drafting of proposed legislation and rules and regulations. These assistants also represent the department in Administrative hearings and court cases involving departmental matters other than those noted.

Insurance Division

The Insurance Division is composed of one assistant attorney general. The division's most important function is rendering legal advice to the Insurance Department of Iowa. This function consumes at least sixty percent of the division's time. The legal questions presented are of a wide range but mostly involve construction of the statutes in Title XX of the Iowa Code dealing with insurance. The Insurance Division also handles litigation in which the Department is a party. In the biennium, a relatively large number of cases were handled—twenty-two—with all but eight having been disposed of, either by way of victory in court or favorable settlement. Nevertheless, the case load of the division will doubtless rise once again.

A further function of the Assistant Attorney General assigned to the Insurance Department is fulfilling the statutorily prescribed role of reviewing routine, but important, documents of insurance companies such as articles of incorporation and reinsurance treaties. The Assistant Attorney General estimates he was obliged to review at least ninety of these documents in the biennium. While not statutorily mandated, he also advises the Commissioner of Insurance on legal questions relating to insurance company mergers and acquisitions, some of which can entail considerable legal controversy.

Prosecuting Attorneys Training Coordinator

The office of the Prosecuting Attorneys Training Coordinator was established as an agency within the Department of Justice by the General Assembly through the Prosecuting Attorneys Training Coordinator Act of 1975, now codified as Chapter 13A, The Code. The policy-making head of the agency is a Council prescribed by law and the agency is thus commonly denominated as either the Prosecuting Attorneys Council or, simply, the Council.

The Council consists of five members: the Attorney General "or his designated representative", the incumbent president of the Iowa County Attorneys Association, and three county attorneys elected to three-year terms by and from the membership of the ICAA. The Council is required to meet at least four times each year and the members serve without receiving compensation other than

their actual expenses in attending the meetings and in the performance of their duties.

The chief administrative officer for the agency is the Executive Director who is an employee of the Department of Justice but is appointed by and serves at the pleasure of the Council.

The Prosecuting Attorneys Council is charged with the responsibility to provide continuing legal educaiton and training specifically for the 99 county attorneys and their approximately 200 assistants. The agency's over-all objectives encompass many support services for Iowa prosecutors. The goals are to: (1) provide a center for communications which reflect the attitudes and concerns of the county attorneys; (2) provide programs of coninuing legal education for prosecutors and their staffs utilizing experts in trial tactics, criminal law, county civil law, management assistance, and other areas; (3) develop a realistic and comprehensive training program; (4) provide a clearinghouse for the collection and dissemination of materials and information pertaining to the prosecutors' responsibilities; (5) provide information and guidance on facilities, staffing and office management, case screening, and pre-trial diversion programs; (6) develop uniform prosecutorial practices throughout the state; (7) develop and maintain current substantive and procedural manuals, forms, pleadings, and outlines; (8) coordinate technical assistance from the state level (e.g. expert witnesses, directories of state departments with their assigned responsibilities, personnel rosters, and telephone numbers); (9) act as a liaison at the policy-making level between prosecutors, public defenders the courts, law enforcement agencies, corrections officials, and others; (10) monitor the legislative process to provide input form prosecutors regarding legislation that would affect the counties or the criminal justice system; (11) screen complaints concerning prosecuting attorneys and assist in the development of standards for prosecutorial conduct; and (12) participate in national associations such as the National Association of Prosecutor Coordinators and the National District Attorneys Association to learn of systems and techniques used in other states.

Public Safety Division

The Attorney General provides legal counsel to the Iowa Department of Public Safety pursuant to § 80.1, The Code (1981), which requires that one employee of the Department be an attorney appointed by the Attorney General as an Assistant Attorney General. The Public Safety Division is housed within the Department of Public Safety.

The Public Safety Division is involved in a wide range of activities providing the Department with counsel and representation in civil matters. It reviews Department policies and practices and advises the Department as to the legality of and potential liability arising from such policies and practices. It assists the Department in the drafting of administrative rules. It reveiws contracts and leases entered into by the Department and gives advice as to their legality and practicability. It represents the Department in suits seeking injunctive relief or which are in federal court. It assists the Tort Claims Division by preparing a report on all claims against the Department. It gives day-to-day advice in civil matters to line officers and cooperates with the Area Prosecutions Division and the various county attorneys in providing them with advice in criminal matters. The Public Safety Division also prosecutes the Department's complaints against liquor control licensees and retail beer permittees before the Iowa Beer and Liquor Control Department. It is also counsel to the Peace Officers Retirement, Accident and Disability System, and assists local authorities and citizens with inquiries on law enforcement issues.

Revenue Division

The Revenue Division advises and represents the Department of Revenue for the various taxes which are administered by the Department and which include income taxes, franchise tax on financial institutions, sales and use taxes, cigarette and tobacco taxes, motor fuel taxes, inheritance taxes, property taxes, hotel and motel local optional taxes, and freight line and equipment car taxes. In addition, the Division drafts tax opinions of the Attorney General.

For the 1979-1980 biennium, the Division participated in the resolution of informal proceedings, pursuant to Department of Revenue Rule 730-7.11, IAC, for 266 protests filed by audited taxpayers. Also, the Divisoin handled 59 contested case proceedings before a Department hearing officer or the Director of Revenue. Of these, 40 were won, 6 were lost, 10 were settled, and 3 were pending decision as of December 31, 1980.

In the biennium, 36 contested cases were disposed of before the State Board of Tax Review in which 14 were won, 8 were lost, 11 were settled, and 3 were pending decision as of December 31, 1980.

During this time period, 86 Iowa District Court cases were resolved. Of these, 27 were won, 3 were lost, and 56 were settled.

A total of 31 Opinions of the Attorney General were drafted and released. Also, this Division drafted or assisted the Department of Revenue in disposing of 25 petitions for declaratory rulings.

In addition to the above activities, countless hours were spent rendering advice to Department of Revenue personnel and answering questions from other state officials and members of the public concerning the tax laws administered by the Department of Revenue and the property tax.

As a result of this Division's activities on behalf of the Department of Revenue during the biennium, $6,805,849.10 of tax revenue was collected, which is a record for a two year period. In addition, the activities of this Division have an indirect impact in the collection of other tax revenue by the Department of Revenue.

Social Services Division

The Attorney General performs legal services for the Department of Social Services pursuant to § 13.6, Code of Iowa, 1981, requiring a Sepcial Assistant Attorney General to serve in such capacity. In addition, there are eight other Assistant Attorneys General assigned 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	4
United States District Courts	146
Iowa District Courts	176
Iowa Supreme Court	35
Miscellaneous Tribunals	11

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

Medical Subrogation	$455,639
Probate	59,137
Nursing Homes & Care Facilities	199,906
Iowa State Industries	71,711
Mental Health Institutes	2,811
Miscellaneous	48,631
TOTAL	$837,835

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 assists in training 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. Six Assistant Attorneys General located throughout the state carry a child support caseload. State child support collections by the Department of Social Services, principally from the absent parents of welfare recipients, were over twenty-five million dollars.

Special Prosecutions Division

The Special Prosecutions Section was created in 1972 with a grant from the Law Enforcement Assistance Administration. Funding for the section's activities during the period 1979-1980 came from two sources. Approximately 50% came from the general budget appropriated for the attorney general's office and 50% came from a grant by Congress to the states to increase their antitrust enforcement efforts.

The section's primary activities are enforceing Chapter 553, Code of Iowa (Iowa Competition Law) and prosecuting violations of Chapter 502, Code of Iowa (Iowa Uniform Securities Act). Occasionally, the section will assist other divisions in the office with unique cases which may involve some other type of economic crime.

The section investigates and prosecutes civil and criminal violations of the Iowa Competition Law, as well as certain types of civil actions for violations of federal antitrust laws.

Substantive areas of antitrust investigation include price fixing, tie-ins, requirements contracts, resale price maintenance, customer or territorial allocations, and bid rigging.

A variety of methods are available in this antitrust enforcement effort. These include criminal prosecutions and actions for injunctions, civil penalties, damages incurred by the state in its proprietary capacity or **parens patriae** actions in federal court for violations of federal antitrust laws on behalf of the citizens of Iowa. The section has also gone to specific state regulatory agencies and asked for the adoption of pro-competitive administrative rules, or to seek a halt to anticompetitive practices of the industry regulated.

The section's enforcement of the securities effort involves investigating securities violations in cooperation with the Securities Division of the Iowa Insurance Commissioner's office. The investigation may lead to the Special Prosecutions section filing and prosecuting criminal charges, or bringing a civil action seeking an injunction and/or receiver on behalf of the Superintendent of Securities.

In addition to these enforcement efforts, the Special Prosecutions Section writes opinions on antitrust matters and consults with other state agencies concerning anticompetitive problems they may be facing.

1979-1980 Statistics

	Antitrust-State Actions	Antitrust-Federal Actions	Securities
Cases Opened	56	12	13
Civil Cases Filed	3	5	2
Civil Cases Pending	3	8	3
Criminal Cases Filed	-0-	N/A	7
Criminal Cases Pending	-0-	N/A	5
Cases Closed With formal Action Taken	3	-0-	6
Cases Closed With Informal Action Taken	7	-0-	-0-
Cases Closed With No Action Taken	30	2	2
Investigations Pending	25	7	5

Tort Claims Division

The Tort Claims Division provides the State with legal representation in tort litigation. In addition, the Division is charged with the investigation of all Administrative Claims made to the State Appeal Board, lends legal advice to state agencies, and represents state agencies in administrative and court hearings.

Administrative claims handled by the division fall into three basic categories: general, tort and county indemnification fund. The largest number of claims fall into the general category with the tort claims numbering slightly more than one-third of the total. In the calendar years 1979 and 1980 the total number of general and tort claims handled by the division exceeded 5500. About 50 county indemnification fund claims were handled during that same period. The costs of those claims to the state compiled by year and category are:

1979

	REQUEST	APPROVED
GENERAL	$ 550,500.00	$330,600.00
TORT	399,000,000.00	106,000.00
TOTAL	$399,550,500.00	$436,000.00

1980

	REQUEST	APPROVED
GENERAL	$ 1,133,300.00	$375,000.00
TORT	147,000,000.00	170,000.00
TOTAL	$148,133,300.00	$545,000.00

Tort litigation handled by this division during the last two years continued to meet high standards. In 1979, this division handled 147 tort lawsuits with prayers exceeding $83,000,000.00 and in 1980, 142 tort lawsuits with prayers for over $90,000,000.00 were handled. Not included in the prayer figures are the medical malpractice lawsuits. Historically, medical malpractice claims were turned over to outside counsel because of the time, effort, and special competence. That practice, however, has been changed over the last two years and now the division is actively involved in all litigation. This increased level of investigation and litigation of malpractice suits by this division has greatly reduced the utilization of outside counsel which significantly eases budgetary pressures.

Although a number of cases are still pending, the results of tort litigation for the 69th Biennium is as follows:

69TH BIENNIUM

	SETTLEMENTS	JUDGMENTS LOST	JUDGMENT WON
PRAYER	$2,860,000.00	$17,400,000.00	$11,707,500.00
PAYMENT	400,745.00	1,024,639.00	N/A

Commencing in June of 1979, the Tort Claims Division took over the task of litigating contested workers' compensation claims involving State employees. The Division also took over the representation of the Second Injury Fund of Iowa and the Iowa Industrial Commissioner. During the past two years these new areas of responsibility have generated 125 workers' compensation cases. These cases have been litigated from the administrative level through the Supreme Court.

Also during the biennium 94 non-tort suits generally involving contract disputes or medical licensing cases were handled by this division.

The staff attorneys have developed a rapport with state agencies by providing legal advice and representing them in administrative and court hearings. Part of the legal advice takes place in the form of opinions, of which tort claims wrote 95 during the biennium.

In the near future the division hopes to eliminate some of the filing requirements on the Administrative claims through coordination with the Comptroller's office. Some modification in the current system will elimiante some duplicate files and speed up the currently cumbersome system. Tort claims also hopes to provide "preventive" legal advice to state agencies. Such advice would hopefully reduce future claims by preventing them from occurring.

Department of Transportation Division

The Attorney General provides legal services to the Iowa Department of Transportation through a nine member staff located in Ames. This staff handles a current case load in the Iowa District Courts of 288 involving tort claims, eminent domain, damages suits, and miscellaneous litigation. Current pending federal actions number 13 and involve bankruptcy claims, and environmental concerns.

The staff is active in providing advisory opinions to the DOT Commissioners, department divisions, and offices. Staff assists in reviewing proposed legislation, preparing rules and regulations. Attorneys represent the state in driver license revocation hearings. There are approximately 720 administrative hearings on implied consent driver license revocation matters and fewer appeals from administrative decisions brought to district court.

State of Iowa
1980

FORTY-THIRD BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1980

THOMAS J. MILLER

Attorney General

Published by
THE STATE OF IOWA
Des Moines

ATTORNEYS GENERAL OF IOWA

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
Thomas J. Miller	Clayton	1979-

PERSONNEL OF THE DEPARTMENT OF JUSTICE

Main Office

THOMAS J. MILLER, 1/79- ..... Attorney General
J.D., Harvard University, 1969
MARK E. SCHANTZ, 1/79- ..... Solicitor General
L.L.B., Yale University, 1968
BRENT R. APPEL, 1/79-2/82 ..... First Assistant Attorney General
J.D., University of California, 1977

WILLIAM C. ROACH, 1/79- ..... Administrator
KAY BALLEW, 8/79-6/80 ..... Administrative Ass't
ANN BAUSSERMAN, 1/79- ..... Administrative Ass't
KATHRYN R. FOREMAN, 6/80-10/81 ..... Administrative Ass't
KAREN A. REDMOND, 10/80- ..... Receptionist
PATTI SAMPERS, 1/79-10/81 ..... Accountant
MANDA C. STUART, 7/79-9/80 ..... Receptionist
SUSAN E. POHLMAN, 1/79-9/80 ..... Administrative Ass't
CLARENCE J. WEIHS, 1/79- ..... Administrative Ass't

Administrative Law

HOWARD O. HAGEN, 2/79- ..... Division Head, Ass't Attorney General
J.D., University of Chicago, 1973
DAVID FORTNEY, 2/79-1/82 ..... Ass't Attorney General
J.D., University of Iowa, 1975
ALICE HYDE, 7/79-1/81 ..... Ass't Attorney General
J.D., University of Iowa, 1978
STEVEN G. NORBY, 11/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
FRANK J. STORK, 5/80-8/81 ..... Ass't Attorney General
J.D., University of Iowa, 1977
SALLY HIGGINBOTTOM, 1/79- ..... *Legal Secretary*

Area Prosecutions Staff 79-80

HAROLD A. YOUNG, 7/75- ..... Division Head, Ass't Attorney General
J.D., Drake Law, 1967
JOSEPH S. BECK, 11/73-8/79 ..... Ass't Attorney General
J.D., Drake University 1971
EDWARD M. BLANDO, 3/78-10/80 ..... Ass't Attorney General
J.D., University of So. Dakota, 1968
ROBERT J. BLINK, 8/79-8/81 ..... Ass't Attorney General
J.D., Drake University, 1975
CELESTE F. BREMER, 4/79-8/79 ..... Ass't Attorney General
J.D., University of Iowa, 1977
BRUCE COOK ..... Ass't Attorney General
J.D., Drake University, 1975
SELWYN L. DALLYN, 3/80- ..... Ass't Attorney General
J.D., w/honors, University of Iowa, 5/78

JAMES KIVI, 2/80- ..... Ass't Attorney General
J.D., University of Iowa, 1975
PAUL D. MILLER, 3/80- ..... Ass't Attorney General
J.D., University of Iowa, 1976
RICHARD L. RICHARDS, 6/77- ..... Ass't Attorney General
J.D., Drake University, 1977
WILLIAM K. STOOS, 8/79-9/79 ..... Ass't Attorney General
J.D., w/Distinction, University of Iowa, 1975
RICHARD A. WILLIAMS, 7/75- ..... Ass't Attorney General
J.D., University of Iowa, 1971
GARY D. WOODWARD, 10/72-7/79 ..... Ass't Attorney General
ALFRED C. GRIER, 9/72- ..... Investigator/Pilot
SCOTT D. NEWHARD, 3/79- ..... Investigator
BILLIE J. EVANS, 11/79 ..... Secretary
DEBRA L. PETERSON, 1/76-10/79 ..... Secretary

CIVIL RIGHTS

VICTORIA L. HERRING, 1/79- ..... Ass't Attorney General
J.D., Drake University, 1976
SUSAN JACOBS, 7/79-3/81 ..... Ass't Attorney General
J.D., University of Iowa, 1979
SCOTT H. NICHOLS, 1/80- ..... Ass't Attorney General
J.D. University of Iowa, 1979
RAYMOND D. PERRY, 9/77-2/80 ..... Ass't Attorney General
J.D., University of Iowa, 1975

Consumer Protection

DOUGLAS R. CARLSON, 6/67- ... Division Head, Ass't Attorney General
J.D., Drake University, 1968
KATHRYN L. GRAF, 2/78- .... Deputy Division Head Ass't Attorney Gen
J.D., Drake University, 1977
ROBERT CLAUSS, 2/78-6/79 ..... Ass't Attorney General
J.D., Drake University, 1972
PATRICIA J. McFARLAND, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
TAM B. ORMISTON, 1/79 ..... Ass't Attorney General
J.D. University of Iowa, 1974
FRANK THOMAS, 3/79- ..... Ass't Attorney General
J.D., Indiana University, 1974
TERESA D. ABBOTT, 5/78- ..... Investigator
CATHLEEN L. ANTILL, 8/78- ..... Investigator
EUGENE R. BATTANI, 5/77- ..... Investigator
SUSAN HERBERS, 6/74-6/79 ..... Investigator
JAMES R. LANGENBERG, 7/77-4/80 ..... Investigator
KAREN LIKENS, 8/77- ..... Investigator
ONITA MOHR, 4/80- ..... Investigator
NORMAN NORLAND, 1/80- ..... Investigator
LYNN M. O'HERN, 2/79-12/79 ..... Investigator
ELIZABETH ANN THORNTON, 1/79- ..... Investigator

JANICE M. BLOES, 3/78- ..... Secretary
CHERYL A. FREEMAN, 4/69- ..... Secretary
ROSIE JO KAUFMAN, 12/80-1/81 ..... Receptionist
PAMELA L. McGILVREY, 4/78-3/80 ..... Receptionist
MARTA MARIE PROCYK, 3/80-9/80 ..... Receptionist
MARILYN RAND, 10/69- ..... Secretary
DEE ANN ROCHFORD, 1/79-2/79 ..... Receiptionist
VALERIE TEED, 7/76- ..... Secretary
RUTH WALKER, 2/79- ..... Receptionist

Criminal Appeals Division

KERMIT L. DUNAHOO, 1/79-3/80 .. Div. Head, Spec Ass't Attorney Gen
J.D., Drake University
RICHARD L. CLELAND, 4/79 ..... Ass't Attorney General
J.D., University of Iowa, 1978
ANN FITZGIBBONS, 6/77-6/79 ..... Ass't Attorney General
J.D., Drake University, 1977
MERLE W. FLEMING, 7/80 ..... Ass't Attorney General
J.D., University of Iowa, 1980
JEANINE FREEMAN, 7/79 ..... Ass't Attorney General
J.D., University of Iowa, 1978
LONA HANSEN, 7/77 ..... Ass't Attorney General
J.D., University of Iowa, 1976
LEE M. JACKWIG, 7/76-2/79 ..... Ass't Attorney General
J.D., DePaul University
KATHY KREWER, 7/79-9/80 ..... Ass't Attorney General
J.D., University of Iowa, 1978
THOMAS D. McGRANE, 6/71 ..... Ass't Attorney General
J.D., University of Iowa, 1971
THOMAS N. MARTIN, 7/80-1/82 ..... Ass't Attorney General
J.D., University of Iowa, 1980
JOHN P. MESSINA, 1/80 ..... Ass't Attorney General
J.D., Drake University, 1979
JULIE POTTORFF, 7/79 ..... Ass't Attorney General
J.D., University of Iowa, 1978
ROXANN M. RYAN, 9/80 ..... Ass't Attorney General
J.D., University of Iowa, 1980
MARK R. SCHULING, 10/80 ..... Ass't Attorney General
J.D., University of Iowa, 1980
FAISON T. SESSOMS, JR. 6/77-9/79 ..... Ass't Attorney General
J.D., Drake University, 1977
DOUGLAS F. STASKAL, 7/79-11/80 ..... Ass't Attorney General
J.D., University of Iowa, 1979
SHIRLEY ANN STEFFE, 9/79 ..... Ass't Attorney General
J.D., University of Iowa, 1979
CONNIE LEE ANDERSON, 12/76 ..... Secretary
CHRISTY J. FISHER, 1/67 ..... Confidential Secretary
MELANIE L. RITCHEY, 6/77 ..... Secretary

Environmental Protection

ELIZABETH M. OSENBAUGH, 1/79- ..Div Head, Ass't Attorney General
J.D., University of Iowa, 1971

JOHN I. ADAMS, 1/69-9/80 ..... Ass't Attorney General
L.L.B., University of Iowa, 1952
ELIZA J. OVROM, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
CLIFFORD E. PETERSON, 10/68- ..... Ass't Attorney General
J.D., University of Iowa, 1951
JOHN P. SARCONE, 3/79 ..... Ass't Attorney General
J.D., Drake University, 1975
MICHAEL P. VALDE, 6/77-9/81 ..... Ass't Attorney General
J.D., University of Iowa, 1976
ROXANNE C. PETERSEN, 5/79- ..... Legal Secretary
MARGARET M. RAMSEY, 6/75-5/79 ..... Secretary
DIANA TRIGGS, 9/79-4/81 ..... Legal Secretary

FARM

EARL WILLITS, 7/79- ..... Division Head, Ass't Atty General
J.D., Drake University, 1974
TIMOTHY D. BENTON, 7/77- ..... Ass't Attorney General
J.D., University of Iowa, 1977
NEIL D. HAMILTON, 6/79-3/81 ..... Ass't Attorney General
J.D., University of Iowa, 1979
CHARLES G. RUTENBECK, 12/74- ..... Invesitgator
NANCY A. MILLER, 9/73- ..... Legal Secretary

HEALTH

BARBARA BENNETT, 10/78-7/81 ..... Ass't Attorney General
J.D., Creighton University, 1978
SARA K. JOHNSON, 8/77-7/79 ..... Ass't Attorney General
J.D., Drake University, 1977
LAYNE M. LINDEBAK, 7/78- ..... Ass't Attorney General
J.D., University of Iowa, 1979

INSURANCE

BRUCE W. FOUDREE, 3/76-2/80 ..... Ass't Attorney General
J.D., Drake University, 1972, L.L.M., University of Pennsylvania, 1975
Fred M. Haskins, 6/72- ..... Ass't Attorney General
J.D., University of Iowa, 1972

PROSECUTING ATTORNEYS TRAINING COUNCIL

RONALD KAYSER, 1/75-8/80 .... Exec Dir., Training Coord., Div. Head
J.D., St. Louis University, 1967
DONALD R. MASON, 9/80- ..... Exec. Dir., Training Coord., Div. Head
J.D., University of Iowa, 1976
BRENDA K. JOHNSON, 12/79-3/82 ..... Clerk Typist
JULIE JOHNSON, 7/77-12/79 ..... Secretary

PUBLIC SAFETY

THEODORE R. BOECKER, 6/73-8/79 ..... Ass't Attorney General
J.D., Drake University, 1973
GARY L. HAYWARD, 6/76- ..... Ass't Attorney General
J.D., University of Iowa, 1976

REVENUE

HARRY M. GRIGER, 1/67-8/71, 12/71- .. Division Head, Ass't Attny Gen

J.D., University of Iowa, 1966
THOMAS M. DONAHUE, 6/78- ..... Ass't Attorney General
J.D., Drake University, 1974
GERALD A. KUEHN, 9/71- ..... Ass't Attorney General
J.D., Drake University, 1967
SANDRA LUDWIGSON, 6/78-5/79 ..... Ass't Attorney General
J.D., Drake University, 1978
LINWOOD J. PRICE, 7/79-12/80 ..... Ass't Attorney General
J.D., Drake University, 1979

SOCIAL SERVICES

JOHN BLACK, 9/79- ..... Division Head, Special Ass't Attorney General
J.D., Northwestern, 1969
CRAIG BRENNEISE, 8/79- ..... Ass't Attorney General
J.D., Drake University, 1979
GEORGE COSSON, 10/79-7/79 ..... Ass't Attorney General
J.D., University of Iowa, 1972
JEAN DUNKLE, 10/75- ..... Ass't Attorney General
J.D., University of Iowa, 1975
BRUCE FOUDREE, 3/76-2/80 ..... Ass't Attorney General
J.D., Drake University, 1972; L.L.M., Pennsylvania University, 1975
JEANINE GAZZO, 7/79-3/80 ..... Ass't Attorney General
J.D., Creighton University School of Law, 1979
JONATHAN GOLDEN, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
MARK HAVERKAMP, 6/78- ..... Ass't Attorney General
J.D., Creighton University, 1976
BRENT D. HEGE, 9/80- ..... Ass't Attorney General
J.D., Drake University, 1973
FRANCIS C. HOYT, Jr., 10/75/80 ..... Ass't Attorney General
J.D., University of Iowa, 1974
ROBERT HUIBREGTSE, 6/75- ..... Ass't Attorney General
L.L.B., Drake University, 1963
ROBERT KEITH, 12/75-3/82 ..... Ass't Attorney General
J.D., University of Iowa
LINDA THOMAS LOWE, 8/79 ..... Ass't Attorney General
J.D., University of Iowa, 1979
BRUCE C. McDONALD, 7/78- ..... Ass't Attorney General
J.D., University of Iowa, 1978
THOMAS MANN, Jr., 1/80- ..... Ass't Attorney General
J.D., University of Iowa, 1974

JOHN R. MARTIN, 4/79- ..... Ass't Attorney General
J.D., University of Iowa, 1972
E. DEAN METZ, 5/78- ..... Ass't Attorney General
L.L.B., Drake University, 1955
CANDY MORGAN, 9/79- ..... Ass't Attorney General
J.D., University of Iowa, 1973
STEPHEN C. ROBINSON, 8/73- ..... Ass't Attorney General
L.L.B., Drake University
JOHN N. WEHR, 8/78-7/79 ..... Ass't Attorney General
J.D., Creighton University
LORNA L. WILLIAMS, 1/67-2/79 ..... Ass't Attorney General
J.D., Drake University
TAMARA J. BARRETT ..... Secretary II
CYNTHIA S. HANSEN ..... Clerk Steno III
JANE A. McCOLLOM, 10/79- ..... Secretary
D.J. MURPHY ..... Administrative Assistant II
CHERYL O'BRAZA ..... Clerk Steno III
RONNI B. SCOTT ..... Clerk Steno III

SPECIAL PROSECUTIONS

JOHN R. PERKINS, 12/72 ..... Division Head Ass't Attorney General
J.D., University of Iowa, 1968
J. ERIC HEINTZ, 12/78- ..... Ass't Attorney General
J.D., University of Iowa, 1971
NANCY D. POWERS, 3/79-9/80 ..... Ass't Attorney General
J.D., Drake University, 1976
WILLIAM F. RAISCH, 7/74- ..... Ass't Attorney General
J.D., Drake University, 1974
THOMAS L. SLAUGHTER, 7/79-11/80 ..... Ass't Attorney General
J.D., University of Iowa, 1979
GARY H. SWANSON, 4/72 ..... Ass't Attorney General
J.D., Drake University, 1964
DAVID H. MORSE, 3/78- ..... Paralegal
ROBERT P. BRAMMER, 11/78 ..... Administrative Assistant
MAUREEN E. LARSON, 11/77 ..... Legal Secretary
DIANE POLLARD, 4/78-1/79 ..... Secretary
MARSHA ANN WILLIAMS, 5/79- ..... Legal Secretary

TORT CLAIMS PERSONNEL, 1979 and 1980

JOHN R. SCOTT, 9/80- ..... Division Head, Spec. Ass't Attorney General
J.D., University of Iowa, 1969
JOHN WERNER, 6/79-7/80. Division Head, Spec. Ass't Attorney General
J.D., University of Iowa, 1973
LARRY M. BLUMBERG, 6/71-7/81 ..... Ass't Attorney General
J.D., Drake University, 1971
MARIE A. CONDON, 1/77-9/79 ..... Ass't Attorney General
J.D., Drake University, 1977
THOMAS A. EVANS, Jr., 6/77- ..... Ass't Attorney General
J.D., Drake University, 1977
PATRICK J. McNULTY, 9/77-5/81 ..... Ass't Attorney General
J.D., University of Iowa, 1977

JAMES PAUL MUELLER, 7/79-2/81 ..... Ass't Attorney General
J.D., University of Iowa, 1979
CARLTON G. SALMONS, 3/77-5/79 ..... Ass't Attorney General
J.D., Drake University, 1975
JON K. SWANSON, 10/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
ULRICH "RICK" GROTH, 11/80-1/82 ..... Investigator
THOMAS R. PATTERSON, 3/79-11/80 ..... Investigator
LOREN SNYDER, 1/73-3/79 ..... Investigator
CATHLEEN M. CREGER, 11/79-8/81 ..... Legal Secretary
ROSIE JO KAUFMAN, 12/80-1/81 ..... Secretary
PAMELA M. LIPPERT, 8/77-4/79 ..... Legal Secretary
JANICE THIEMAN, 10/78-7/80 ..... Legal Secretary

TRANSPORTATION

ROBERT W. GOODWIN, 12/70-9/81 ..... Division, Head Ass't Attorney General
J.D., Drake University, 1967
JOHN W. BATY, 9/72- ..... Ass't Attorney General
J.D., Drake University, 1967
STEPHEN P. DUNDIS, 1/77 ..... Ass't Attorney General
J.D., University of Iowa, 1976
DAVID FERREE, 4/79-9/81 ..... Ass't Attorney General
J.D., University of Iowa, 1978
DANIEL R. GOGLIN, 6/79-9/79 ..... Ass't Attorney General
CRAIG GREGERSEN, 2/79- ..... Ass't Attorney General
J.D., University of Iowa, 1978
ROBERT J. HUBER, 7/79- ..... Ass't Attorney General
J.D., University of Iowa, 1979
JAMES D. MILLER, 12/79-4/82 ..... Ass't Attorney General
J.D., Drake University, 1976
STUART D. MILLER, 12/77-11/79 ..... Ass't Attorney General
J.D., Drake University, 1977
RICHARD E. MULL, 7/78 ..... Ass't Attorney General
J.D., University of Iowa, 1977
LESTER A. PAFF, 1/78- ..... Ass't Attorney General
J.D., St. Louis University, 1973
MARK W. LINDHOLM, 1/79-6/79 ..... Investigator

REPORT OF THE ATTORNEY GENERAL

March 23, 1971

The Honorable Robert D. Ray
Governor of Iowa

Dear Governor Ray:

In accordance with §§13.2(6) and 17.6, Code of Iowa, 1981, I am privileged to submit the following report of the condition of the office of Attorney General, opinions rendered and business transacted of public interest.

THOMAS J. MILLER
Attorney General

MARK E. SCHANTZ
Solicitor General

ATTORNEY GENERAL OPINIONS

JANUARY 1979
TO
DECEMBER 1980

January 31, 1979

MUNICIPALITIES: Police Retirement System — §§411.1(2) and 411.3, Code of Iowa, 1977. A person who does not pass a civil service examination, even though a police officer in the department, cannot receive the benefits of Chapter 411 of the Code. (Blumberg to Hansen, State Senator, 1-31-79) #79-1-1 (L)

January 31, 1979

COURTS: Judgment Costs — §§321A.12, 606.15 and 625.14, Code of Iowa, 1977. The Clerk's certified copy fee for sending an unsatisfied judgment to DOT under §321A.12 can be charged to the judgment creditor and taxed to the debtor. (Nolan to Rush, State Senator, 1-31-79) #79-1-2 (L)

February 5, 1979

MUNICIPALITIES: Municipal Housing Commission — §§403A.2(6) and 403A.5, Code of Iowa, 1977; §5, Ch. 116, Acts of the 67th G.A. (1977). A member of a municipal housing commission must be a resident of the municipality only if the area of operation of the municipality does not extend beyond its corporate limits. If the area of operation includes an area adjacent to, and within one mile of, a municipality, the member can be a resident of the municipality or the adjacent area. (Blumberg to Larsen, State Representative, 2-5-79) #79-2-1 (L)

February 5, 1979

MOTOR VEHICLES: Display and Sale of Motor Vehicles at Iowa State Fair. §322.5, Code of Iowa (1977). Motor vehicle dealers may not display, offer for sale or negotiate the sale of motor vehicles at the Iowa State Fair. (Condon to Taylor, Iowa State Fair Board, 2-5-79) #79-2-2 (L)

February 5, 1979

COURTS: Superior courts, preservation and destruction of records. §§602.36, 606.20-606.23, Code of Iowa, 1977. The Code abolishes superior courts and orders that all records be deposited with the clerk of court. The clerk of court may dispose of the records of the superior court pursuant to the Code's provisions governing preservation and destruction of court records. (Heintz to Synhorst, Chairman, State Records Commission, 2-5-79) #79-2-3 (L)

February 9, 1979

MOTOR VEHICLES: Display and Sale of Motor Vehicles at Iowa State Fair. §322.5, Code of Iowa (1977). Motor vehicle dealers may display, but may not offer for sale or negotiate the sale of motor vehicles at the Iowa State Fair. (Condon to Taylor, 2-9-79) #79-2-4 (L)

February 15, 1979

TERRACE HILL: Hours of opening to general public of governor's mansion. §3, Ch. 1012, Acts of the 67th G.A. (1978). Terrace Hill may be open to the public for more than ten hours per week. (Schantz to Willits, 2-15-79) #79-2-5 (L)

February 16, 1979

HEALTH FACILITIES: Public Disclosure of Inspection Findings: §135C.19, Code of Iowa, 1977. Citations and fines levied against a health care facility are public information forty-five days after the facility has been notified of the inspection results. Any denial, suspension, or revocation of a facility license is not public information until forty-five days have expired after the facility receives notice of such or until completion of a hearing pursuant to 135C.11, whichever is later. (Bennett to Middleton, Department of Health, 2-16-79) #79-2-6 (L)

February 16, 1979

CONSTITUTIONAL LAW: Ban on Chiropractic Advertising: §151.7 Code of Iowa, 1979. Section 151.7, which prohibits most kinds of advertising by Chiropractors, is unconstitutional. (Blumberg to Masters, Chairman, State Board of Chiropractic Examiners, 2-16-79) #79-2-7

Mr. Ronald O. Masters II, D.C., Chairman, Iowa Board of Chiropractic Examiners: We have your opinion request where you ask whether §151.7, 1979 Code of Iowa, which prohibits advertising by chiropractors, is constitutional. Prior to July 1, 1974, the prohibition was only against misleading or deceptive advertising. Since that time there has been a nearly total ban on advertising.

Section 151.7 provides:

"The license of a chiropractor shall be placed on probation upon a showing at a hearing conducted by the board of chiropractic examiners that such licensee is guilty of advertising. For purposes of this section 'advertising' is defined as a chiropractor publicizing himself, his partner, or associate as a chiropractor through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, or authorizing or permitting others to do so on his behalf. 'Advertising' does not include a simple boldface listing in a phone directory, professional cards, letterheads, or professionally discreet lettering identifying premises where chiropractic is practiced. Any proceeding for the probation of a chiropractic license shall be conducted by the board of chiropractic examiners in a manner substantially in accord with the provisions of section 148.7."

This statute broadly prohibits all that would normally be considered "advertising," except basic listings in phone directories, business cards, letterhead and the like. We assume you are asking whether this statute is violative of either the First Amendment of the Federal Constitution or section 7 of Article 1 of the Iowa Constitution. The subject of advertising by licensed professionals (most notably lawyers and doctors) has come to the forefront the past few years. Many cases may have been filed, but only a few have been decided.

The first recent major case regarding advertising by licensed professionals in relation to first amendment freedoms is *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 1976, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346. There, in holding unconstitutional a state law forbidding price advertising of prescription drugs, the Supreme Court made clear that the First Amendment provides at least some significant protection of "commercial speech" (advertising). Of course, that decision is not completely analagous to the question before us. First, the case dealt solely with advertising of prepackaged products. Second, Mr. Justice Blackmun, at the end of his majority opinion in footnote 25, stated (425 U.S. at 773, 48 L.Ed.2d at 365):

"Mr. Justice Stewart aptly observes that the 'differences between commercial price and product advertising . . . and ideological communication' allows the state a scope in regulating the former that would be unacceptable under the First Amendment with respect to the latter. I think it important to note also that the advertisement of professional services carries with it quite different risks than the advertisement of standard products. The court took note of this . . . in upholding a state statute prohibiting entirely certain types of advertisement by dentists. . . .

"I doubt that we know enough about evaluating the quality of medical and legal services to know which claims of superiority are 'misleading' and which are justifiable. Nor am I sure that even advertising the price of certain professional services is not inherently misleading, since what the professional must do will vary greatly in individual cases." [Citations omitted.]

In July, 1976, the Supreme Court of Arizona, in *Matter of Bates*, 113 Ariz. 394, 555 P.2d 640, held that a broad ban on advertising by attorneys was constitutional. It relied upon the fact that restrictions on professional advertising have repeatedly survived constitutional challenge. *Williamson v. Lee Optical Co.*, 1955, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563; *Barsky v. Board of Regents*, 1954, 347 U.S. 442, 74 S.Ct. 650, 98 L. Ed. 829; *Semler v. Oregon State Board of Dental Examiners*, 1935, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086. The court also relied upon footnote 25 and Mr. Chief Justice Burger's concurring opinion from *Virginia State Board of Pharmacy*. A lone dissenting justice indicated he felt the ban on advertising was unconstitutional. This case was appealed to the Supreme Court of the United States. 429 U.S. 813, 50 L.Ed.2d 73.

In December, 1976, a three-judge court, in *Consumers Union of United States, Inc. v. American Bar Association*, 427 F.Supp. 506 (E.D. Va. 1976), vacated, 433 U.S. 917, 97 S.Ct. 2993, 53 L.Ed.2d 1104, held 2-1, that a ban on lawyer advertising was unconstitutional because of overbreadth. The regulations here, Disciplinary Rules 2-101 and 2-102, were the same as in the Arizona case. The court, although realizing that *Virginia State Board of Pharmacy* was not controlling, still based a large part of its decision on it. First, it ruled, based upon the earlier case, that the right to receive advertising is protected by the First Amendment. It then took footnote 25 and Mr. Chief Justice Burger's concurring opinion and used them, not as an indication that the ban on professional advertising might continue to be constitutional, but as support for the conclusion that it was unconstitutional. In his majority opinion, Judge Merhige concluded that what Justice Blackmun and Chief Justice Burger were speaking to was, in fact, misleading and deceptive advertising by professionals. Since other regulations in question already banned such deceptive advertising, Judge Merhige stated that the ban on advertising in general was overbroad.

On June 27, 1977, the United States Supreme Court decided the Arizona Case. *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810. The Court held that Disciplinary Rule 2-101 of the State Bar was unconstitutional as violative of First Amendment rights. Mr. Justice Blackmun, writing for the majority, relied heavily upon the pronouncements in *Virginia State Board of Pharmacy* in holding that the listener's interest is substantial because the consumer's concern for the free flow of commercial speech may often be keener than his concern for other matters. In addition, significant interests of society are served by commercial speech. Such speech serves to inform the public of the availability, nature, and prices of products and services, thus performing an indispensable role in the allocation of resources. The majority opinion did not speak to advertising relating to the quality of services nor with in-person solicitation. The issue was limited to whether lawyers may advertise the prices at which certain routine services will be performed.

After determining that certain lawyer advertising would substantially advance free speech values, the majority then examined the state arguments claimed to justify the broad restriction on advertising: the adverse effect on professionalism; the inherently misleading nature of attorney advertising; the adverse effects on the administration of justice; the undesirable economic effects of advertising; the adverse effect of advertising on the quality of services; and, the difficulty of enforcing narrower restrictions. Each argument was rejected as an insufficient basis for the blanket restriction on advertising. In summary, the majority held (433 U.S. at 383, 384, 53 L.Ed.2d at 835, 836):

"In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. We mention some of the clearly permissible limitations on advertising not foreclosed by our holding."

The Court went on to state that false, deceptive, or misleading advertising is subject to restraint, and that the concerns about subtle deception in advertising by lawyers might justify more narrowly tailored regulations. The Court also stated that reasonable restrictions as to time, place and manner of advertising, along with special consideration for electronic broadcast advertising were not necessarily precluded by this decision. In support of this the Court cited to *Virginia Pharmacy Board v. Virginia Citizens Council* supra; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *NLRB v. Gissel Packing Co.*, 395 U.S. at 618; *Pittsburgh Press Co. v. Human Relations Comm'n.*, 413 U.S. 376 (1973); *Capitol Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972).

In three dissents by Chief Justice Burger, and Justices Powell, Stewart and Rehnquist, it was stated that price advertising by itself could be misleading since each case handled by a lawyer was different, and the consumer would not know that from advertisements. They felt that this state interest was sufficient to justify broad regulation of advertising in general.

In *Health Systems Agency of Northern Virignia v. Virginia State Board of Medicine*, 424 F.Supp. 267 (E.D. Va. 1976), a three-judge Federal Court held Virginia's prohibition of advertising by doctors unconstitutional on First Amendment grounds. The statute in question provided:

"Any practitioner of medicine . . . shall be considered guilty of unprofessional conduct if he:

. . .

(13) Advertises to the public directly or indirectly in any manner his professional services, their costs, prices, fees, credit terms or quality."

The court recognized that a state has a substantial interest in preventing the fraudulent or deceptive practice of medicine. However, it held that the state cannot achieve its goals by unnecessarily broad encroachments of First Amendment rights. In summary, the Court stated (424 F.Supp. at 275):

"Since the advertising ban extends to the publication of truthful information, it may be justified only if the state has a valid interest in protecting the public from the danger that some people will unwit-

tingly use the information to their detriment. This interest, however, rests on the same kind of paternalism that was criticized by the Court in *Virginia State Board of Pharmacy*. In that case, the Court admonished that a state's protectiveness of its cititzens cannot rest solely on the advantages of their being kept in ignorance. 425 U.S. at 769, 96 S.Ct. at 1829. It recognized that when information is not in itself harmful, . . . people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. 425 U.S. at 770, 96 S.Ct. at 1829.

"Although certain kinds of advertising by physicians might be confusing to the public, we believe that the principles expressed in *Virginia State Board of Pharmacy* are applicable to the information to be included in the directory. We base this conclusion on the factual nature of the directory, the detailed explanation of the information in the introduction, the exclusion of any promotional statements, the opportunity of all physicians to be listed without charge and the absence of any material that could be construed as soliciting patients.

"In summary, then, we hold that, §54-317(13) abridges the plaintiffs' first amendment rights to gather, publish, and receive information about physicians' services in the manner proposed by the Agency through the publication of its directory.

In summary, it is increasingly clear that the courts will not uphold a total ban on truthful advertising by professionals. Although a state may have a compelling interest in restricting fraudulent and deceptive advertising, these regulations must be narrowly tailored to accommodate the consumers' need for information upon which to base an intelligent decision.

Section 151.7 is strikingly similar to the prohibitions on advertising struck down in *Bates* and *Health Systems Agency*, and in our opinion would not survive a similar overbreadth attack. Accordingly, we are of the opinion that §151.7 is unconstitutional.

February 21, 1979

ENVIRONMENTAL PROTECTION: Additional fees for issuance of licenses — chapters 110 and 110B, Code of Iowa, 1977 and §§8, 9, 10 and 14, Chapter 1064, Laws of the 67th G.A., 1978 Session. County recorders and depositaries may charge twenty-five cents in addition to the stated license fee for each license so designated and sold pursuant to the provisions of chapter 110, the Code, and for each state migratory waterfowl stamp issued or sold pursuant to chapter 110B, the Code. (Peterson to Priewert, Director, State Conservation Commission, 2-21-79) #79-2-8(L)

February 23, 1979

GENERAL ASSEMBLY: STATUTES: TITLES: SUBJECT MATTER. Art. III, §29, Constitution of Iowa. Senate File 158, 68th, 68th G.A. (1979). Senate File 158, an Act relating to financial transactions involving loans or deposits of money or extensions of credit, is sufficiently related to one subject to satisfy the "one-subject" requirement of Art. III, §29. (Schantz to Rush, State Senator and Walter, State Representative, 2-23-79) #79-2-9

The Honorable Bob Rush, State Senator; The Honorable Craig D. Walter, State Representative: You have both requested opinions of the Attorney General concerning whether Senate File 158 satisfies the requirements of Aritcle III, §29 of the Iowa Constitution. Senator Rush asks specifically:

1. If a bill contains two subjects (share drafts and usury) primarily because neither would have sufficient support to be passed on its merits, would it be "log-rolling" and prohibited by the Iowa Constitution?

2. If Senate File 158 violates the Iowa Constitution, Article III, §29, would all provisions of the bill be invalid?

Article III, §29 provides:

"Every Act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be expressed in the title."

The title to Senate File 158, as amended and passed by the Senate February 14, 1979, provides:

"An Act relating to financial transactions involving loans or deposits of money or extensions of credit which were affected by the provisions of Acts of the Sixty-seventh General Assembly, 1978 Session, chapter one thousand one hundred ninety (1190), sections eleven (11) through twenty-four (24), and providing for the restriction or regulation of interest rates, charges and prepayment penalties in transactions which are subject to section five hundred thirty-five point two (535.2) of the Code, and providing for the restriction or regulation of the use of share drafts drawn on credit unions, and providing penalties."

From the face of the bill one also learns that it was submitted as a unit by the Senate Committee on Commerce and that it proposed a permanent solution to matters regulated on a temporary basis by chapter 1190, Acts of the 67th G.A. (1978). Summarized briefly, the bill authorizes a credit union to provide share draft services upon the approval of a credit union administrator. The administrator may grant approval only if it is determined that specified conditions are satisfied. The bill also provides for a floating usury rate and prohibits or regulates certain other charges made by lenders.

No question has been raised concerning the adequacy of the title and it appears that the title adequately apprises the reader of the contents of the bill. The sole question presented is whether the bill is consistent with the requirement of Article III, §29 that an Act embraces but one subject and matters properly connected therewith. As framed by Senator Rush, the suggestion is that usury and share drafts are two subjects and improperly connected.

The "one-subject" requirement has produced a number of decisions by the Supreme Court of Iowa and Opinions of the Attorney General. In a leading case on the point, Justice Larson engaged in an extensive and scholarly review of developments to that date. *Long v. Supervisors of Benton County*, 258 Iowa 1278, 142 N.W.2d 378 (1966). According to *Long*, the primary purpose of the "one-subject" requirement is the prevention of "log-rolling" (the practice of several groups combining individual measures unlikely to obtain majority approval into an omnibus bill that will likely be passed by a consolidation of votes). In addition, the "one-subject" requirement facilitates an orderly legislative procedure under which the issues presented by a bill may be more easily understood and debated. *Id.* at 382.

Although treating the requirement as "mandatory" rather than merely "directory," the Supreme Court has repeatedly stated that the "one-sub-

ject" requirement must be liberally construed and should not be employed to embarrass legislation or hamper the Legislature. As expressed by Justice Larson:

"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 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."

Long, supra at 381.

Subsequent decisions of the Supreme Court have been generally consistent with this approach to the problem. *Webster Realty Co. v. City of Fort Dodge*, 174 N.W.2d 413 (Iowa 1970) (upholding Urban Renewal Act, ch. 403, Iowa Code); *State ex rel. Turner v. Iowa State Highway Comm.*, 186 N.W.2d 141 (Iowa 1971) (upholding a provision forbidding relocation of resident engineers' offices inserted in Highway Commission appropriation measure); *Sampson v. City of Cedar Falls*, 231 N.W.2d 609 (Iowa 1975) (upholding statute authorizing joint ownership of electric utilities, ch. 390, Iowa Code). *Cf. Green v. City of Cascade*, 231 N.W.2d 882 (Iowa 1975). Nor is the Supreme Court of Iowa unique in taking this approach. The author of an exhaustive survey of the "one-subject" rule observed:

"The most remarkable fact that emerges from this investigation is that, while the rule has been invoked in hundreds of cases, in only a handful of cases have the cours held an act to embrace more than one subject."

Rudd, "No Law Shall Embrace More Than One Subject," 42 Minn. L. Rev. 389, 447 (1958).

The rationale for significant judicial deference to legislative determinations of what counts as "one subject" may be readily inferred. The term "subject" is inherently vague. Whether a bill relates to one subject or several depends almost entirely upon how specifically one chooses to characterize it. Several examples may clarify the point. A bill requiring licenses for the sale of beef and the sale of milk can certainly be characterized as involving two subjects, but at a more general level one can state that the bill involves the one subject of "food." Apples and oranges are different species (two subjects), but they are both fruit (one subject). There is simply no uniform, mechanical formula which can be developed for characterizing the subject (or subjects) of a particular bill. A mechanical formula that might be appropriate for bills relating to boiler inspection could produce ludicrous results if applied to a massive criminal code revision. Put more technically, the "one-subject" requirement does not readily generate judicially manageable standards of review. A court can reasonably do little more than search for a minimal unity of purpose in the challenged legislation.

In addition, significant judicial deference is suggested by the nature of the constitutional requirement. Article III, §29 does not protect individual rights against government, a context in which more active vindication of constitutional protections is generally believed justified. Rather, it involves the internal processes of a coordinate branch of

government. In a system of government characterized by separation of powers, the respect due a coordinate branch of government makes it inappropriate for a court lightly to conclude that the legislative branch has not abided by its primary obligation to operate within constitutional requirements.

We believe the courts will continue to apply a liberal construction or deferential approach to legislation challenged as violative of the "one-subject" requirement. Although the coupling of regulations in Senate File 158 may approach the limits of judicial deference, in our opinion the courts would uphold its constitutionality.

As previously noted, Senate File 158 emerged from the Commerce Committee dealing with usury and share drafts; no late "riders" were added to a popular bill. The regulation of usury and share drafts clearly falls within the general "subject" of commerce. Indeed, regulation of usury and share drafts falls within that narrower category of commerce relating to transactions involving the lending of money by or deposits of money with financial institutions. In this regard, it should be noted that Senate File 158 amends provisions of existing law that are closely grouped in the 1977 Code of Iowa, *viz.* Chs. 524-536. Finally, House File 2467, temporarily regulating share drafts and usury, was enacted into law by the last General Assembly, apparently without formal challenge. An additional logical argument for keeping the regulations together in this session is the fact House File 2467 (ch. 1190) expires July 1, 1979. In short, we note a minimal unity of purpose in Senate File 158 and conclude that its provisions are not so dissimilar or discordant that they cannot stand together.

We do not suggest that the legislative process might not more closely approximate the constitutional ideal if Senate File 158 were subdivided into two or more separate bills. What should be stressed, however, is that the courts, for sound institutional reasons, have not insisted upon the ideal in reviewing challenges under Article III, §29. Rather, they have indicated that they can police only a minimum standard, a floor beneath which untoward combinations of subjects will not be tolerated. In our opinion, Senate File 158 satisfies that minimum.

In your request, Senator Rush, you invite us to look beyond the language of Senate File 158 and its formal legislative history and consider "extrinsic evidence" of a "log-rolling" purpose in the form of remarks made during floor debate. You state:

"An amendment was offered on the floor to in effect take up the issues of share drafts and usury separately. Speaking in opposition to dividing the bill the floor manager stated the primary reason for the two issues being considered in one bill is that neither would pass on its individual merits and that it was necessary to combine the two subjects in order to obtain passage of the proposal. This reasoning was not contradicted by any member of the Senate."

We note that no official record of legislative floor debates is maintained by the General Assembly. The Supreme Court of Iowa has indicated an unwillingness to take cognizance of informal (not recorded in the Journals) legislative history in the consideration of statutes. See *Tennant v. Kuhlemeier*, 142 Iowa 241, 120 N.W. 689 (1909). See also 73 Am.Jur. 2d, Statutes, §§173-177 (1974).

We believe the Court would decline to entertain extrinsic evidence of a "log-rolling" purpose of the type you submit; we feel similarly obliged to disregard it in framing this opinion and have restricted ourselves to the language of Senate File 158 and its formal history.

This extrinsic evidence, however, does warrant an additional comment. In a system of government where the judicial branch exercises the power of judicial review and is the final arbiter of the meaning of constitutional requirements, it is all too easy to forget that the legislative and executive branches are also sworn to uphold the letter and spirit of constitutional requirements. Especially with respect to Article III, which relates to the functioning of the General Assembly, the legislative branch is certainly free, and perhaps morally required, to apply stricter limits than the deferential standards applied by the Court to the conduct of legislative business. And, the General Assembly, in regulating itself, is perfectly free to consider extrinsic evidence of a "log-rolling" purpose in assessing whether this or any other bill satisfies the important requirements of Article III, §29.

The second question you pose is whether Senate File 158 would be entirely void if held to violate Article III, §29. It may be noted that prior Attorney General's Opinions have answered that question in the affirmative. See OAG #6-18-75 and OAG #7-8-75. Because we take the view that Senate File 158 does not violate Article III, §29, we have not undertaken a reexamination of those prior conclusions.

In summary, the provisions of Senate File 158 are sufficiently related to one general subject to withstand a constitutional challenge under Article III, §29.

February 26, 1979

STATE OFFICERS AND DEPARTMENTS: Board of Regents, §262.9 (12), Code of Iowa, 1977. Term "leaves of absence" in §262.9 (12) refers to traditional year-long sabbatical leaves. Obligation to repay institution where service commitment not completed is proportionate to extent of unperformed service. No authority for waiver of statutory obligation, but some changes in duty assignments may be outside scope of statute. (Appel to Richey, Executive Secretary, Board of Regents, 2-26-79) #79-2-10 (L)

February 26, 1979

TAXATION: PROPERTY TAX — Lands Acquired By Local Government Entities For Use As Wildlife Habitats. Chapter 1064, §7, Acts of 67th G.A., 1978 Session; §§428.1, 428.4, 428.5, and 443.3, Code of Iowa, 1977. Lands acquired by local government entities on a cost sharing basis pursuant to agreements between such entities and the Iowa Conservation Commission to carry out the purposes of §7 of Chapter 1064, but not acquired by the State of Iowa, should not be listed and taxed to the State. (Griger to Priewert, Director, Iowa Conservation Commission, 2-26-79) #79-2-11

Mr. Fred A. Priewert, Director, Iowa Conservation Commission: You have requested an opinion of the Attorney General in your letter of January 24, 1979, as follows:

"The last session of the Legislature passed an omnibus bill dealing with a wide variety of subjects (Chapter 1064, Acts of the 67th G.A., 1978 Session) including a provision requiring most hunters and trappers

to obtain a wildlife habitat stamp. This requirement is found in Section 7, unnumbered paragraph two entitled *New Section*, of the above mentioned chapter. Among other things, it obviously requires that the state pay property taxes on lands it may acquire with the revenues from these wildlife habitat stamps. It further provides that the Commission may enter into agreements with local governmental agencies to cost share wildlife habitat projects.

"The question now arises as to whether the state must pay property taxes on lands to which counties or other agencies might acquire title using cost sharing funds from the state."

In a telephone conversation, you informed the undersigned that your opinion request was limited to the question of whether §7 of Chapter 1064, Acts of 67th General Assembly, 1978 Session, required lands, which were never acquired by the State of Iowa, but which were acquired by local government entities on a cost sharing basis with the State, to be listed and taxed to the State.

Section 7 of Chapter 1064 provides in relevant part:

"*NEW SECTION.* A resident or nonresident person required to have a hunting or trapping license shall not hunt or trap unless he or she has on his or her person a valid wildlife habitat stamp signed in ink with his or her signature across the face of the stamp. This section shall not apply to residents who are permanently disabled or who are younger than sixteen or older than sixty-five years of age. Special wildlife habitat stamps shall be administered in the same manner as hunting and trapping licenses except all revenue derived from the sale of the wildlife habitat stamps shall be used within the state of Iowa for habitat development and shall be deposited in the state fish and game protection fund. The revenue may be used for the matching of federal funds. The revenues and any matched federal funds shall be used for acquisition of land, leasing of land or obtaining of easements from willing sellers for use as wildlife habitats. Notwithstanding the exemption provided by section four hundred twenty-seven point one (427.1) of the Code, any land acquired with the revenues and matched federal funds shall be subject to the full consolidated levy of property taxes which shall be paid from those revenues. In addition such revenue may be used for the development, management and enhancement of wildlife lands and habitat areas. Not more than fifty percent of all revenue from the sale of wildlife habitat stamps may be used by the commission to enter into agreements with county conservation boards or other public agencies in order to carry out the purposes of this section. The share of funding of those agreements provided by the revenue from the sale of wildlife habitat stamps shall not exceed fifty percent."

For Iowa property tax purposes, the general rule is that real estate is listed and taxed to the owner. *Gates v. Wirth*, 1917, 181 Iowa 1b, 16b N.W. 215; 1925 - 6 O.A.G. 232; 1928 O.A.G. 370; §§428.1, 428.4, 428.5, and 443.3, Code of Iowa, 1977. Section 427.1(1), Code of Iowa, 1977, exempts from taxation the property of the State of Iowa. Obviously, §7 of Chapter 1064 makes this tax exemption inapplicable where land is acquired by the State with wildlife habitat stamp revenues for use as wildlife habitats. But, the language quoted above in §7 does not require the State to pay property taxes upon land which it never acquires and the language cannot be construed so as to abrogate the general rule of taxing property to the owner.

Therefore, it is the opinion of this office that lands acquired by local government entities on a cost sharing basis to carry out the purposes of §7 of Chapter 1064, but not acquired by the State of Iowa, should not be listed and taxed to the State.

February 26, 1979

STATE OFFICERS AND EMPLOYEES: Individual bonds for state auditors are not required by §11.7, Code of Iowa, 1977, if each individual officer is covered by a group bond in the requisite statutory amount. (Appel to Johnson, State Auditor, 2-26-79) #79-2-12 (L)

March 7, 1979

COLLECTIVE BARGAINING AGREEMENTS: MINORITY UNIONS: DUES CHECK-OFF. Iowa Code Chapter 20 (1979); §§20.8; 20.8(2); 20.9; 20.10(2)(a, b); 20.10(3)(a); 20.14(1); 20.15(2); 20.15(5); 20.15(6); 20.16; 20.17(1); 736A.5. The provisions of Chapter 20, The Code (1979), do not recognize "minority unions" and do not contemplate bargaining by public employers for dues check-off with other than Board certified exclusive bargaining representatives. The Iowa right to work law is not violated by such a scheme. (Salmons to Husak, 3-7-79) #79-3-1

Honorable Emil J. Husak, State Representative: This office is in receipt of your opinion request of February 7, 1979. You state with reference to Chapter 20, The Code, the Public Employment Relations Act:

Provisions are being negotiated in collective bargaining agreements with school boards excluding minority unions from dues check-off.

It is the feeling these agreements violate both the letter and intent of the Iowa Right to Work Law.

In labor parlance, the term "minority union" is somewhat a misnomer. Roberts' Dictionary of Industrial Relations (B.N.A. Rev. ed. 1971) at 328, defines "minority union" as

". . . a union which does not enjoy exclusive bargaining or majority status. Frequently it is an organization which has been unable to obtain a majority of the employees in the appropriate unit for certification but still retains its identity as a group within the plant and possibly may be recognized by the employer as representative of such group."

Because the union represents at best a minority of workers, its separate identity in the plant is not one to which an employer owes any legal obligations or duties. This is because in the private sector, the National Labor Relations Act (NLRA) guarantees employees a freedom of choice in determining their bargaining representatives and majority rule prevails. *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 339, 64 S.Ct. 576, 58, 88 L.Ed. 762 (1944). As was said in *Brooks v. National Labor Relations Board*, 348 U.S. 96, 103, 75 S.Ct. 176, 181 99 L. Ed. 125 (1954), the NLRA places "a non-consenting minority under the bargaining responsibility of an agency selected by a majority of workers."

In Iowa, Chapter 20, the Code, aodpts the same form of majoritarian rule found in the private sector. Public employees are granted the right to "[n]egotiate collectively through representatives of their own choosing." Section 20.8(2), Code 1979. Employees must vote their approval of a bargaining representative by a majority of their number. Section 20.15(2). Upon majority approval of a representative, the Public Employment Relations Board is required to certify the results of the election, Section 20.15(5), and the representative so chosen is the *exclusive* repre-

sentative of all employees in the bargaining unit. Sections 20.14(1), 20.15(6), 20.17(1). Once the representative has been Board certified as exclusive, a public employer has the unqualified duty to bargain with the employee organization. Section 20.16. Chapter 20 makes no express reference to "minority unions" and consideration of the whole of Chapter 20 leaves no doubt that the existence of a minority employee organization after the majority has elected its exclusive representative is without legal import.

That portion of the Iowa Right to Work law relevant to your request reads:

"It shall be unlawful for any person, firm, association, labor organization or corporation to deduct labor organization dues, charges, fees, contributions, fines or assessments from an employee's earnings, wages or compensation, *unless* the employer has first been presented with an individual written order therefor signed by the employee, which written order shall be terminable at any time by the employee giving at least thirty days' written notice of such termination to the employer."

Section 736A.5 (1977).

It is certain the legislature was cognizant of Section 736A.5 when it passed Chapter 20 into existence. That portion of 736A.5 permitting dues deduction upon written authorization of an employee, with termination of such authority by thirty days written notice, is almost the verbatim of a similar provision in Section 20.9, which, *inter alia*, establishes dues check-off for members of the employee organization as a mandatory item of bargaining between the employer and representative:[1]

If an agreement provides for dues check-off, a member's dues may be checked-off only upon the member's written request and the member may terminate the dues check-off at any time by giving thirty days' written notice.

Chapter 20, read in its entirety, reveals the absence of any expression permitting minority unions and the clear expression that employer's obligations under the Act extend to only Board certified exclusive employee representatives. Dues deduction, if an item of bargaining asserted by the representative, and later part of the parties' contract, must conform to the requirements of Section 20.9. And, as those requirements are identical to Section 736A.5, neither the letter nor spirit of this section is violated by inclusion of such a contract term. Moreover, because the Act bestows exclusive bargaining rights upon the duly elected and certified employee representative, a "minority union" cannot require a public employer to deduct dues for those it "represents"

when the employer's allegiance under the Act is owed only to the exclusive majority chosen agent. Neither Chapter 20 nor 736A are violated under such circumstances, and the practice is not constitutionally infirm.[2]

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[1] See, *Charles City Community School District v. Public Employment Relations Board*, (Iowa Supreme Court slip opinion filed February 21, 1979) and *City of Fort Dodge v. Public Employment Relations Board* (Iowa Supreme Court filed same date).

[2] *Bauch v. City of New York*, 21 N.Y.2d 599, 289 N.Y.S.2d 951, 237 N.E. 2d 211 (1968). See also, *City of Charlotte v. Local 660, International*

Confirmation of this result is reached from considering the contrary view.

Iowa law makes it a prohibited practice for a public employer willfully to "a. (i)nterfere with, restrain or coerce public employees in the exercise of rights granted by this chapter [Section 20.8]" and "b. (d)ominate or interfere in the administration of any employee organization." Section 20.10(2) (a,b). It is also an unfair labor practice for an employee organization willfully to "a. (i)nterfere with, restrain, coerce or harass any public employee with respect to any of his rights under this chapter or in order to prevent or discourage his exercise of any such right, including, without limitation, all rights under section 20.8." Section 20.10(3)(a). Aside from the element of scienter found in the Iowa Act, these sections are patterned after very similar provisions in the N.L.R.A.[3]

In *International Ladies' Garment Workers' Union, AFL-CIO v. National Labor Relations Board*, 366 U.S. 731, 81 S.Ct. 1603, 6 L.Ed.2d 762 (1961) the Court affirmed an N.L.R.B. holding that 29 U.S.C. §§158(a)(1,2), (b)(1)(A) were violated by the employer (Bernhart-Altmann) who had mistakenly bargained with petitioner union on the assumption the union represented a majority of its workers. As to the specific violations the Court said:

> Bernhard-Altmann granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority. There could be no clearer abridgment of §7 of the Act, assuring employees the right "to bargain collectively through representatives of their own choosing" or "to refrain from" such activity. It follows without need of further demonstration, that the employer activity found present here violated §8(a)(1) of the Act which prohibits employer interference with, and restraint of, employee exercise of §7 rights. Section 8(a)(2) of the Act makes it an unfair labor practice for an employer to "contribute * * * support" to a labor organization. The law has long been settled that a grant of exclusive recognition to a minority union constitutes unlawful support in violation of that section, because the union so favored is given "a marked advantage over any other in securing the adherence of employees," . . .

Id., at 737, 1607, 768. Since Congress intended to impose upon unions the same restrictions as imposed upon employers, Section 158(b)(1)(A) was also violated. *Id.*

It seems likely the Public Employment Relations Board would follow this lead. See *Perry v. Council Bluffs Education Association*, PERB Case No. 671-72 (1976). Consequently, it appears that both public

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Association of Firefighters, 426 U.S. 283, 96 S.Ct. 2036, 48 L.Ed.2d 636 (1976).

[3] "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7; (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . ." 29 U.S.C. §158(a)(1,2) and "It shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . ." 29 U.S.C. §158(b)(1)(A).

employers and minority employee organizations would commit breaches of Iowa law by permitting and requesting dues check-off for a minority union.

Therefore, we conclude that collective bargaining agreements may exclude minority unions from dues check off without violating the Iowa Right To Work Law.

March 9, 1979

SMOKING IN PUBLIC PLACES: CIVIL FINES. Ch. 1061, Acts of the 67th General Assembly (1978); §336.2(5), Code of Iowa (1979); Ch. 631, Code of Iowa (1977). A violation of Section 6 of ch. 1061 should be pursued by commencement of a civil action rather than a criminal prosecution. Actions for these civil fines are small claims and the procedures provided by ch. 631 should be followed. County attorneys have the duty to prosecute these claims. (Miller and Schantz to Kopecky, 3-9-79) #79-3-2

Mr. Eugene J. Kopecky, Linn County Attorney: You have requested an opinion of the attorney general concerning the "no smoking" bill, ch. 1061, Acts of the 67th G.A. (1978). You pose the following questions for our consideration:

"1. What procedure should be followed in the filing of these charges?

2. Is this matter considered a misdemeanor or not?

3. How are court costs to be handled by the Clerk of the District Court?

4. Who is responsible for initiating prosecution of these matters?"

Chapter 1061 (S.F. 1022), entitled, "An Act Prohibiting Smoking in Certain Public Areas and Providing a Civil Penalty," prohibits "smoking," as defined in §1, in certain areas enumerated in §2. §4 requires the posting of conspicuous no smoking signs.

Your questions focus upon §§5 and 6 which deal with the means of enforcing the smoking ban. These sections provide:

"Sec. 5. ENFORCEMENT OF SMOKING PROHIBITION. The person in custody or control of a facility in which smoking is prohibited under section two (2) of this Act, or an employee of any such facility who is on duty therein, who observes a person smoking in that facility in violation of this Act shall inform the person that smoking is prohibited by law in that facility or that area of the facility, as the case may be.

Sec. 6. CIVIL PENALTY FOR VIOLATION. A person who smokes in those areas covered by section two (2) of this Act or who violates section four (4) of this Act shall pay a civil fine of five dollars for the first violation and not less than ten or more than one hundred dollars for each subsequent violation.

Judicial magistrates shall hear and determine violations of this Act. The civil fines paid pursuant to this Act shall be deposited in the county general fund."

The overriding issue your request presents is whether a violation of §6 of the Act should be pursued by a criminal prosecution or by commencement of a civil action. Before attempting to resolve this question, it may be helpful briefly to outline the operational consequences of its resolution.

The question of the essential differences between civil and criminal law has been much discussed, but remains in a state of considerable confusion. It is sometimes suggested that civil and criminal law have different purposes — the former to regulate, the latter to punish. But the prevalent modern view is that punishment is better seen as a means and that both civil and criminal law have utilitarian or preventive goals, *viz.*, the reduction of socially undesirable behavior. Moreover, both the civil and criminal law may employ deprivations of liberty and property as preventive measures. What is distinctive about criminal punishment, then, is neither its purpose nor its objective sanctions, but rather the intentional use of the formal moral condemnation of the community as an additional feature of the sanction. See H. M. Hart, "The Aims of the Criminal Law," 23 L.&C.Prob. 401, 402-05 (1958).

The second major operational consequence attending the resolution of your question relates to the many important differences between civil and criminal procedure. The defendant in a criminal case is surrounded by a variety of safeguards designed to enhance the reliability of fact-finding and to promote other values grounded in a concern for human dignity. Certain of these safeguards are established by specific constitutional guarantees, such as the Fifth Amendment protections against double jeopardy and self-incrimination, and the Sixth Amendment guarantees of a speedy and public trial by an impartial jury, notice, confrontation, compulsory process and the assistance of counsel. Civil procedure, on the other hand, generally must satisfy only the more flexible requirements of "due process of law." These differences in procedure may be largely explained by the deliberate us of moral condemnation associated with the criminal sanction and by the perception that the "stakes" for the defendant in a criminal case are generally greater than in a civil matter. See Clark, "Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis," 60 Minn. L. Rev. 379, 432-34 (1976).

It should also be noted that the use of civilly-labelled monetary penalties as a regulatory technique has increased markedly in recent years. The Administrative Conference of the United States has suggested the use of civil penalties will foster administrative efficiency and produce greater due process "in fact" than the overcrowded criminal courts in which minor offenses are prosecuted. See *Administrative Conference of United States, Recommendations and Reports* 896 (1972). Indeed, it is increasingly clear that legislatures are employing civilly-labelled monetary penalties to regulate behavior of a type that a generation ago would frequently have been designated a misdemeanor and bequeathed to the criminal process.[1] Restated, then, the central question you pose is

[1] Such regulatory money penalties are not uncommon to Iowa law. *See, e.g.*, §86.12 ("civil penalty" for failure to report employee injuries to the industrial commissioner); §88.14 ("civil penalty" for nonserious violations of occupational safety and health provisions); §98.31 (cigarette distribution, wholesale, and retail permit holders "civilly liable to the state as a penalty" for certain violations); §413.108 ("civil penalty" for violations of housing laws); §455B.82 ("civil penalty" for illegal dumping of solid waste); §533.13 ("civil penalty" for violations of competition law), Code of Iowa (1977). The United States Code is replete with provisions pursuant to which federal administrative agencies or federal courts may impose civil monetary penalties. An illustrative

whether the monetary sanction authorized by ch. 1061 is such a civil penalty or rather is a form of criminal punishment.

The question whether a given sanction is civil or criminal is, in the first instance, one of statutory construction. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972). The goal must be to ascertain the intent of the legislature. An ambiguity in §6 of S.F. 2022, however, complicates our task: "A person . . . who violates . . . this Act shall pay a *civil fine* of five dollars for the first violation. . . ." The term "civil" traditionally designates procedures and remedies for redress of private wrongs; the term "fine" ordinarily connotes a pecuniary punishment imposed in a criminal prosecution for redress of public wrongs. *Marquart v. Maucker*, 215 N.W.2d 278, 282 (1974). Faced with such an ambiguity, the courts may consider a variety of factors to determine legislative intent. Section 4.6, Code of Iowa (1979); *Doe v. Ray*, 251 N.W.2d 496, 500-01 (Iowa 1977). On balance, we conclude the legislature intended that civil procedure should be employed.

First, great weight must be given to the fact that the legislature has characterized the remedy as "civil." *United States v. J. B. Williams Co. Inc.*, 487 F.2d 414, 421 (2d Cir. 1974); *United States v. Eureka Pipeline*, 401 F.Supp. 934, 937-38 (N.D.W. Va. 1975). The choice of the term "civil" is more directly relevant to our problem than the term "fine." Money is money whatever the label; real differences turn upon whether civil or criminal procedure is employed.

Second, the term "civil" is employed consistently in §6, but the term "fine" is employed after a caption which reads "CIVIL PENALTY FOR VIOLATION." This suggests the legislature viewed as interchangeable the terms "fine" and "penalty." The term "penalty" has been conjoined with "civil' in many contexts, apparently to avoid the historical association of "fine" with criminal convictions. The mixture of terms in §6 suggests either the legislature was unaware of the historical association or did not wish to be bound by history here. The legislature may be its own lexicographer. *Cedar Rapids Comm. School Dist. v. Parr*, 226 N.W. 2d 486, 495 (Iowa 1975).

Third, this interpretation is strongly supported by the available legislative history. As originally drafted, Senate File 2022 was entitled "An Act prohibiting smoking in certain public areas and providing a penalty." Section 6 of the original bill simply imposed a "fine" for a violation. During committee action, an amendment was rejected which would have made a violation a "simple misdemeanor." See Minutes of the Human Resources Committee, 67th G.A., March 7, 1978. During floor debate, Senator Charles Miller successfully moved the adoption of S-5328, an amendment which struck §6 as originally drafted and inserted a new §6 employing the term "civil fine" as it appears in the enrolled bill. The title was also amended to read: ". . . and Providing A *Civil* Penalty." Subsequent attempts to amend §6 in the House of Representa-

(Footnote Cont'd)

catalogue of such provisions is reprinted as Footnote 43 to the opinion in *Atlas Roofing Co. v. O.S.H.R. Comm'n*, 518 F.2d 990, 1003-09 (5th Cir. 1975).

tives failed. Among those defeated was H-6396, which would have substituted the word "conviction" (a term of "criminal" denotation) for the word "violation" [a term which appears in many statutes unambiguously providing for civil procedure, *see, e.g.*, 29 U.S.C.A. §666(b)].

Fourth, the disposition of the "fine" proceeds suggests a civil penalty was intended. Section 6 of S.F. 2022 provides that civil fines should be paid to the county *general* fund. Section 666.3, Code of Iowa (1979), provides that fines shall go to the county treasurer for the benefit of the *school* fund. This special disposition suggests the legislature did not intend that criminal procedure be employed, both because a different disposition is provided and because no special provision would have been required if the legislature had in mind an ordinary criminal fine.

Finally, viewed as a whole, the regulations of smoking in public places do not evince an intent to employ the formal moral condemnation characteristic of criminal punishment. The behavior regulated has not been traditionally regarded as criminal. Smoking *per se* is not regulated; only the place at which the activity may be conducted is controlled. And, a violation apparently may be established without a finding of guilty knowledge (scienter) that smoking is not permitted in the particular place. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 640, 660-61.

Taken together, these factors strongly suggest a legislative intent that civil procedure be employed to enforce the smoking regulations. As previously noted, the principal argument for the opposite conclusion rests upon the historical connotation of the term "fine." The Supreme Court of Iowa had occasion to define the term in *Marquart v. Maucker*, 215 N.W.2d 278, 282 (1974):

"In *ordinary* legal phraseology a "fine is a pecuniary punishment which may be legally imposed or assessed only by a lawful tribunal in a case wherein it has jurisdiction, properly invoked, of the offense charged and of the person of the accused. It is the sentence pronounced by the court for the violation of a criimnal law, the amount of which may be fixed by law or left in the discretion of the court." (Emphasis added).

Another Iowa decision lends some support to the contrary view. In *Bopp v. Clark*, 165 Iowa 697, 147 N.W. 172 (1974), defendant challenged a conviction under a statute imposing a fine "of not less than twenty-five ($25.00) dollars, nor more than one hundred ($100.00) dollars" for hiring a teacher at less than the minimum wage. In rejecting Bopp's contention that violation of the statute did not constitute a crime because the act by its terms neither declared its violation to be a crime nor imposed a penalty of imprisonment, the court stated:

". . . it is rendered quite clear therefrom that the doing of an act in violation of statutory prohibition is a public offense. Such public offense will be a felony or a misdemeanor according to the punishment which may be imposed therefor. . . . In the case at bar the statute does provide for punishment by way of a fine. This of itself implies a public offense. The limitations of the fine to a sum not in excess of $100 classifies it as a misdemeanor. It is argued, however, that, because no imprisonment is imposed, a mere fine is collectible by civil action. *For the purpose of the argument only, it may be conceded that a civil action may lie in an appropriate case to recover a fine as distinguished from a penalty or forfeiture. Such actions, however, are usually based upon express statu-*

tory provisions. There is no such provision in the statute under consideration. (Emphasis added) 147 N.W. at 174-75.

Although *Marquart* and *Bopp* would support a tenable argument that the term "fine" implies the use of criminal procedure, we conclude that the arguments advanced above are substantially stronger. The term "fine" ordinarily connotes a criminal punishment, but, as *Marquart* and *Bopp* both recognize, this is not invariably the case. See also 36A C.J.S., Fines, §1:

"The terms 'fine' and 'penalty,' however, are often used as synonymous; and the term 'fine' has been held broad enough to include penalties for the violation of law which are recoverable in civil actions. . . ."

In this respect, we have examined the statutes of other jurisdictions which regulate smoking in public places. Most such jurisdictions do employ criminal sanctions,[8] but of particular interest is the Alaska statute which employs the term "civil fine" and makes explicit that the fine may be enforced "only by civil complaint or citation." Alas. Stat. Ann. §§18.35.300, *et seq.* (1975). Moreover, the use of the term "fine" in a civil context is not a stranger to Iowa law. Section 455B.25, Code of Iowa (1979), provides:

"Civil action for compliance. If any order or rule of the commission is being violated, the attorney general shall, at the request of the commission or the executive director, institute a civil action in any district court for injunctive relief to prevent any further violation of such order or rule, or for the assessment of a fine as determined by the court, not to exceed five hundred dollars per day for each day such violation continues, or both such injunctive relief and fine."

Despite the term "fine," this provision explicitly contemplates the use of civil procedure. It would doubtless be preferable to employ the term "penalty" rather than "fine." When viewing the statute as a whole, however, we cannot conclude that the use of the term "fine" standing alone manifests a legislative intent that criminal procedure should be employed to enforce violations of smoking regulations.

Before leaving this issue, we should take note of the principle that statutes should be construed to avoid doubts as to their constitutionality. *Iowa Nat. Indus. Loan Co. v. Iowa State Dept. of Revenue*, 224 N.W.2d 436, 442 (Iowa 1974); *State v. Ramos*, 260 Iowa 590, 149 N.W.2d 862 (1967). The mere use of the labels "civil penalty," indicating a legislative intent to employ civil procedure, would not invariably end the inquiry. If, for example, a statute imposed a "civil penalty" of 10 years imprisonment in the Iowa State Penitentiary and authorized the use of civil rather than criminal procedure, a court almost certainly would hold the statute unconstitutional as violative of the Sixth Amendment to the United States Constitution. At some point, in other words, a court will look beyond the label to ascertain whether a sanction bears the traditional indices of criminal punishment. Clark, *supra*, 60 Minn.

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[8] *See, e.g.*, Ariz. Stat. Ann. §36-601.01 (1973) (misdemeanor, $10-$100 fine); Ga. Code Ann. §26-9910 (1975) (misdemeanor, $10-$100 fine); Mich. Compiled Laws Ann. §325.811 (1977) (misdemeanor); Minn. Stat. Ann. §144.417 (1977) (petty misdemeanor), Nev. Rev. Stat. §202.2491-2 (misdemeanor, $10-$100 fine); S.D. Stat. Ann. ch. 22-36, §22-36-2 (misdemeanor, $10-$100 fine).

L.Rev. at 401-03. Indeed, numerous statutes imposing civil penalties have been challenged on the theory that constitutional protections available in criminal cases were not afforded. If there were a serious question here as to whether the Constitution requires criminal procedure for enforcing violations of these smoking regulations, we would invoke the above principle of construction and resolve any doubts in favor of a "criminal" interpretation. However, we have little doubt that it is constitutionally permissible to enforce smoking regulations by civil penalties. Far more stringent penalties have been upheld. See, e.g., *Atlas Roofing Co., Inc. v. O.S.H.R. Comm.*, 518 F.2d 990 (5th Cir. 1975), *aff'd.* 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d. 464 (1977).

Having determined that §6 imposes a civil penalty, we turn to your remaining questions. Section 6 provides that judicial magistrates shall hear and determine violations of this Act. Presumably, this manifests an intent that actions for civil fines be treated as small claims and the procedures provided by ch. 631 be employed. We note that ch. 631.1 defines a small claim as "a civil action for a money judgment where the amount in controversy is one thousand dollars or less, exclusive of interest and costs." We see no reason why a civil fine should be characterized as anything other than "a civil action for a money judgment." In addition, we note that a part-time magistrate has no civil jurisdiction other than small claims. Section 602.60, Code of Iowa (1977).

It follows that the action should be commenced by the filing of an original notice. Section 631.3.1. Fees and costs should be handled as provided for in §631.6. Actions for these civil fines should be pursued by the county attorney's office because it is the duty of the county attorney to "prosecute all proceedings necessary for the recovery of debts, revenues, moneys, penalties and forfeitures accruing to the state or his county." Section 336.2(5), Code of Iowa (1977).

March 9, 1979

PUBLIC RECORDS: Confidentiality. §§18.7, 18.38, 68A, 68A.1, 68A.2, 68A.7, 68A.7(3), 68A.7(6), 68A.7(7), 68A.8, and 714.16(2)(a). Evaluations of bid proposals by state employees are public records which are confidential until the bids are opened and an award made. The possibility of misuse of nonconfidential public records does not justify placing restrictions on access to those records. (Cosson to McCausland, Director, Department of General Services, 3-9-79) #79-3-3

Mr. Stanley McCausland, Director, Department of General Services: You have asked for an opinion of the Attorney General on the relationship between Chapter 68A, 1977 Code of Iowa (the open records law) and the competitive bidding process administered by your department.

Specifically, you asked the following three questions:

Are reports, evaluations and recommendations prepared by employees of the State concerning bids or technical proposals to be considered public records prior to the consummation of a contract or purchase order?

Would the announcement of the apparent successful offeror in a notice of award letter for the purpose of allowing for vendor appeals prior to consummation of a contract or purchase order require the release of all documents at that time, or is it permissible to withhold evaluation documents until consummation of the contract and/or completion of the appeal process?

Further, does the State of Iowa have any control over the subsequent use of such documents by the public, so that they may not be reproduced as testimonials or product endorsements in the marketing practices of vendors?

Section 68A.1, 1977 Code of Iowa, provides as follows:

Public records defined. Wherever used in this chapter, "public records" includes all records and documents of or belonging to this state or any county, city, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing.

Although labeled a "definition", this provision does not itself afford a workable basis for distinguishing "public records" from any piece of paper in the possession or control of a public official because it fails to define the words "record" and "document". In a case arising prior to the passage of Chapter 68A, The Code, but decided after its enactment, the Iowa Supreme Court explained the phrase "public record" in **Linder v. Eckard**, 261 Iowa 216, 152 N.W.2d 833 (1967). There the court said, 261 Iowa at 219, 152 N.W.2d at 835:

Not every document which comes into the possession or custody of a public official is a public record. It is the nature and purpose of the document, not the place where it is kept, which determines its status.

This limited view of a "public record" has been broadened by Chapter 68A, The Code, which states that every "record" or "document" in the possession or control of a public body is a "public record". However, it is still not clear that every piece of paper is a "record" or "document". This uncertainty is heightened by the Supreme Court's decision in *Des Moines Register & Tribune v. Osmundson*, 248 N.W.2d 493, 501 (Iowa 1976), in which the court characterized the definition of a public record in the *Linder* case as restrictive, but neither overruled nor affirmed it. Furthermore, several previous Attorney General's Opinions have relied on the *Linder* case to restrict public access to certain notes and work-sheets, without corrective action by the Legislature See, for example, 1972 OAG p. 616, 1974 OAG p. 403, and see also 1972 OAG p. 605 at 610. But see Note, *Iowa's Freedom of Information Act: Everything You've Always Wanted To Know About Public Records But Were Afraid To Ask*, 57 Iowa L. Rev. 1163, 1169 (1972).

We need not belabor the point, however, because your question assumes, and we agree, that a final and formal evaluation of bids or technical proposals prepared by a state employee is a "public record" within the meaning of Section 68A.1, The Code.

Section 68A.2, 1977 Code of Iowa, provides in part:

Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential . . . .

Thus every "public record" is a nonconfidential public record unless confidentiality is required or permitted under some other provision of the Code of Iowa. See *Des Moines Register & Tribune v. Osmundson*, supra, 248 N.W.2d at 501-503.

Chapter 68A includes a listing of some public records which may be held as confidential. Section 68A.7, The Code, provides, in part, as follows:

Confidential records. The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information:

* * *

3. Trade secrets which are recognized and protected as such by law.

* * *

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.

Your first question was whether or not the work product of your employees used in analyzing bids and technical proposals were to be considered as "public records" prior to the consummation of a contract or purchase order. As shfown above, those records are definitely public records, however they may also be fairly categorized as "appraisal information concerning the purchase of . . . personal property for public purposes" and thus are confidential records until the public announcement of the project.

Your second question was whether the cloak of confidentiality should be dropped when the sealed bids were opened and an award letter sent pursuant to Section 18.38, The Code, or whether the records would remain confidential until the award had been "finalized" by the lack of or resolution of any appeals available to an unsuccessful bidder under Section 18.7, The Code. The answer is to be gleaned by comparing Section 68A.7(7) *supra* with Section 18.38, The Code.

Section 18.38, The Code, reads in part as follows:

All bids shall be publicly opened and read and the contracts let at the time and place fixed therefor, or on the adjourned day or days named by the director, of which adjournment all parties shall take notice.

The procedure in Section 18.38, The Code, seems to be the public announcement referred to in Section 68A.7(7), The Code. That conclusion is reinforced by the fact an appeal might never take place, and thus the public opening and reading of the bid could be the only public announcement of the project to ever occur. Thus, our answer is that confidentiality applies only until the sealed bids are opened and read.

I would add that any "trade secrets which are recognized and protected as such by law" contained in any of your records or documents should be kept confidential even after a public announcement of the bidding, based on Section 68A.7(3), The Code. If confidentiality of public records is required by more than one subsection in Section 68A.7, The Code, then those records remain confidential even if one reason for confidentiality no longer exists. The same reasoning would require continued confidentiality for "Reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose". Section

68A.7(6), The Code. As you did not refer to specific reports or data in your letter, we offer no opinion as to which of your records or documents should be kept confidential based on these two subsections.

In those cases where a serious question exists as to whether or not certain records should be kept confidential, The Code of Iowa contains a clarification procedure. Section 68A.8, The Code, permits an action to be brought in the Iowa District Court to restrain the examination of records when the custodian of those records believes they should be kept confidential and his decision is challenged by a citizen seeking to examine the records. If the custodian of the records believes in good faith that the records should be kept confidential, Section 68A.8, The Code, also permits the custodian of the records to delay the examination of those records for a reasonable period of time to seek an injunction restraining the examination of a specific public record. As Section 68A.7, The Code, uses some imprecise language in stating what records may be kept confidential, the use of this injunction procedure could be helpful if a serious challenge is made to the judgment of a custodian of records.

Your third question was whether or not the State of Iowa could control the subsequent use of such documents by the public to prevent their use as testimonials or product endorsements by vendors. Similar questions have been asked many times, and the consistent response has been that the possibility of future misuse or commercial use of nonconfidential public records will not justify restrictions on their release. See, e.g., OAG #78-9-10, 1968 OAG p. 656, 1978 OAG p. 518, 1974 OAG p. 389. See also *Des Moines Register & Tribune v. Osmundson*, supra, 248 N.W.2d at 502-503.

However, as this is a matter of concern to you, you might consider printing a disclaimer on all public records which could conceivably be used as an endorsement. Such a disclaimer would state specifically that no endorsement was intended by any of the statements in any of your records. A rubber stamp could be used to apply the disclaimer to the records. If you decide to use a disclaimer statement, we would be most happy to assist you with appropriate wording.

If any of your records are inaccurately and improperly portrayed in an advertisement as being an endorsement of a product by the State of Iowa, the provisions of the Criminal Code could apply. See, for example, Section 714.16(2)(a), Supplement to the Code 1977, which provides:

> The act, use or employment by any person or any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

Thus the State can deal with the actual misuse of nonconfidential public records. However the possibility of misuse of nonconfidential public records does not justify placing restrictions on them.

March 12, 1979

TAXATION: PROPERTY TAX: Notice Requirements to Extinguish Right of Redemption From Tax Sale. Section 447.9, Code of Iowa, 1977. Service of notice of expiration of the right of redemption from

tax sale must only be made upon those persons enumerated in §447.9 as entitled to such notice. When there is no one upon whom such notice can be served, an affidavit of service setting forth the facts and filed with the county treasurer negates the necessity for such notice. (Donahue to Smith, 3-12-79) #79-3-4

Mr. Lauren Ashley Smith, Assistant Clinton County Attorney: You have requested an opinion of the Attorney General in regard to the notice requirements set forth in §447.9, Code of Iowa, 1977, pertaining to extinguishment of redemption rights as a result of a tax sale. Specifically, in your letter, you state:

"Where the person in whose name the property is taxed is dead, there being no one in possession and there being no lien holders, would it still be the opinion of your office that the certificate holder need only file an affidavit setting these facts forth with the county treasurer in order to qualify for a deed without more?"

Section 447.9, Code of Iowa, 1977, states in relevant part:

"*Notice of expiration of right of redemption.* After two years and nine months from the date of sale, or after nine months from the date of sales made under the provision of Section 446.18, Section 446.38 or 446.39, the holder of the certificate of purchase may cause to be served upon the person in possession of such real estate, and also upon the person in whose name the same is taxed, if such person resides in the county where the land is situated, in the manner provided for the service of original notices, notice signed by him, his agent, or attorney, stating the date of sale, the description of the property sold, the name of the purchaser, and that the right of redemption will expire and a deed for the land be made unless redemption is made within ninety days from the completed service thereof."

In your letter, you made reference to 1942 O.A.G. 22, in which the Attorney General construed §7279, Code of Iowa, 1939, and opined:

"No statutory provision is made for service upon any other person or persons if when an attempt is made to serve notice, the person in whose name the property is taxed is deceased. The statutory requirement for notice thereon ceases to be effective. See *Gray v. Morin*, 218 Iowa 540, 255 N.W. 631, and other cases cited herein. There being no one upon whom notice could be served, an affidavit of service setting forth such facts and filed with the county treasurer would eliminate the necessity of notice." 1942 O.A.G. 23.

An examination of §7279, Code of Iowa, 1939, and §447.9, Code of Iowa, 1977, discloses that these statutes are identical in pertinent part.

In *Burks v. Hedinger*, 1969, Iowa, 167 N.W.2d 650, the Iowa Supreme Court upheld the conclusions rendered in 1942 O.A.G. 22. The Court stated at 167 N.W.2d 654:

"Of course where, as here, the one in whose name the property is taxed is dead, it is impossible to serve him and no notice upon such person is necessary. Thompson v. Chambers, 229 Iowa 1265, 1271, 296 N.W. 380, 383 and citations."

It is the opinion of this office that service of notice of expiration of the right of redemption from tax sale must only be made upon those persons enumerated in §447.9 as entitled to such notice. When there is no one upon whom such notice can be served, an affidavit of service setting forth the facts and filed with the county treasurer negates the necessity for such notice.

March 12, 1979

TAXATION: SALES TAX: Sales of Chicks for Resale. §422.47, Code of Iowa, 1977, as amended by §2 of Chapter 1142, Acts of the 67th General Assembly, Second Session. Iowa hatcheries and other chick dealers can sell chicks to purchasers tax free pursuant to a valid exemption certificate taken in good faith regarding those chicks which are purchased for resale and, further, the purchaser will be solely liable for sales tax on those chicks which could later be disposed of or used by the purchaser in a non-exempt manner. (Kuehn to Pellett, 3-12-79) #79-3-5 (L)

March 16, 1979

TAXATION: PROPERTY TAX — PUBLIC ACCESS TO ASSESSOR'S RECORDS. §§68A.1, 68A2., 68A.7, 441.19, 441.21. The records of the assessor's office are public records and are open to public examination, unless expressly made confidential by statute. (Ludwigson to Life, 3-16-79) #79-3-6

Mr. Greg A. Life, Mahaska County Attorney: We acknowledge receipt of your letter in which you have requested an opinion of the Attorney General regarding the following problem:

"[Whether the public has open access to] information from the County Assessor as to assessments made on other real estate not owned by the inquirer, and the breakdown of the assessment relative to that portion of the assessment on the real estate and that portion of the assessment which is the assessment on buildings or improvements located on the real estate."

Section 68A.2, Code of Iowa, 1977, states in part that "[e]very citizen of Iowa shall have the right to examine all public records and to copy such records, . . . unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential." Section 68A.1, Code of Iowa, 1977, defines "public records" as follows:

"68A.1 Public records defined. Wherever used in this chapter, 'public records' includes all records and documents of or belonging to this state or any county, city, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing."

It cannot be argued that assessment records compiled by county and city assessors are not public records within the meaning of §68A.1. The records kept by the assessors which would contain information regarding individual assessments would be the assessment book, the assessment rolls and the property record cards. The assessment book contains the assessed values for all the parcels in a particular district. The assessment roll contains a breakdown of the total assessment for dwelling, other buildings and land for an individual parcel. The property record cards contain more detailed information regarding the value for each individual parcel. The assessor keeps these records on a regular basis in the course of his or her duties. The assessor's office is obviously a branch or department of a county or city, and its records would fall within the definition of public records in §68A.1.

The remaining question is whether the Iowa Code limits public access to the assessor's records or renders the records confidential within the meaning of §68A.2. Section 441.21, Code of Iowa, 1977, contains the following:

"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."

It is the opinion of this office that this sentence does not expressly limit the public's access to the aforementioned records of the assessor. The language "all information in any formula or method used to determine the actual value" refers to more than "public records" of the assessor; "all information in any formula or method" would include the assessor's worksheets, mathematical computations, personal observations, etc. A previous opinion of the Attorney General indicated that worksheets and the like are not "public records" within the meaning of §68A.1.

1972 O.A.G. 616 (Voorhees to Addy, 9-26-72). Thus, access to the assessor's worksheets would be limited to written inquiry by an individual taxpayer regarding his or her property. However, access to the "public records" of the assessor is not limited by §441.21.

The only other section wherein the public's access to the assessor's records is expressly limited is §441.19(4), Code of Iowa, 1977, regarding supplemental returns:

"The supplemental returns herein provided for shall be preserved in the same manner as assessment rolls, but *shall be confidential* to the assessor, board of review, or director of revenue, and shall not be open to public inspection, but any final assessment roll as made out by the assessor shall be a public record, provided that such supplemental return shall be available to counsel of either the person making the return or of the public, in case any appeal is taken to the board of review or to the court." (Emphasis supplied.)

The above language is the type of express limitation referred to in §68A.2. Note that §441.19(4) indirectly states that the assessment roll is public record.

Finally, any portion of the assessor's public records which may contain information rendered confidential by §68A.7, Code of Iowa, 1977, would not be open to the public. Section 68A.7 renders specifically enumerated information confidential for the purposes of Chapter 68A. For example, it is possible that property record cards regarding rental property would contain information ". . . which, if released, would give advantage to competitors and serve no public purpose." Such information would thus be confidential pursuant to §68A.7(6).

Public access to the assessor's records is within the spirit of Chapter 68A. Section 68A.8, regarding injunctions to restrain examination, states:

"[t]he 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."

Furthermore, open access to the assessor's records helps an individual taxpayer determine whether there exist any grounds for protest of his or her assessment under §441.37, Code of Iowa, 1977. For example, the assessor's records may reveal that the difference in total value between one individual's property and a neighbor's results from one parcel containing a house with a finished basement, or a more valuable silo, etc. Knowledge of such information may provide grounds for protest or prevent an unnecessary protest.

It is thus the opinion of this office that the public has access to the records of the assessor's office, subject to the few restrictions discussed above.

March 23, 1979

COUNTIES: Full-Time County Attorneys; Office Space — Iowa Const. Art. III, §38A; §§4.7, 4.8, 332.9, 332.62, 340.9 and 340A.6, Code of Iowa, 1979; Chs. 1119 and 1206, Acts of the 67th G.A. (1978). The Board of Supervisors shall initially set the salary of a full-time County Attorney. Thereafter, the County Compensation Board has jurisdiction. Pursuant to Home Rule, a board of supervisors may supply an additional office for a County Attorney outside the county seat. (Blumberg to West, State Representative, 3-23-79) #79-3-7

The Honorable James C. West, State Representative: We have your opinion request regarding the compensation and office space of county attorneys. Under your facts, the County Compensation Board, in December, 1978, recommended a salary for a full-time County Attorney. Thereafter, the Board of Supervisors adopted a resolution, pursuant to §3(2), Ch. 1119, Acts of the 67th G.A. (1978), now §332.62(2), 1979 Code of Iowa, establishing a full-time county attorney, and setting a salary for the position higher than that recommended by the compensation board. Based upon these facts, you ask:

1. "Does Section 3 of House File 2164 [Ch. 1119, 67th G.A.] remove jurisdiction as to the determination of annual salary from the Hardin County Compensation Commission and place the jurisdiction as to determination of the full-time County Attorney permanently within the power and discretion of the Board of Supervisors?"

2. "In the event the jurisdiction is not permanently removed from the Compensation Commission, does the Compensation Commission resume jurisdiction as to determination of the salary of the full-time County Attorney on July 1, 1979, or in the alternative July 1, 1980?"

Chapter 340A, 1979 Code of Iowa, established the county compensation board. Section 340A.6 provides that in December of each year the compensation board shall review the compensation of each county elective office, and make recommendations to the board of supervisors. The supervisors shall review the recommendations and determine the final compensation schedule, which shall not exceed the recommendation. The supervisors may reduce the recommended compensations. The final compensation schedule shall become effective on July first next following its adoption by the supervisors. In an earlier opinion, No. 77-4-4, we held that the supervisors can only accept the recommendations or reduce them.

Section 3, Ch. 1119, Acts of the 67th G.A. (1978), amended Chapter 332 of the Code by adding the following (§332.62):

1. "The board of supervisors may provide, by resolution at any regular meeting after at least fourteen days public notice, that the county attorney shall be a full-time county officer. The resolution shall include an effective date which shall not be less than sixty days from the date of adoption. However, if the county attorney-elect objects to the full-time status, the effective date of the change to a full-time status shall be delayed until January first of the year following the next general election at which a county attorney is elected. A resolution changing the status of the county attorney shall not be adopted between March first and the date of the general election of the year in which the county attorney is regularly elected as provided in section thirty-nine point seventeen (39.17) of the Code."

2. *"The resolution changing the status of the county attorney shall state the annual salary to be paid to the full-time county attorney. Notwithstanding section three hundred forty A point six (340A.6) of the Code, the board of supervisors shall adopt an annual salary for the county attorney* which is between forty-five and one hundred percent of the annual salary received by a district court judge. [Emphasis added].

A reading of this amendment along with §340A.6, leads us to the conclusion that initially, when the county attorney's position is made full-time, the supervisors, not the compensation board, have the sole authority to set the salary. The question is whether the supervisors retain the authority to set the salary to the exclusion of the compensation board.

House File 2164, as it was initially introduced, concerned only assistant county attorneys. By way of amendment, H-5317, it was expanded to include full-time county attorneys. Subsection 2 of section 3 of H-5317, provided:

2. Notwithstanding section three hundred forty A point six (340A.6) of the Code, before the effective date of the resolution changing the status of the county attorney the *county compensation board shall* hold a public hearing after at least fourteen days public notice to *consider the annual salary* of the county attorney *and make a recommendation to the board of supervisors. The board of supervisors shall adopt an annual salary* for the county attorney *which is not more than the recommendation* and which is effective on the effective date of the resolution changing the status of the county attorney. [Emphasis added].

House File 2164 was passed by the House and sent to the Senate with the above provision.

The Senator further amended the bill by S-5766. That amendment changed subsection 2 of section 3 to read:

2. "The resolution changing the status of the county attorney shall state the annual salary to be paid to the full-time county attorney. Notwithstanding section three hundred forty A point six (340A.6) of the Code, *the board of supervisors shall adopt an annual salary* for the county attorney which is between sixty-five and one hundred percent of the annual salary received by a district court judge. [Emphasis added].

This amendment was adopted by the House, with the exception that the salary range was changed from a minimum of 65 percent to 45 percent of a district court judge's salary.

What we now have before us is a situation where the bill originally provided that the compensation board was to recommend the salary of the full-time county attorney. However, it was later amended to its present form by deleting all reference to the compensation board. Since debates and full committee reports of the Legislature are not recorded, it is difficult to determine legislative intent. Thus, we cannot state with any degree of certainty the reason for the change of language of the relevant portion between the House and Senate versions.

In *Lenertz v. Municipal Court of City of Davenport*, 219 N.W.2d 513 (Iowa 1974), the bill there in question contained a penalty clause as passed by the House. The Senate deleted the clause and the House concurred. The Court held that this legislative history showing the striking of the clause was an indication that the statute should not be construed to include it. The same could be said here. The House

initially provided that the compensation board set the full-time county attorney's salary. However, that was stricken by the Senate and the House concurred. Thus, it could be said that the salary of the full-time county attorney is to be set only by the supervisors.

Section 4 of the original bill provided that the supervisors could change the status back to part-time county attorney in the same manner as it set the status as full-time. It then provided that the compensation board shall meet and recommend a salary in the same manner as for the full-time county attorney. This provision was also changed by S-5766. That change rewrote section 4 (§332.63) to include subsection two, which provided:

"The resolution changing the status of a full-time county attorney shall state the annual salary to be paid to the part-time county attorney."

What is conspicuous by its absence is any reference to §340A.6 as is found in §332.62. The result would then be that the supervisors set the county attorney's salary to the exclusion of the compensation board for full-time county attorneys, whereas for part-time county attorneys, the compensation board has jurisdiction.

Another way of reaching this conclusion is by review of the rules of special versus general legislation. Section 340A.6 is general in that it applies to all elected county officials, and does not specifically name them. Section 332.62 speaks only to the full-time county attorney, and is therefore special. Pursuant to §4.7 of the Code, the special controls over the general.

This, however, does not necessarily solve the issue. Section 340.9 provides that the annual salary of the county attorney shall be determined as provided in §340A.6. That section was not amended nor referred to by Chapter 1119, 67th G.A. If the above interpretation of §332.62 is correct, then it is in direct conflict with §340.9. The special versus general argument can be used here in that §340.9 refers to county attorneys in general, whereas as §332.62 refers only to full-time county attorneys. Therefore, §340.9 controls for part-time county attorneys while §332.62 controls for full-time county attorneys. Another way of addressing this is by way of application of §4.8 of the Code. There, if two statutes of different sessions are irreconcilable, the latest in date of enactment prevails. Thus, §332.62 would prevail.

If the above is the correct interpretation, the result would be that the salary of a full-time county attorney would be set by a different body than the salary of a part-time county attorney. Although such legislative intent is possible, we do not readily believe that such was the intent.

By including the "notwithstanding section 340A.6" language in §332.62, the Legislature may have merely intended that the supervisors only initially set the salary. Since the compensation board only submits its recommendations once a year, in December, and those recommendations are applicable the following July, it is possible that the county attorney's position may become full-time before the compensation board has a chance to recommend a salary. Thus, this interpretation is reasonable.

Section 332.62 is ambiguous. Legislative intent is therefore unclear. However, we believe that the better reasoned approach would be that

the supervisors only set the salary of a full-time county attorney initially. The compensation board would regain jurisdiction after that.

Under your facts, the compensation board recommended a salary for a full-time county attorney. That recommendation would be effective July 1, 1979. However, it was made prior to the time that the supervisors adopted the resolution required by §332.62. Although the applicable sections are void of any provisions affecting this type of situation, we believe that the salary set by the supervisors should control until such time following the change in status that the compensation board again makes its recommendations to the supervisors. In this case, that would be December, 1979, to become effective July 1, 1980.

Your final question is whether the county can legally pay for office space for the county attorney outside the county seat. Section 332.9 of the Code provides that the supervisors shall furnish the county officers, including the county attorney, with offices at the county seat. Nothing in that section, nor of any other section of the Code of which we are aware, prohibits the supplying of an additional office outside the county seat. Prior to the passage of Chapter 1206, Acts of the 67th G.A. (1978), the answer would have been that the county could only supply one office, and it had to be at the county seat. However, the result is now different.

Chapter 1206, Acts of the 67th G.A. (1978), is the amendment to Art. III of the Iowa Constitution adopted by the voters in November 1978 and confers Home Rule on counties. That amendment provides:

"Counties or joint-municipal corporation governments 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 general assembly may provide for the creation and disolution of joint county-municipal corporation governments. The general assembly may provide for the establishment of charters in county or joint county-municipal corporation governments.

"If the power or authority of a county conflicts with the power and authority of a municipal corporation, the power and authority exercised by a municipal corporation shall prevail within its jurisdiction.

"The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in express words is not a part of the law of this state."

If that amendment operates the same as that for municipalities, Art. III, §38A, Iowa Constitution, and we believe that it does, the grant of a specific power or duty is not necessarily a limitation any longer. Thus, under Home Rule, a county could provide an additional office for a county attorney outside of the county seat.

In summary, we are of the opinion that:

1. The board of supervisors shall initially set the salary of a full-time county attorney. Thereafter, the county compensation board has jurisdiction.

2. Pursuant to Home Rule, the board of supervisors may supply an additional office for the county attorney outside of the county seat.

March 23, 1979

CIVIL SERVICE; ATTORNEYS AND COUNSELORS; Sections 400.26; 68.8; 279.37; 327C.21; 455.163; 455.166; 475.1; Iowa R. App. P. 14(f)(13); Iowa Court Rule 120. Use of the term 'counsel' in civil service trails comprehends only attorneys at law. (Salmons to Walter, State Representative, District 100, 3-23-79) #79-3-8 (L)

March 26, 1979

COUNTIES AND COUNTY OFFICERS: County Indemnification Fund. Sections 332.36, 332.41, Iowa Code (1979); Sections 613A.1(1), 613A.1(3), 613A.2, 613A.7, Iowa Code (1979). Insurance may be purchased by a county to protect its officers or employees from liability for their errors or omissions, even though the fund provides duplicating coverage to some extent. (Haskins to Davis, Scott County Attorney, 3-26-79) #79-3-9

William E. Davis, Scott County Attorney: You ask the written opinion of our office concerning the county indemnification fund (hereafter, the "fund") found in §332.36, Iowa Code (1979). 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 county officer, any 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."

We preliminarily note that no protection is provided under the fund to a county and its agencies as formal legal entities. Section 332.36 authorizes indemnification only for county "officers", "deputies", "assistants", or "employees" and not to a county itself or any of its agencies.[1]

You ask whether a county may lawfully purchase insurance to protect its officers or employees from liability for errors and omissions. As we have indicated above, no coverage is provided under the fund for a county or its agencies, as opposed to its officers or employees. Hence, insurance would still be necessary to provide protection for a county and its agencies as a result of the errors or omissions of its officers or employees, unless the county decided to self-insure. Clearly, a county may purchase insurance to cover itself and its agencies from liability arising from the errors or omissions of its employees. The question is whether it may purchase insurance which insures its officers or employees from errors or omissions, that is, whether it may purchase insurance which essentially duplicates the coverage provided by the fund. Section 613A.7, Iowa Code (1979), authorizes a county to purchase insurance to cover its liability and the liability of its officers or employees. That section states in relevant part:

'The governing body of any municipality may purchase a policy of liability insurance insuring against all or any part of liability which might be incurred by such municipality or its officers, employees and

[1] Of course, coverage is also provided for a township trustee, and a deputy, assistant, or employee of a township. But, as is true of a county and its agencies, as entities, a township itself would not be protected.

agents under the provisions of section 613A.2 and section 613A.8 and may similarly purchase insurance covering torts specified in section 613A.2.[2]

Section 613A.2, Iowa Code (1979), makes the county liable for the "torts" of its officers employees and §613A.1(3), Iowa Code (1979), defines the phrase "torts" to include an "error or omission." Hence, under Ch. 613A, a county may purchase insurance covering its officers or employees for liability for errors or omissions. Nothing in the particular statutes pertaining to the fund precludes the purchase of such insurance.

Indeed, §332.41, Iowa Code (1979), providing that the fund shall pay only that amount by which any judgment against a county officer or employee exceeds the amount payable by reason of insurance covering the officer or employee, implies that the purchase of insurance to cover a county officer or employee for errors or omissions is proper. That section states:

"If a final judgment is obtained against any elected county officer, any township trustee, or any deputies, assistants, or employees of the county or 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 above section makes clear that insurance may be purchased by a county to cover its officers or employees from liability arising from their errors or omissions. Otherwise, there would be no need for language providing that the fund shall pay only that amount of a judgment which is in excess of any insurance.

Hence, we conclude that insurance may be purchased by a county to protect its officers or employees from liability for their errors or omissions, even though the fund provides duplicate coverage to some extent.

[2] The term "municipality" in Ch. 613A includes a county. See 613A.1(1), Iowa Code (1979).

March 26, 1979

INSURANCE. Mutual hospital service; physical therapists. §§514.1, 514.5, 514.8, Chs. 147, 148A, Code of Iowa, 1977. Physical therapists cannot be directly reimbursed for their services by either hospital or medical and surgical service corporations created under Chapter 514 of the Code. (Foudree to Rush, State Senator, 3-26-79) #79-3-10(L)

March 26, 1979

STATE OFFICERS AND DEPARTMENTS; RULES AND REGULATIONS: The Commission for the Blind — §§17A.3, 17A.9, 17A.11, 17A.19. Commission's rules describing organization do not comport with §17A.3 of IAPA. Commission may elect to make decisions outside scope of §17A.3 on ad hoc basis, but must promulgate as rules, with full notice and comment procedures, any statements of general applicability that affect the rights of the public. Commission's declaratory ruling policy unduly isolates agency and is unreasonable under §17A.19. In any proceeding where an evidentiary hearing is required by Constitution or statute, hearing must be by hearing officer or member or members of Commission, §17A.11. (Appel to Redmond, 3-26-79) #79-3-11

James M. Redmond:* We are in receipt of your opinion request concerning compliance of the Commission for the Blind with the Iowa Administrative Procedure Act. (IAPA), §17A *et seq.*, Code of Iowa, 1979. In that letter, you ask:

1) whether the Commission's rules adequately describe the organization and its general course and method of its operations as required by §17A.2 of the IAPA;

2) whether IAPA affirmatively requires the Commission to promulgate rules describing:

a) the method by which it gives notice of Commission meetings and informs the public of tentative agendas as required by the Open Meetings Law, §28A.4, Code of Iowa, 1979;

b) when minutes of Commission meetings are available for public inspection;

c) the qualifications of and method of selecting a director;

d) the circumstances under which out-of-state residents may be admitted to the Commission's adjustment centers for the blind pursuant to §601B..6(12), Code of Iowa, 1977;

e) operations of the adjustment centers generally;

f) types of services generally available;

g) the location, hours and services available at the Commission's library;

3) whether the Commission's standing rule for declaratory rulings, which requires that petitioners demonstrate that lack of such ruling would "jeopardize petitioner's business, place the petitioner in imminent peril, or have a substantially detrimental effect on the public interest" is consistent with the IAPA;

4) whether the IAPA allows the director of the Commission to sit as a hearing officer in contested cases before the Commission.

I.

You first ask whether Rule 1.4 of the Commission, and, by implication, whether any other rule of the Commission, complies with §17A.3(1)(a) and (b) of the Iowa Administrative Procedure Act. In our opinion, the

* The policy of the Department of Justice will be to respond to proper opinion requests of state legislators who leave office while their requests are pending unless it is doubtful that the questions posed are of current public importance. In close cases, opinion requests will be returned to successors in office for resubmission. Those requests not refiled will be considered withdrawn.

Commission's rules do not comply with this statutory mandate.

A. Description of Organization

Section 17A.3(1) of the Iowa Administrative Procedure Act requires that each agency "adopt as a rule a general description of the organization of the agency which states the general course and method of its operation. . . ." The Iowa provision is identical to §2 of the Revised Model State Administrative Procedure Act. Under the original Model Act, descriptions of the general course and method of operations was required only "so far as practicable." The Revised Act, however, is more stringent in that it allows no such elastic escape from its mandatory requirements. *See* Uniform Laws Ann., Vol. 13 at 366-67 (1979 Supp.)

While over 25 states have enacted the Revised Act since its adoption in 1961, many have not incorporated §2 as proposed. Hawaii, for instance, does not require a description of organization but only "methods whereby the public may obtain information or make submittals or requests." Haw. Rev. Stat. §91-2(a)(1). Nebraska requires only that "each agency shall, so far as deemed practicable, supplement its rules with descriptive statements of its procedures." Neb. Rev. Stat., 1943, §83-909. A number of other states have dropped the express requirement of general description rulemaking altogether. *See e.g.*, Idaho Code §67-5202, Mo. Ann. Stat. §536.010 *et. seq.* (Vernon), N.C. Gen. Stat., §150-A-11. In Iowa, however, the legislature elected to embrace fully the expansive mandatory rulemaking requirements of the Revised Act.

While we have been unable to discover authoritative case law in any jurisdiction construing the scope of §2 of the Revised Act, its purposes are relatively clear. As is noted in an authoritative treatise on state administrative law, §2 is designed to allow the public to ascertain the respective functions and powers of each division and officer within an agency. The treatise writer illustrates the purpose of §2 with the following example:

> Within a state department of conservation, for example, there may be one official whose particular concern is to effect a workable accommodation between the necessities of manufacturing concerns whose operations require the discharge of toxic wastes into rivers, and the desires of outdoorsmen that fishing should be protected. Once a manufacturer with a problem establishes contact with this official he is on the way toward working out a solution to his problem. . . . The publication of a description of the agency's organization affords a practicable means of making it easier for the manufacturer to find the official who can help him discover a solution to his problem. F. Cooper, *State Administrative Law* at 165 (1965).

A similar gloss has been placed on §2 of the Revised Act as adopted in Iowa by Professor Arthur Bonfield. According to Bonfield, the purpose of the provision is to enable the public to ascertain the functions, powers and responsibilities of each major officer within the agency. When responsibilities are clearly identified, members of the public at least have a starting point in trying to resolve any difficulties they may have with an agency. A. Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process, 60 *Ia. L. Rev.*, 731, 783 (1975).

Support for Professor's Bonfield's interpretation may be found in the unusually broad statement of purpose section of the IAPA. There it is

declared that, among other things, the purpose of the Act is to "increase public accountability" and "increase public access to governmental information," §17A.1(2). In effectuating these goals, the Act explicitly directs that its provisions be given a broad construction, §17A.23.

Professor Bonfield's approach is also consistent with the legislative history of Public Information Section of the Federal Administrative Procedure Act, which closely parallels §2 of the Revised Act by requiring publication of "descriptions of [each agency's] central and field organization," and "statements of the general course and method by which [each agency's] functions are channeled and determined." 5 U.S.C. §502. Referring to these provisions, the Senate Committee noted that "the purpose of inclusion of material in the Federal Register is to guide the public in determining where and by whom decisions are made. . . ." S. Rep. No. 813, 89th Cong., 1st Sess. at 6 (1965). Similarly, the House Report observed that the public "would be able to find out where and by whom decisions are made in each Federal agency. . . ." H.R. Rep. No. 1497, 89th Cong. 2d Session, p. 7 (1965). *See also* B. Menzines, J. Stein, and I. Greiff, *Administrative Law*, v. 11, (1977), §8.02; K. Davis, *Administrative Law Treatise*, (1978), §5.10.

In addition to facilitating public access to administrative agencies, the public information section of the IAPA is also designed "to provide legislative oversight of powers and duties delegated to administrative agencies," §17A.1(2). By requiring published statements describing the general course and method of agency operation, the Act helps legislators determine whether the authority delegated to the agency is being exercised in a manner consistent with expressed or unexpressed legislative intent. The increased administrative openness that results from identification of major decisionmakers within an agency also can help the legislature ferret out information relevant to the budgetary process.

The administrative practice of many state agencies in Iowa comports with Professor Bonfield's gloss on §2. For instance, the Department of Agriculture has published a rule which describes the responsibilities of three major regulatory divisions and the subdivisions within each division. *See* 30 - 1.1 (159) I.A.C. Smaller state agencies, like the Arts Council, may not have massive divisions, but the duties and responsibilities of the Council and its director and other major employees are described in some detail. *See* 100-1.2 (304A) I.A.C. A quick examination of the administrative rules of these state agencies informs a citizen of "where and by whom" important decisions are made.

The only Rule that deals directly with the organization of the Commission for the Blind is contained in Rule 1.5, 160 - 1.5 (601B) I.A.C. This rule states in its entirety:

The Commission elects its own officers and employs a director and such assistants as are necessary to carry out its statutory function.

As is obvious, this rule contains no description of who is doing what in the organization. Yet it is clear from the Commission's rules that somebody is making decisions. Eligibility for services "will be determined" upon the presence of enumerated conditions. 160 - 2.5 (601B,C). I.A.C. Consideration "is given" to similar benefits available to a blind person in determining what facilities will be provided, 160 - 4.1(1)

(601B,C) I.A.C. Operators of vending facilities "will be assigned" various locations for an indefinite period of time, 160-4.1(1) (601B,C) I.A.C. But the rules do not indicate who makes the key decisions.

The naked organizational description and the uninformative use of the passive tense to describe agency functions do not comport with the requirements of §17A.3 of the Iowa Administrative Procedure Act. The rules simply do not give the public or the Legislature enough information to deal effectively with the agency. *See* Bonfield, *supra* at 783. In order to comply with the public information section of the IAPA, the Commission must promulgate rules which a) outline the division of responsibility between it and the director; b) generally describe major organizational divisions within the agency; and c) outlines the duties and responsibilities of each major decisionmaker within the agency. *See e.g.* 30-1.1(159) I.A.C. (Department of Agriculture), 100-1.2 (304A) I.A.C. (Arts Council), 370-1.6 (96) I.A.C. Employment Security—Job Service).

As can be seen by the rules of other state agencies, the requirement of §17A.3 are not impossible to meet. Indeed, they are not particularly onerous as, in most cases, all that is required is that the agency publish a clear and succinct public statement of common organizational knowledge. But for citizens or members of the legislature without personal knowledge of the way an agency is run, compliance with §17A.3 can mean the difference between relatively quick access to the agency or a frustrating escapade in what may seem to be a bureaucratic labyrinth.

B. Description of Procedures

Other than not clearly describing decisionmakers, the rules outlining the procedures available to persons dealing with the Commission generally appear adequate. It is reasonably clear how a person applies for services (contact specified offices and complete application form, opportunity for administrative review and hearing), *see* 160.2.3 (601B) I.A.C.; seeks administrative review of a decision with respect to services provided (written application to department head), *see* 160-3.3 (601B) I.A.C.; and obtains review of revocations of certificates to operate vending facilities owned by the Commission (written request to Commission for review by supervisor of business program, opportunity for evidentiary hearing, and appeal to HEW for arbitration, *see* 160-4 (601B,C) I.A.C.

While the above cited procedures are not highly detailed, the promulgation of such general rules is within the Commission's discretion. By not publishing more detailed rules, however, the Commission forecloses the possibility of requiring highly structured participation in the administrative process by an uninformed party.

A question could be raised concerning the lack of forms published in the Commission's rules. Section 17A.3(1)(b) of the IAPA requires that the agency promulgate rules "including a description of all forms and instructions that are to be used in dealing with the agency." Like so many parts of the IAPA, this section has not been authoritatively construed by the courts.

The legislative history of the federal counterpart of §17A.3(1)(b) provides some guidance. Originally, §3(a)(2) of the federal APA

required publication in the Federal Register of "the nature and requirements of forms." In order to meet the problem of "too much publication," this provision was amended in 1965 to require publication of either "description of forms available or the places at which forms may be obtained." According to the report of the Senate Committee, the purpose of the change was "to eliminate the need of publishing lengthy forms." Sen. Rep. No. 813, 89th Cong., 1st Sess., at 6 (1965).

The IAPA is somewhat more restrictive in that it does not allow agencies to simply indicate the place at which forms are available, but we think the use of words "description of forms" instead of "the nature and requirements" of forms used in the early federal act is significant. The choice of the more narrow language suggests a similar concern about "overpublication." And, identification of a form by number or name adequately serves the apparent purpose of the provision. As Professor Bonfield notes, the section is designed to eliminate" the time, bother, and aggravation created when, after carefully preparing and submitting Form A, the applicant is told he must resubmit on Form B because the agency requires the use of Form B in the factual context outlined in his original application." Bonfield *supra* at 783. Identification by number, letter, or other designation eliminates any such problems. *See also* B. Mezines et. al., *supra*, §8.02(3).

The Commission has promulgated one rule which specifically mentions a form. Rule 2.3 of the Commission states that "application forms calling for data necessary to determine eligibility for services may be obtained from the Commission for the Blind, 4th and Keosauqua Way, Des Moines, Iowa 50309." 160-2.3(601B) I.A.C. Such a description, though terse, adequately informs the public of how to proceed with the agency when dealing with an eligibility problem. By calling the agency and asking for a service application form, an interested party has found the proper door to enter the administrative process.

There is no mention in the Commission's rules of forms to be used in seeking administrative review of a decision of the Commission with regard to the furnishing of services, nor is there any mention of forms in connection with administrative review of action arising from the administration of the Commission's vending facility program. The relevant rules simply state that interested parties may file written request for review of agency action.

The IAPA does not *require* that agencies use forms in various administrative processes. What it does require is that if forms are used, they must be identified in their rules so that a member of the public does not find that his or her request for agency consideration is defeated because of failure to file the proper form with the agency. In other words, if the Commission for the Blind in fact has forms that are to be used in various proceedings, it must identify them and describe their purposes.

II.

You also ask whether the IAPA requires the Commission to promulgate rules covering a variety of subjects. While each subject you raise is individually analyzed below, some prefatory remarks may help clarify

the requirements of the IAPA. The only situations where the IAPA mandates that an agency promulgate rules rather than proceed on an ad hoc, case by case basis are described in §17(3)(1)(a) and (b). In the absence of express direction in the agency's enabling act or in another statute, proceeding by rule rather than ad hoc decisionmaking is permissive, not mandatory. But, whenever the agency in its discretion elects to adopt a statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of the agency, the procedural rulemaking requirements of the IAPA must be followed. Thus, except in very narrow classes of cases not relevant here, §17A.5(b), the IAPA guarantees that interested citizens will be afforded an opportunity to have their views known and considered by an agency before any proposed generally applicable policy that affects the public hardens into final agency action.

Neither the enabling statute of the Commission for the Blind, Chapter 601B, Code of Iowa, 1977, nor any other Code Provision outside the IAPA, directs the Commission to promulgate rules in any subject area. Therefore, unless the subjects you mention are either within the scope of mandatory rulemaking provisions of the APA or have in fact been dealt with by the agency through policy statements of general applicability, the rulemaking provisions of the IAPA have no application.

A. Notice, Agenda, and Minutes

The Iowa Open Meetings Law expressly provides that governmental bodies "shall give notice of the time, date, and place of each meeting, its tentative agenda, in a manner reasonably calculated to apprise the public of that information." §28A.4, Code of Iowa, 1979. The statute further specifies that reasonable notice shall include advising the news media who have filed a request for notice and posting the notice on a bulletin board or other prominent place easily accessible to the public and the principal office, or, if no office exists, at the building in which the meeting is held. In addition, the Open Meetings Law requires that each government body keep minutes of all meetings and make the minutes available for public inspection.

As a government body, see §28A.2(1)(a), the Commission for the Blind must comply with the letter and spirit of the statute. Agency decisionmaking with respect to implementation of the Open Meetings Law, however, is not within the scope of the mandtory provisions of the IAPA since the method of implementation does not describe the organization or set forth procedures available to the public. If it chooses, the Commission may regard the statute as its only rule, *Weiner v. State Real Estate Comm.*, 171 N.W. 2nd, 783 (Neb., 1969), and give reasonable notice on an ad hoc basis consistent with the statutory requirements.

The IAPA, however, does require that each agency describe by rule "the methods by which and location where the public may obtain information or make submissions or requests." §17A.3, Code of Iowa, 1979. This statutory requirement is satisfied by Rule 1.2 of the Commission which states that the public "may obtain information by writing, visiting or telephoning the Office of the Commission for the Blind, 4th and Keosauqua Way, Des Moines, Iowa 50309 (515-283-2601), 160-1.2 (601B) I.A.C. By representing that "information" may be obtained from the offices of the Commission, we assume that office staff is fully advised

of the public posting of notice and agenda matters and the location of minutes and that the public can obtain such information by simply calling the Commission's Office.

B. Qualifications and Methods of Selection of Director

The Commission's Rules state that it employs a director but does not indicate the qualifications or methods of selecting the officer. Personnel decisionmaking does not arguably fall within the mandatory rule-making provisions of the IAPA which are exclusively concerned with general organization, information gathering and formal and informal public procedures. Thus, in the absence of other express statutory direction, the Commission for the Blind may, in its discretion, fill any vacancy which may occur for the directorship on an entirely ad hoc basis in the total absence of preordained rules governing the qualifications of applicants of the method by which applications are processed. Whether the increased flexibility by proceeding in an ad hoc fashion is worth the risk of irrational results that sometime accompany unstructured decisionmaking is a question for the Commission to decide. If the legislature becomes dissatisfied with the approach of the Commission, it may pass legislation either establishing qualifications and procedures for director selection or mandate the Commission to promulgate rules governing the process.

C. Policy Toward Out-of-State Students

Chapter 601B.12, Code of Iowa, 1977, provides that non-residents may be admitted to Iowa centers for the blind if their presence would not be prejudicial to the interests of residents and upon such terms as "may" be fixed by the Commission, §601B.6(12), Code of Iowa, 1977. This statute does not mandate rulemaking ("may" implies a power, not a statutory direction, §4.1(36)(c), the Code), and the subject is not within the mandatory organizational description requirements of §17A.3. The Commission can, in its discretion, decide to admit out-of-state students on an entirely ad hoc, case by case basis, varying the terms of such admittance as deemed necessary by the facts and circumstances of each individual case, *See Hicks v. Physical Therapist Examining Board*, 221 A. 2nd 712 (D.C.), *Aff'd sub. nom., Schramm v. Physical Therapist Examining Board*, 394 F 2d 972 (1967), *cent. denied*, 390 U.S. 987 (1968) (physical therapist board may consider waiver of approved school requirements on a case by case basis rather than through rule).

A word of caution, however, is appropriate here. As stated above, the choice of whether to proceed by general rule of ad hoc decisionmaking is generally vested in the discretion of the agency. It is possible, however, that an agency's decision to proceed on a case by case basis could be found to be an abuse of discretion. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). For instance, if many persons sought entry to Iowa facilities and only limited places were available, proceeding on an entirely ad hoc basis might be subject to attack. We do not, however, have sufficient information to express an opinion as to whether the Commission's ad hoc policy approaches the boundaries of reasonableness.

D. Rules Governing Operation of Adjustment Centers

You ask whether the Commission must promulgate detailed rules governing the operation of its adjustment center. Section 17A.2(k)

of the IAPA expressly exempts from rulemaking procedures statements concerning "students enrolled in an educational institution." While we do not engage in fact-finding in writing official opinions, we think it likely that the environment of the adjustment centers approaches that of an educational institution. If so, rules governing such institutions are not within the scope of the rulemaking provisions of the IAPA *provided they face inward to students and do not affect the rights of the public.* Any rules affecting the rights of the public such as those describing visiting hours or admissions policies are not exempt from rulemaking, *see* Bonfield, *supra*, at 843-44. The public is therefore entitled to an opportunity to comment upon them before their adoption, §17A.4(1).

E. Description of Services

You query whether the IAPA requires the Commission to promulgate comprehensive and detailed rules describing services available. In particular, you ask whether the Commission must promulgate a rule describing its library, its location, its hours, loan policies, and availability of materials.

Again, beyond what would be contained in a rule describing the organization which states its general course and methods of operations, the IAPA does not mandate rule-making outlining the substance of what an agency does. But, while the Commission may operate its library on an ad hoc basis, administrative convenience strongly suggests the existence of generally applicable policies, *See*, i.e. 560-1, I.A.C. (Library Department). Such statements, even though not crafted to comply with §17A.3 (1)(a) and (b), but only to further rational administration, must be promulgated pursuant to the rule-making procedures of the IAPA, §17A.4. *Any* agency statement of general applicability that "implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency," must run the gauntlet of the notice and comment procedures for rule-making, outlined in the IAPA. Thus, if the Commission has cast its imprimatur on general statements of policy in any bulletins, manuals or interpretive documents relating to the public's use of library facilities or any of the subjects raised in your opinion request, these statements must be promulgated as rules, *see* Bonfield, *supra*, at 827. We are confident that upon the release of this opinion, the Commission will examine its files to determine whether any such statements exist, and will proceed to properly promulgate them as rules according to the IAPA notice and comment procedures, §17A.1.

III.

You ask whether the Commission's standing requirements for declaratory rulings violate the IAPA. Rule 3.2 of the Commission states, in relevant part:

Any person may petition the director for a declaratory ruling when it is demonstrated that the lack of such ruling would substantially jeopardize the petitioner's business, place the petitioner in imminent peril, or have substantial detrimental effect on the public interest.

The IAPA does not contain a standing requirement for declaratory rulings. Section 17A(9) simply states that each agency "shall provide

by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provisions, rule or other written statement of law or policy decision of the agency. The question remains, however, whether the Commission's rule is "unreasonable, arbitrary, capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion." §17A.19(g).

Declaratory rulings from an administrative agency are useful for a variety of reasons. The cost of declaratory ruling, of course, is much less than an adjudication. Moreover, there are situations where a person seeks a declaratory ruling only for planning purposes, thereby failing to demonstrate an immediate legal controversy generally required for invocation of the judicial process, *McCarl v. Fernberg*, 126 N.W. 2nd 427, 428 (1964). As agency functions become more complex, the need for advance, authoritative rulings increases.

Once again, Iowa courts have not considered the question of whether agency standing requirements might be so restrictive as to be "Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion." §17A.19(8)(g). Professor Bonfield, however, notes that in light of the purposes of declaratory rulings, the IAPA is at least intended to provide members of the public with a means of securing binding advice "where it is necessary or helpful for them to conduct their affairs in accordance with law." Bonfield, *supra*, at 812. While he notes approvingly that some agencies have defined persons entitled to declaratory relief as broadly as "any interested person" or "any person," he concedes that a rule might require a person to be "aggrieved or adversely affected" in order to spare the agency from expending energies on unnecessary or frivolous requests.

In our view, agencies may, reasonably in their discretion, adopt an "aggrieved or adversely affected" declaratory standing rule if it can be shown that lack of such a device would subject the agency to an unwarranted administrative burden. But the Commission's rule goes well beyond such a requirement. A petitioner must demonstrate that lack of a ruling "would substantially jeopardize the petitioner's business" or "place the petitioner in imminent peril," or "have a substantial detrimental effect on the public interest." Under this rule, a petitioner with a tangible business interest, but one that did not threaten financial disaster, could be unable to obtain a declaratory ruling. And, a user or potential user of the Commission's services might not be able to abtain a declaratory ruling regarding eligibility or service policy because of the lack of "imminent peril" to the petitioner.

We have a healthy respect for the administrative burdens that result from requests for formalized expressions of agency policy. Indeed, our office issues several hundred written opinions yearly — an undertaking that requires considerable organizational time and energy. But, with due deference, we think the administrative benefits attributable to the Commission's extraordinary barrier to obtaining declaratory rulings cannot possibly outweigh the tremendous isolation of the Commission from the public that results from the policy. In our view, the rule is unreasonable and therefore violates §17A.19(8)(g) of the IAPA.

IV.

Finally, you ask whether the director or his or her designee can make final decisions in contested cases on behalf of the agency. A contested case is a proceeding "in which the legal rights, duties, or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing." §17A.2(2). Since no provision of state law requires the Commission to hold evidentiary hearings, you are primarily referring to decisions where such a hearing is constitutionally required in order to comport with due process. This would include, for instance, an action to suspend or revoke a license where constitutionally protected property or liberty interests are at stake, or a decision to withdraw important government benefits where, by statute, rule, or pratice the recipient had more than a "mere expectancy" that the government would continue to provide the benefits. *See generally, In re Buffalo*, 380 U.S. 544 (1968) (occupational licenses), *Goldberg v. Kelley*, 397 U.S. 254 (1970), *Perry v. Sinderman*, 408 U.S. 593 (1972) (employment), *Bishop v. Wood*, 426 U.S. 341 (1976) (employment). If any action of the Commission impinges on qualified interests, the IAPA *requires* that the presiding officer at the evidentiary hearing be the agency, or one or more members of a multi-member agency, or an administrative hearing officer covered by the merit employment system. §17A.11(1). In such cases, if they exist, the director of the Commission, or his designee, cannot properly sit as trial examiner.

V.

In conclusion, we find that the rules of the Commission of the Blind do not comport with the Iowa Administrative Procedure Act in at least two respects. In order to bring its rules into compliance, the Commission should:

1) promulgate a rule which adequately describes the organization and its general course and method of operation;

2) promulgate an amended rule which relaxes its unduly stringent standing requirement for declaratory rulings.

Beyond this, the Commission should search its files and initiate notice and comment rulemaking proceedings for every statement of general applicability it has adopted that affect the rights of the public. We also recommend that the Commission for the Blind, like all agencies in state government, keep abreast of rapidly developing due process doctrine to insure that the agency's rules comply with the dictates of §17A.11 of the IAPA.

March 29, 1979

MUNICIPALITIES: Incompatibility — 16 U.S.C. §§1701, 1704; §362.5, the Code, 1979. Based upon the facts of this case, a city park commissioner cannot also occupy the position of a Youth Conservation Corps camp director for that city where the Park Commission has supervisory power over the YCC project. (Blumberg to Nystrom, State Senator, 3-29-79) #79-3-12 (L)

March 29, 1979

TAXATION: FRANCHISE TAX: Discrimination Against Income From Federal Securities. §§422.60—422.66, 422.73, Code of Iowa, 1977. The State of Iowa cannot lawfully discriminate against federal securities by establishing a tax base for franchise tax purposes requiring the inclusion of income from federal securities and the exclusion of income from Iowa securities. Were a court to declare that portion of §422.61(4) which discriminates against federal securities invalid, it appears likely a writ of mandamus could issue to compel the Department of Revenue to refund to a financial institution that portion of franchise tax attributable to income from federal securities paid within the period of limitations. The legislature, however, has the constitutional authority to amend the refund provisions with respect to the recovery of franchise taxes voluntarily paid. (Miller, Schantz and Griger to Palmer, 3-29-79) #79-3-13

Honorable William D. Palmer, State Senator: You have requested an opinion of the Attorney General pertaining to the Iowa franchise tax contained in Division V, Chapter 422, Code of Iowa, 1977. A brief description of the franchise tax is necessary as a preclude to placing your questions in appropriate context.

The Iowa franchise tax statutory provisions are set forth in §§422.60 through 422.66 of the Code. The tax is imposed upon "financial institutions" as defined in §422.61(1) measured by their "net incomes" as defined in §422.61(4) for their "taxable years" as defined in §422.61(2). The tax rates are set forth in §422.63. Financial institutions are not subject to Iowa corporation income tax. See §422.34(1), Code of Iowa, 1977. However, the tax base (net income), as defined in §422.61(4), references the computation thereof to §422.35 of the Code which defines "net income" for Iowa corporation income tax purposes. But, the tax base for Iowa franchise tax purposes differs materially from that set forth in §422.35. The latter statute expressly exempts from income tax all interest and dividends from federal securities and imposes the tax upon all interest and dividends from securities of any state (including Iowa) and political subdivisions exempt from federal income tax under the Internal Revenue Code of 1954. Section 422.61(4) plainly requires, on the other hand, that interest and dividends from federal securities must be *included* in the tax base for franchise tax purposes and further requires that interest and dividends from securities of Iowa and its political subdivisions exempt from federal income tax must be *excluded* from the tax base.

Based upon this background, you essentially pose two questions: (1) Can the State of Iowa lawfully require inclusion of income from federal securities in and exclusion of income from Iowa and political subdivision securities from the tax base, and (2) If the answer to the first question is negative, can financial institutions who have paid Iowa franchise tax measured by that portion of their net incomes representing income from federal securities obtain tax refunds from the State of Iowa.

A federal statute prohibits the states from taxing income from federal securities, but provides an exception to this prohibition for "nondiscriminatory franchise taxes." 31 U.S.C. §742 provides:

"Exemption from taxation. — All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under state or municipal or local authority. This exemption ex-

tends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except *nondiscriminatory franchise* or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes." (Emphasis supplied.)

There are two sentences in 31 U.S.C. §742. The genesis of the first sentence can be found in 12 Stat. 346 (February 25, 1862). The United States Supreme Court has held that this sentence merely adopted established principles of constitutional law, which foreclose the states from taxing federal securities and the income therefrom, as previously established by the Court. *Society for Savings v. Bowers*, 1955, 349 U.S. 143, 75 S.Ct. 607, 99 L.Ed. 950; *Home Savings Bank v. City of Des Moines*, 1907, 205 U.S. 503, 27 S.Ct. 571, 51 L.Ed. 901. The second sentence in 31 U.S.C. §742 was enacted in 1959. Public Law 86-346, 73 Stat. 621. Prior to the addition of this second sentence, which clearly allows the states to include in the tax base of a "nondiscriminatory franchise" tax income from federal securities, the first sentence did not preclude such nondiscriminatory inclusion in a franchise tax base. *Realty Title Insurance Company v. Division of Tax Appeal*, 1950, 338 U.S. 665, 70 S.Ct. 413, 94 L.Ed. 439; *Werner Machine Co., Inc. v. Director of Taxation*, 1956, 350 U.S. 492, 76 S.Ct. 534, 100 L.Ed. 634. Indeed, the legislative history of Public Law 86-346 clearly indicates that this 1959 amendment's purpose was clarification of existing law. In 2 U.S. Code, Cong. and Adm. News (Senate Report and Conference Report), the reason for the 1959 amendment to 31 U.S.C. §742 is stated at p. 2773:

"D. CLARIFYING EXEMPTION OF U.S. OBLIGATIONS FROM STATE OR LOCAL TAXATION.

"Present law provides that obligations of the United States are to be exempt from taxation by or under State or local authority. The Supreme Court has held that this includes the exemption of interest on U.S. obligations from taxation by or under State or local authority. It has been pointed out to your committee, however, that one State has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing 'gross income' upon which taxable net income is determined. The bill (sec. 105) makes it clear that the exemption for Federal obligations extends to every form of taxation that would require either the obligations, or the interest on it, or both to be considered directly or indirectly in the computation of the tax, except nondiscriminatory franchise taxes (or other nondiscriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate and inheritance taxes."

At this point, it should be noted that this legislative history of 31 U.S.C. §742, and the language therein, would not support an argument that a franchise tax is "nondiscriminatory" in the even that all financial institutions are treated alike because they are required to include in franchise tax net income the income from federal securities and to exclude income from Iowa securities. *The forbidden discrimination pertains to federal securities receiving a less favorable tax treatment than other securities.* That this is so is clear from the language in 31 U.S.C. §742 and will be borne out by the case law to be discussed, infra.

In *Commonwealth v. Curtis Pub. Co.*, 1949, 363 Pa. 299, 69 A.2d 410, the Pennsylvania Court considered the constitutionality of the Pennsylvania corporate income tax which equated Pennsylvania income with the income required to be reported on a federal income tax return. Since

the federal tax laws exempted income from state securities and taxed income from federal securities, the Pennsylvania tax law had a like effect. The Court stated at 69 A.2d 414:

"*If this tax so determined results in discrimination against the securities of the United States it is invalid because discrimination by any state against the United States securities has uniformly been interdicted by the decisions of the United States Supreme Court.* This inhibition of all discrimination by one sovereignty, national or state, against the securities of the other is essential to the maintenance of the American system of duality of government. It is based on a recognition of the fact that the well-being of the dual sovereignties requires that neither should do anything that would tend to cripple the governmental functions of the other. As the marketing of Federal securities is vital to the Federal government's financial soundness and as the state's well-being is promoted by the Federal government's well-being, state governments will not do anything prejudicial to that other government's well-being. The Federal government for like reasons will do nothing prejudicial to the state's well-being. Self-interest recommends this policy and the decisions of the United States Supreme Court require it." (Emphasis supplied.)

From the above quoted discussion, it is clear that the foundation for the constitutional prohibition of discrimination against federal securities is grounded upon concepts of federalism and Article I, §8, C1.2 (congressional authority to borrow money) and Article VI, C1.2 (Supremacy Clause) of the United States Constitution.

The Court collected and discussed the cases decided by the United States Supreme Court with reference to permissible inclusion of income from federal securities in a state tax base. The Court stated at 69 A.2d 417:

"No case has been brought to our attention, and we have found none, in which the United States Supreme Court has upheld any tax imposed by a state if that tax discriminated either directly or indirectly against the securities of the United States. There is no decision of the United States Supreme Court which weakens in the slightest degree the mandate of that court as expressed in many cases that states cannot in their tax acts discriminate against the securities of the United States in favor of their own securities. The United States Supreme Court has been consistent and adamant in its rulings that there must be equality of treatment by the state imposing taxes, either direct or indirect, on the respective securities of the state and nation."

The Court found that the Pennsylvania law was facially unconstitutional as discriminatory against federal securities. The Court held that since income from Pennsylvania securities was excluded from the tax base, income from federal securities would also be excluded. A refund of taxes paid requested by the taxpayer was granted.

In *Pacific Company Ltd. v. Johnson*, 1932, 285 U.S. 480, 52 S.Ct. 424, 76 L.Ed. 893, the Supreme Court sustained the California franchise tax measured by net income which included income from federal and state securities. The Court stated at 285 U.S. 496:

"As it operates to measure the tax on the corporate franchise by the entire net income of the corporation, *without any discrimination between income which is exempt and that which is not*, there is no infringement of any constitutional immunity." (Emphasis supplied.)

In *Tradesmens' National Bank of Oklahoma v. Oklahoma Tax Commission*, 1940, 309 U.S. 560, 60 S.Ct. 688, 84 L.Ed. 947, the Court, in uphold-

ing the inclusion of income from federal securities in the nondiscriminatory franchise tax in controversy, stated at 309 U.S. 566:

"It has effected its purpose by including within the measure of its franchise tax on national banks the entire net income without respect to source *and without discrimination against tax-exempt federal securities.*" (Emphasis supplied.)

It is clear that both 31 U.S.C. §742 and the United States Constitution prohibit a state from imposing a franchise tax which includes income from federal securities in and excludes income from state securities from the tax base. Therefore, in answer to your first question, it is our opinion that the State of Iowa cannot lawfully impose its franchise tax on that portion of financial institutions' net income which includes income derived from federal securities as long as income from Iowa securities is excluded from the tax base. Thus, the legislature should amend §422.61(4) to remove this discrimination against federal securities. The defect in §422.61(4) may be cured by including in the tax base income from both federal and Iowa (and political subdivision) securities.

Next, your second question, namely, whether the State of Iowa must refund franchise tax, will be considered. At common law, taxes voluntarily paid were not refundable in the absence of a statute authorizing refunds, even if such taxes were paid pursuant to a tax law subsequently declared unconstitutional. *Kraft v. City of Keokuk*, 1862, 14 Iowa 86; *Slimmer v. Chickasaw County*, 1908, 140 Iowa 448, 118 N.W. 779. However, there are statutory provisions authorizing the refund of franchise taxes by the Department of Revenue. Section 421.6, Code of Iowa, 1977, directs that excess taxes received be refunded. This statute should be read in pari materia with §422.73, Code of Iowa, 1977, which is incorporated by reference as applicable to Iowa franchise tax pursuant to §422.66. Section 422.73 of the 1977 Code is applicable for tax years ending on or before December 31, 1978.[1] Section 422.73 provides:

"If it shall appear that, as a result of mistake, an amount of tax, penalty, or interest has been paid which was not due under the provisions of this chapter, then such amount shall be credited against any tax due, or to become due, under this chapter from the person who made the erroneous payment, or such amount shall be refunded to such person by the department. No claim for refund or credit that has not been filed with the department within five years after the tax payment upon which a refund or credit is claimed became due, or one year after such tax payment was made, whichever time is the later, shall be allowed by the director. Notwithstanding the period of limitation specified, the taxpayer shall have six months from the day of final disposition of any income tax controversy between the taxpayer and the internal revenue service with respect to the particular tax year or years to claim an income tax refund or credit, provided the taxpayer has notified the department of revenue of the existence of said income tax controversy within the five-year limitation period."

In *Morrison-Knudsen Co. v. State Tax Commission*, 1950, 242 Iowa 33, 44 N.W.2d 449, 41 A.L.R.2d 523, the Iowa Supreme Court construed §422.73 to require refund of use taxes paid, by reason of a mistake of

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[1] Chapter 1140, Acts of 67th G.A., 1978 Session amended §422.73 of the Code for tax years ending on or after January 1, 1979. Such amendments have no effect upon the conclusions reached in this opinion.

law, in interpretation of the use tax statutes, and held the taxpayer could bring an action in mandamus to compel the State to refund the taxes erroneously or illegally paid. The Court stated at 242 Iowa 44:

"Sections 422.66 [§422.73], 422.67 [§422.74, Code of Iowa, 1977] are much like section 445.60, pertaining to ordinary property taxes, which reads, 'The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid***.' Because of this statute we have uniformly held mandamus lies to compel the refund of taxes erroneously or illegally paid even though payment was voluntary. Jewett Realty Co. v. Board of Supervisors, 239 Iowa 988, 995, 33 N.W.2d 377, 381, 382, and citations; Eyerly v. Jasper County, 72 Iowa 149, 33 N.W. 609.

"Sections 8613.3, Code of 1939 (now 505.11, Code of 1950), providing for refund of taxes paid by insurance companies, states: 'Whenever it appears to the satisfaction of the commissioner of insurance that because of error, mistake, or erroneous interpretation of statute that [an] ***insurance corporation has paid***taxes***in excess of the amount legally chargeable against it, the commissioner*** shall have power to refund to such corporation any such excess***.' By virtue of this statute we have held mandamus lies to compel the refund of taxes erroneously paid whether or not such payment was voluntary. Lincoln National L. Ins. Co. v. Fischer, 235 Iowa 506, 17 N.W.2d 273.

"See also Craig v. Security Producing & Refining Co., 189 Ky. 565, 225 S.W. 729, from which we quote with approval in the Lincoln National L. Ins. Co. case (at page 515 of 235 Iowa, page 277 of 17 N.W.2d); Craig v. Frankfort Distilling Co., 189 Ky. 616, 225 S.W. 731."

The Court concluded at 242 Iowa 45-6:

"As previously indicated it is the rule in this state by virtue of Code section 445.60 that mandamus lies to compel the refund of property taxes 'erroneously or illegally exacted or paid' notwithstanding the taxpayer's failure to pursue the administrative remedy of complaint to the board of review and, if relief is denied, appeal to the district court. Such administrative remedy is not exclusive where taxes were 'erroneously or illegally exacted or paid.' See Charles Hewitt & Sons Co. v. Keller, 223 Iowa 1372, 1378, 1379, 275 N.W. 94, and citations; Griswold Land & Credit Co. v. County of Calhoun, 198 Iowa 1240, 1245, 201 N.W. 11; Commercial National Bk. v. Board of Supervisors, supra, 168 Iowa 501, 504, 150 N.W. 704, Ann. Cas. 1916C 227."

The Court reaffirmed its decision in *Morrison-Knudsen* in the case of *Allis-Chalmers Mfg. Co. v. State Tax Commission*, 1958, 250 Iowa 193, 92 N.W.2d 129.

In *Morrison-Knudsen*, the Court considered the provisions of §422.73 to be "much like" §445.60, Code of Iowa. The Court also cited several cases which are significant for purposes of resolving the question you posed. In *Lincoln National L. Ins. Co. v. Fischer*, 1945, 235 Iowa 506, 515, 17 N.W.2d 273, 277, the Court stated:

"However, looking at the situation from the standpoint of the history and purpose of the statute, also that relating to justice and fair dealing, we find ourselves unable to see why a state or an individual should be permitted to hold property to which the holder has neither legal nor moral claim. Where a state secures money paid to it as taxes under the erroneous or mistaken belief that it was owing, and it refuses to refund, it would be a travesty upon justice to deny the one justly entitled thereto the right to recover."

In *Craig v. Security Producting & Refining Co.*, 1920, 189 Ky. 565, 225 S.W. 729, the Kentucky Court stated that the purpose of the refund

statute involved in that case was to "secure the return of all money paid into the treasury as taxes by taxpayers through mistake, inadvertence, misapprehension of the law, or under void or unenforceable statutes." 189 Ky. 568. This language was quoted with approval in the *Lincoln National L. Ins. Co.* case and was referred to by the Iowa Court in *Morrison-Knudsen.* 242 Iowa 44.

In both *Morrison-Knudsen* and *Allis Chalmers Mfg. Co.*, the Iowa Court cited, as authority to compel tax refunds by mandamus to secure rights given to taxpayers in §422.73, the case of *Commercial National Bank v. Board of Supervisors*, 1915, 168 Iowa 501, 150 N.W. 704. In this case, a taxpayer sued for refund under §445.60 of taxes levied and paid under a statute subsequently declared unconstitutional by the Iowa Supreme Court. The Court stated at 168 Iowa 504:

"The taxes were voluntarily paid as contended, but this furnishes no objection to refunding under this statute. (citations omitted)

"Nor is there anything in the argument that the decision declaring the taxing statute invalid should not operate retroactively. The statute was as vulnerable when enacted as when denounced as void in the First National Bank of Estherville v. City Council of Estherville, supra, and nothing can be found in State v. O'Neill, 147 Iowa 513, to the contrary. That the statute, though at all times void, had been unassailed up to that time does not render the previous exactions any the less illegal, buy may excuse the plaintiff in acquiescing therein."

The Court continued at 168 Iowa 505:

"Counsel argue that inasmuch as the taxes were paid under mistake of law, the suit cannot be maintained. That this is the general rule goes without saying. Ahlers v. City of Estherville, 130 Iowa 272. But Sec. 1417 of the Code heretofore quoted expressly declares that if illegally or erroneously exacted or paid, the treasurer shall be directed to refund. Surely if the assessment of the property and levy of taxes thereon was contrary to law, because not authorized by valid statute, the exaction of the taxes so levied would be illegal, and so regardless of the view thereof entertained by public officers."

Finally, the Court rejected the argument that because the taxpayer had voluntarily paid the invalid tax, it was estopped to question the legality of such tax. The Court stated at 168 Iowa 507:

"We are of the opinion that as the property was not taxable the doctrine of estoppel ought not to be applied."

Section 422.73 states, in relevant part, that tax refunds are warranted when "as a result of mistake . . . tax . . . has been paid which was not due under the provisions of this chapter . . ." The Iowa Supreme Court has interpreted this statute to authorize refunds when taxes are paid as a result of a mistake of law. *Morrison-Knudsen Co. v. State Tax Commission*, 1950, 242 Iowa 33, 44 N.W.2d 449, 41 A.L.R.2d 523. When taxes are paid pursuant to an invalid statutory provision, such payments are made as a result of a mistake of law. *Commercial National Bank v. Board of Supervisors*, 1915, 168 Iowa 501, 150 N.W. 704. Moreover, once a court declares a statutory provison invalid, such provision ceases to exist as if it had never been enacted. *Security Sav. Bank v. Connell*, 1924, 198 Iowa 564, 200 N.W. 8. Therefore, if the requirement in §422.61 (4) that federal securities' income not be deducted is excised from the statute as invalid because income from Iowa securities is deductible, such a requirement, from the date of enactment of the franchise tax, would not be considered as a part of the franchise tax law. Consequently,

franchise tax paid on income from federal securities would constitute "tax paid which was not due under the provisions of this chapter." Thus, it appears likely that §422.73 of the Code, on its face, applies to authorize refunds of tax paid under a statute declared to be invalid by a court.

Where a state statute discriminates against federal securities, the taxpayer is entitled to deduct the discriminated securities or income therefrom from the tax base to cure the discriminatory effect of the tax. *Schuylkill Trust Co. v. Pennsylvania*, 1935, 296 U.S. 113, 56 S.Ct. 31, 80 L.Ed. 91; *Commonwealth v. Curtis Pub. Co.*, 1949, 363 Pa. 299, 69 A.2d 410; *Peter Kiewit Sons' Co. v. Douglas County*, 1955, 161 Neb. 93, 72 N.W.2d 415.

Although an argument can be constructed that this precedent should not be applied to refunds of the particular tax in question, it appears likely that Iowa franchise taxes voluntarily paid by financial institutions may be recovered back by them under the provisions of §422.73 with due regard to the time limitations therein for claiming refunds. But, since the basis of the refund claim would be the alleged facial invalidity of §422.61(4) provisions that income from federal securities be taxed while income from Iowa securities was not, then a further question is presented as to whether the Department of Revenue has the authority, at this time, to pay such refund claims in light of the fact that no court has judicially pronounced any portion of the Iowa franchise tax law invalid.

In 16 Am.Jur.2d *Constitutional Law* §104, it is stated at p. 288:

"It has been stated that the right to declare an act unconstitutional is purely a judicial power and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the Constitution. The oath of office 'to obey the Constitution' means to obey the Constitution, not as the officer decides, but as judicially determined, for since every law found on the statute books is presumptively constitutional until declared otherwise by the court, an officer of the executive department of the government has no right or power to declare an act of the legislature to be unconstitutional or to raise the question of its constitutionality without showing that he will be injured in person, property, or rights by its enforcement."

The above quoted statement is also the rule in Iowa as adopted by the Iowa Supreme Court. See *Board of Sup'rs of Linn County v. Dept. of Revenue*, 1978, Iowa, 263 N.W.2d 227, 234. Furthermore, the Department of Revenue, which must administer the Iowa franchise tax, lacks the power to provide for an administrative remedy to resolve the question of the facial constitutionality of statutes. *Matters v. City of Ames*, 1974, Iowa, 219 N.W.2d 718, 719.

In our opinion, the Iowa franchise tax requirement in §422.61(4) that income from federal securities be included in and income from Iowa securities be excluded from the tax base is invalid and we believe that the Iowa Supreme Court and the United States Supreme Court would so hold. We are also of the opinion that the voluntary payments by financial institutions of franchise tax on income from federal securities would not estop these institutions from bringing suit against the Department of Revenue to have a court declare such taxation invalid and illegal and to authorize the deduction of income from federal securities from the tax base as long as income from Iowa securities is also deductible. In the event that such suit would be successful, the court could

issue a writ of mandamus compelling the Department of Revenue to refund the illegal taxes collected by the Department within the time periods set forth in §422.73.[2] *Commercial National Bank v. Board of Supervisors, supra.* Indeed, it would not be irrelevant to point out that the United States Supreme Court approved a recovery of taxes unconstitutionally imposed upon interest from federal securities where the securities were issued in 1917 and the lawsuit to recover the taxes paid was commenced in 1924. *Miller v. Milwaukee*, 1927, 272 U.S. 713, 47 S.Ct. 280, 71 L.Ed. 487.

In our opinion, then, the State of Iowa is potentially liable to financial institutions for refunds of franchise taxes voluntarily paid during the period of limitations. We would add, however, that should it choose to do so, the legislature may take appropriate action to curtail or eliminate the statutorily-created opportunity to seek a refund. Such action would be based upon solid legal precedent.

In *People v. Lindheimer*, 1939, 371 Ill. 367, 21 N.E.2d 318, 124 A.L.R. 1472, app. dismissed, 308 U.S. 505, 60 S.Ct. 111, 84 L.Ed. 432, the Illinois legislature repealed a prior statute entitling property taxpayers to refunds of excess taxes paid on over-assessed property. Petitions seeking refunds were filed prior to the repeal of the refund statute. The Illinois Supreme Court determined that the repeal operated retrospectively and rejected a claim that as so applied the repeal unconstitutionally impaired vested rights.

Similarly, in *Southern Service Co. v. Los Angeles County*, 1940, 15 Cal.2d 1, 97 P.2d 963, app. dismissed, 310 U.S. 610, 60 S.Ct. 979, 84 L.Ed. 1388, the California legislature enacted a statute prohibiting the refund of taxes voluntarily paid but claimed to be illegal due to errors in setting property tax rates. The California Supreme Court applied this prohibition to a claim for refund pending at the time of its enactment, stating in response to a constitutional challenge:

"In the case before us, therefore, the legislature was acting within its constitutional powers when it withdrew the right to a refund of such illegal taxes and cut off the remedy by action including all pending actions, saving only the common law right to a refund of taxes involuntarily paid."

See also *Fulton Bag & Cotton Mills v. Williams*, 1956, 212 Ga. 783, 95 S.E.2d 848.

Thus, although in some situations retrospective legislation is fraught with constitutional difficulties, this is not one of them. The opportunity to receive a refund for taxes voluntarily paid pursuant to an illegal tax

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[2] According to information provided to us by the Department of Revenue, such refund claims could be substantial. About seventy percent (70%) of franchise tax revenue is attributable to inclusion of income from federal securities in the tax base. Revenue Department statistics disclose that for the years 1978, 1977, 1976, 1975, and 1974, franchise tax collections were $10,329,633.84, $9,436,681.79, $6,700,237.73, $7,300,072.89, and $6,421,190.06 respectively. These figures indicate that, for the past five years, $40,187,816.31 franchise tax revenue has been collected. In the event that approximately seventy percent (70%) of it was illegally collected, about $28,100,000, exclusive of interest, is potentially refundable pursuant to the provisions of §422.73.

law is entirely a creature of statute. Refund statutes have not been characterized as creating contract or vested property rights, but rather have been characterized as remedial in nature. Although a constitutional challenge to legislation curtailing or eliminating the opportunity for franchise tax refunds might be brought in reliance upon Article I, §10, and the Fourteenth Amendment to the United States Constitution, and upon Article I, §§9 and 21 of the Iowa Constitution, in our judgment such a challenge would be rejected by the Supreme Courts of Iowa and the United States. See *Shiner v. Jacobs*, 1883, 62 Iowa 392, 17 N.W. 613; *Miller v. Hagemann*, 1901, 114 Iowa 195, 86 N.W. 281; and *State ex rel. Turner v. Limbrecht*, 1976, Iowa, 246 N.W.2d 330. See generally, J. Nowak, R. Rotunda, and J. Young, *Constitutional Law*, pp. 419-437 (1978).

Nor would any significant inequity appear to arise from eliminating the opportunity for a refund in these circumstances. As previously noted, the constitutional doctrine upon which rests our conclusion that the Iowa franchise tax is presently unconstitutional is grounded solely in a concern for protecting federal securities from being marketed at a competitive disadvantage. If any injury has occurred during the period this tax has been enacted, it has been to the federal government and not to the financial institutions. No discrimination among financial institutions has occurred and they do not appear to have been treated unfairly compared to other business organizations. Indeed, it might well be argued that refunds of these franchise taxes would be in the nature of a "windfall" to financial institutions, insofar as it may be assumed that the legislature would have responded to a holding of unconstitutionality by enactment of a constitutional form of taxation with equivalent effective rates.

In summary, in our opinion, the State of Iowa cannot lawfully discriminate against federal securities by establishing a tax base for franchise tax purposes requiring the inclusion of income from federal securities and the exclusion of income from Iowa securities. Were a court to declare that portion of §422.61(4) which discriminates against federal securities invalid, it appears likely a writ of mandamus could issue to compel the Department of Revenue to refund to a financial institution that portion of franchise tax attributable to income from federal securities paid within the period of limitations. The legislature, however, has the constitutional authority to amend the refund provisions with respect to the recovery of franchise taxes voluntarily paid.

April 2, 1979

VETERANS MEMORIAL COMMISSIONS: Method of Appointing Commissions: §37.10, Code of Iowa, 1977. The authority of the commissioners of veterans memorial buildings and monuments selected pursuant to §37.10 has been undermined by the Iowa Supreme Court in *Gamel v. Veterans Memorial Auditorium Commission.* County boards of supervisors or city councils should invoke §37.14 and appoint successor commissioners after implementing fair and neutral selection procedures. (Bennett to Howell, House of Representatives, 4-2-79) #79-4-1(L)

April 2, 1979

POLITICAL SUBDIVISIONS: Funds of Chapter 28E Entities — §§28E.2, 28E.3, 28E.7, and 453.1, the Code 1979. Funds held by a separate entity established pursuant to Ch. 28E are not generally subject to

§453.1. However, if those funds are held by any of the officials listed in §453.1, then that section is applicable. (Blumberg to Menke, State Representative, 4-2-79) #79-4-2 (L)

April 3, 1979

STATE OFFICERS AND DEPARTMENTS: Commission on the Aging and Area Agencies on the Aging, their fiscal relationship and rate of reimbursement for mileage and travel. 42 U. S. C. §3001 *et. seq.*, 42 U. S. C. §3024; 42 U. S. C. §3045 *et. seq.*; 42 U. S. C. §3045a(c); 45 C. F. R. §909.42(a)(1); 45 C. F. R. §909.43; Chapter 249B, 1979 Code of Iowa; §§18.117, 25A.2(3), 1979 Code of Iowa; §20, Iowa Administrative Code; Area Agencies on Aging are subject to the direct supervision and control of the State Commission on Aging. The Commission on the Aging is vested with the authority to receive all funds on behalf of the Area Agencies. Distribution of funds to Area Agencies is solely through the Commission on the Aging, after the approval by the Commission of the Area Agency's area plan. The Area Agencies are bound by the fiscal policy as formulated by the Commission on the Aging. The Area Agencies are further bound by the uniform standards set for state employees with respect to mileage reimbursements. Area Agencies may reimburse clients for mileage for transportation services provided to conduct the "Nutrition Program for the Elderly". Such reimbursements must also conform to the uniform standards set for state employees. (McDonald to Odell McGhee, Legal Services Developer, Commission on the Aging, 4-3-79) #79-4-3 (L)

April 3, 1979

COUNTIES: Incompatibility — §§137.4, 137.6, 137.20, 174.13, 174.14, 174.15, 174.17 and 174.19, the Code, 1979. A member of a county board of supervisors cannot simultaneously occupy the position of member of the county board of health or county fair board. (Blumberg to Frisk, Harrison County Attorney, 4-3-79) #79-4-4 (L)

April 3, 1979

JUDICIAL MAGISTRATES; IPERS; Iowa Code Sections 97B.41(3)(b)(6); 97B.42; 97B.45; 97B.46; 97B.47; 97B.52; 97B.53(1), (2), (7); 602.50; 602.58; House File 582, 67th G.A., §§5, 6. A judicial magistrate choosing IPERS membership may not voluntarily withdraw from IPERS for personal reasons. (Salmons to Longnecker, Administrator, State Retirement Systems, 4-3-79) #79-4-5 (L)

April 4, 1979

STATE OFFICERS AND DEPARTMENTS: Secretary of State and Iowa Search, Inc., Article III, 31; 554.9407(3), §18.8, 68A.3, Code of Iowa, 1979; O.A.G., 1978, #78-10-13 (Haesemeyer to Synhorst). Article III, §31, Constitution of Iowa, does not require a two-thirds vote of each branch of the General Assembly for approval of the appropriation for the Secretary of State. The relationship of the office of the Secretary of State and Iowa Search, Inc. is not in violation of Constitution or law. Such relationship serves a public purpose, not a private purpose. (Schantz & McDonald to Miller, State Senator, 4-5-79) #79-4-6

The Honorable Charles P. Miller, State Senator: You have requested an opinion of the Attorney General with respect to the relationship between the office of the Secretary of State and Iowa Search, Inc., a private firm for which desk space is allocated within the office of the Secretary of State. Specifically, you have asked:

1. Does Article III, section 31, Constitution of Iowa, require a two-thirds vote of the legislature on the appropriation for the Secretary of State's office?

2. Would a two-thirds vote on a general state appropriations bill fulfill the Constitutional requirement or would a separate vote have to be taken on the Secretary's appropriation or a part thereof?

3. Are there other Constitutional or statutory requirements which need to be met if the relationship is to continue?

I.

The background to the legal questions you pose is somewhat involved. Iowa Search, Inc., is a private corporation to which the Secretary of State has allocated desk space in the office of the Secretary of State for the purpose of facilitating its search of public records. A rental charge of $25 per month is apparently assessed, and Iowa Search pays for the cost of its telephone service. Some members of the legislature have believed that the relationship between Iowa Search and the Secretary of State's office was unwise, if not unlawful, and in 1976, the General Assembly passed a bill that would have terminated the relationship and required the Secretary of State to provide similar services. Governor Robert D. Ray, however, vetoed the measure, stating his view that Iowa Search provided effective service at a cost lower than if the Secretary of State supplied similar services.

On September 8, 1978, a complaint was filed with the Citizen Aide/Ombudsman's Office questioning the arrangement and the office began an investigation. On October 26, 1978, the Citizen's Aide/Ombudsman Office sent a draft of a critical report to the Secretary of State, among others, for comment. The Citizen's Aide/Ombudsman report found, among other things, that the relationship violated §18.8 of the Code of Iowa which provides that "official apartments shall be used only for the purpose of conducting the business of state." On October 27, 1978, the Secretary of State requested an Attorney General's opinion on the legality of Iowa Search's relationship with his office. On October 30, 1978, the Attorney General's office issued an opinion upholding the practice, O.A.G. 1978, #78-10-13, and the Secretary of State included a copy of the opinion with his comments in response to the Citizen Aide/Ombudsman report. Shortly thereafter, the Citizen Aide/Ombudsman released its final report, which hewed to its original position notwithstanding the opinion of the Attorney General. The propriety of Iowa Search's position became a campaign issue in the race for Secretary of State in the last week before the November election.

We express no view as to whether the relationship is cost-effective or whether it represents sound public policy. The role of this office in reviewing the matter is strictly limited to the legality of the relationship. Even in this context, our role is further confined by the presence of an existing Attorney General's opinion covering aspects of the controversy. Our policy, announced when this office refused to overrule a previous Attorney General's opinion construing Iowa's bribery laws, is to decline to disturb previous rulings unless they are clearly erroneous.

You ask whether the relationship between Iowa Search and the Secretary of State's office violates Article III, section 31 of the Iowa Constitution or any other constitutional or statutory provision. Because this office, like the courts, will seek to avoid constitutional dispositions when nonconstitutional grounds are available, we first examine relevant statutory provisions.

II.

The most important statute that is arguably contravened by the Iowa Search relationship with the Secretary of State's office is §18.8, Code of Iowa, 1979. This provision states, in relevant part:

"official apartments shall be used only for the purpose of conducting the business of state."

The Citizen's Aide/Ombudsman report found that "this language clearly prohibits a private corporation from operating in state apartments." The previous Attorney General's opinion, however, found that §18.8 was a general statute preempted by §554.9407 and §68A.3 of the Code. Section 554.9407(3) generally authorizes the allocation of 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." §554.9407(3). Section 68A.3 provides that the lawful custodian of records "shall provide a suitable place" for examination and copying of public records. The Attorney General's opinion further noted that even if these provisions were not special statutes preempting the general terms of §18.8, no violation of this statute occurred because "the granting of space to Iowa Search is in furtherance of the business of the state and in the public interest."

We do not find the general/specific analysis convincing. The principle that special statutes preempt general statutes applies only when the special statute is irreconcilable with the general statute. But the present statutory provisions are not irreconcilable. Sections 554.9407(3) and §68A.3 can rationally be interpreted as simply guaranteeing the right of individuals to have access to space as needed to examine records of personal interest to them. These statutes do not necessarily authorize a private corporation to have permanent space provided for its profit-making activities in apparent contradiction to §18.8.

At the same time, however, we think §554.9407(3) and §68A.3 lend credence to the earlier opinion's view that "the granting of space to Iowa Search is in furtherance of the business of state." These open access and space-providing statutes clearly suggest that the state has an interest in making the information involved readily available to the public. The previous Attorney General's opinion concluded that the state's business can be conducted by private business if it fulfills a public purpose. The Citizen's Aide/Ombudsman view seems to be that state business can be conducted only by state employees.

Whatever conclusion we might have originally reached, we do not believe the previous Attorney General's opinion is clearly erroneous. There are no judicial decisions construing §18.8 which undercut the interpretation, and it is not unreasonable to assume that, at least under some circumstances, the business of the public may be performed by private persons. We therefore decline to reverse the previous position of the Attorney General that §18.8 has not been violated by the relationship.

The only other statutory provision that might be implicated by the Iowa Search/Secretary of State relationship is the Iowa Competition

Law, §553, *et. seq.*, Code of Iowa, 1979. We understand, however, that Iowa Search does not have exclusive control of the records or available space in the Secretary of State's Office. Thus, we assume that a hypothetical corporation, wishing to provide a similar service to its clients, could enter the market on the same terms as that of Iowa Search. As long as the policies of the Secretary of State's office do not tip the competitive scales in favor of Iowa Search, no violation of the Competition Law is present.

III.

Article III, section 31, Constitution of Iowa, provides:

". . . no public money or property shall be appropriated for local, or private purposes, unless such appropriations, compensation, or claim be allowed by two thirds of the members elected to each branch of the General Assembly."

The previous Attorney General's opinion, while not directly considering the applicability of this provision, found no constitutional infirmity in the Iowa Search relationship with the Secretary of State's office. The opinion observed that profit making newspapers, wire services, and television and radio stations have been furnished desks and telephones in the legislative chambers for their exclusive use without charge. In addition, the opinion noted that food services are furnished by private concessionaires utilizing significant amounts of space in "official apartments." These uses of official apartments, according to the prior opinion, were justified because they furthered the business of the state.

We do not find this approach clearly erroneous. Where a public purpose is served by the use of the space, something more than a private gratuity or a charity is involved. *See* O.A.G. 1936, p. 139 (Senate cannot sell chairs to individual Senators at nominal price). We also believe that in interpreting shadowy areas of constitutional law, past custom, and usage, though not necessarily determinative, are entitled to consideration.

We want to repeat that this office takes no view as to the desirability of the relationship between Iowa Search Inc. and the Secretary of State's office. Indeed, policy questions frequently are raised whenever a company which is making a profit charges the public for services that could be provided by government personnel. The determination of whether the policy is sound, however, rests with the Secretary of State, who in his discretion has sanctioned the arrangement, and with the Governor and the members of the General Assembly, who as participants in the legislative process generally have the power to limit the Secretary's range of permissible action.

In sum, we decline to reverse the previous holding of the Attorney General that the Iowa Search/Secretary of State relationship does not violate any statutory or constitutional requirements.

April 6, 1979

COUNTY HOME RULE AMENDMENT: General import of said amendment on State-County legal relationship and its effect on pending legislation. Ch. 1206, Acts of the 67th General Assembly (1978), Article III [Sec. 39A] of the Iowa Constitution; H.F. 121; H.F. 58, §558.52, Code of Iowa (1979). With the passage and adoption of the County Home Rule Amendment, Article III (§39A) of the Iowa Constitution,

the counties have been emancipated from the restrictions of the Dillon Rule as of November 7, 1978, and are now free to exercise and determine their local affairs and government without the necessity of express state legislation. The County Home Rule Amendment contains four basic limitations within itself. First, counties have no power whatsoever to levy any tax unless expressly authorized by the General Assembly. Second, in the event the power or authority of a county conflicts with that of a municipal corporation, a municipal corporation's power and authority prevails within its jurisdiction. Third, the home rule power exercised by a county cannot be "inconsistent with the laws of the General Assembly." Fourth, home rule power can only be exercised for local or county affairs and not state affairs. Based on the language of the County Home Rule Amendment and the Iowa Supreme Court's review of the similar Muncipal Home Rule Amendment, the four limitations should be narrowly construed. Conversely, county's powers should be broadly construed and subject to liberal interpretation absent express statutory conflict. The Iowa Legislature may, in its own discretion, promulgate a county home rule act or county code similar to the city home rule act or city code, whereby it defines and restructures its relationship with counties. (Miller and Hagen to Representatives Danker, Binneboese, Hullinger and Hansen, 4-6-79) #79-4-7

The Honorable Arlyn Danker, The Honorable Don Binneboese, The Honorable Arlo Hullinger, The Honorable Ingwer Hansen, State Representatives: We are in receipt of your letters dated February 12, 1979, generally asking our interpretation of the recently enacted County Home Rule Amendment, Chapter 1206, Acts of the 67th General Assembly, 1978, Article III, §39A, of the Iowa Constitution and specifically asking whether the County Home Rule Amendment eliminates the necessity of enabling legislation in various areas. We initially respond to your more general inquiries and use that analysis as the framework for specific interpretation of the County Home Rule Amendment's application to the proposed bills submitted.

I.

In Representative Danker's, Binneboese's, and Hullinger's letter of February 12, 1979, the following questions are posed:

The basic question is how counties should interpret the existing Code and how much autonomous decision-making authority they have immediately.

The second question is whether legislative action continues to be necessary to permit counties to undertake specific actions . . .

Can a county now take an action in an area that is not specifically addressed by the Code? In cases where the general subject matter is discussed in the Code but the specific action or procedure that the county desires to undertake is not prohibited, is the county's action limited to what is prescribed by the Code? To what extent, if any, can the counties immediately begin to utilize the reversal of the Dillon Rule provided in the County Home Rule Amendment?

THE COUNTY HOME RULE AMENDMENT

The County Home Rule Amendment was adopted and agreed to by the Sixty-sixth General Assembly, published and then adopted and agreed to by the Sixty-seventh General Assembly as Joint Resolution 9, Chapter 1206, Acts of the 67th General Assembly, 1978. On November 7, 1978, the Amendment was submitted to the people of the State of Iowa in the manner required by the Constitution of the State of Iowa and its laws. The people of Iowa approved the Amendment and it immediately became effective.

The County Home Rule Amendment, contained in Article III, [Sec. 39A] of the Constitution of Iowa states as follows:

Counties or joint county-municipal corporation governments 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 general assembly may provide for the creation and dissolution of joint county-municipal corporation governments. The general assembly may provide for the establishment of charters in county or joint county-municipal corporation governments.

If the power or authority of a county conflicts with the power and authroity of a municipal corporation, the power and authority exercised by a municipal corporation shall prevail within its jurisdiction.

The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in express words is not a part of the law of this state.

THE DILLON RULE AND COUNTY-STATE LEGAL RELATIONSHIPS PRIOR TO PASSAGE OF THE COUNTY HOME RULE AMENDMENT

Prior to enactment of the County Home Rule Amendment, the powers of counties were narrowly construed to include only those powers expressly granted or clearly implied by the state law. This restrictive approach to local government power, known as the Dillon Rule, was named after the Judge who initially propounded the rule in an influential Iowa case, *City of Clinton vs. Cedar Rapids and Missouri River Railroad*, 24 Iowa 455, 475 (1868) and restated it in a well known treatise on municipal corporation, Dillon, Commentaries on the Laws of Municipal Corporations (1 J Dillon).

In the treatise, Judge Dillon observed at page 448-449:

It is the general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation — not simply convenient but indispensable. Any fair, reasonable, or substantial doubts concerning the existence of power is resolved by the courts against the corporation and the power is denied.

While Judge Dillon's treatise spoke to the relationship between municipalities and the state, the relationship between counties and the state at the time he wrote was generally perceived as precisely the same. As a result, Iowa courts adopted a similar narrow interpretation to county powers — an interpretation which applied to counties even after the rule was constitutionally repudiated with respect to municipalities with the passage of Municipal Home Rule in 1968, Article III [Sec. 38A] of the Iowa Constitution.

As the demands on county governments grew, however, the General Assembly and the courts became increasingly uncomfortable with the Dillon Rule. Following the legislative lead, the courts tended increasingly to emphasize the importance of county government and the breadth of powers expressly or impliedly conferred by the legislature. For instance, in *Mandicino vs. Kelly*, 158 N.W. 2d 754, 758 and 759 (1968), the court reassessed the Dillon Rule theory and yet detailed the following broad catalogue of county powers:

Political subdivisions of states, such as counties, are not sovereign entities; they are subordinate governmental instrumentalities created by the state to assist in carrying out the state governmental functions. *Reynolds vs. Sims*, 377 U.S. 533, 575, 84 S. Court 1362, 1388, 12 L.E. 2d 506 (19) . . .

The board performs numerous duties in regard to elections, chapters 47, 48, 49, 51, and 52; it fills vacancies in elective county offices, section 69.8; approves appointment of temporary assistants to county officials, section 341.1, appoints certain officials — county surveyor, section 355.1, zoning board of adjustment, section 358A.10, weed commissioner, section 317.3, county board of social welfare, 234.9; provides jails and rules and regulations for their operation, sections 356.19, 356.15; lets contracts in the name of the county, section 332.8, builds and maintains roads and bridges, sections 309.7, 309.10, 309.67, 309.73, 309.88, 309.89; administers the county welfare services, sections 347.21, 347A.3, 347A.7, 222.14, 227.14, 229.26, 234.9, 241A.13, 252.26, 252.34, 252.35, 253.1, 253.2; provides and maintains suitable law library, section 332.6; provides and maintains county library, section 358B.1, with a board of trustees for it, section 358B.4; provides offices for county officers, section 332.9, and supplies for their operation, 332.10; provides and maintains public disposal ground, 332.31, 332.32; erects, remodels and reconstructs building for county purposes with and without approval of citizenry, sections 345.1, 345.3; upon petition conducts hearings regarding relocation of county seats and orders such relocations if certain standards met, chapter 353; upon petition, conducts hearings and orders or disallows formation of, water districts, chapter 357, fire districts, chapter 357A, and sanitary districts, chapter 358; provided zoning regulations for the county, chapter 358A; provides for division of counties into townships, section 359.1, prohibits or regulates public displays, section 444.18; licenses and regulates businesses providing entertainment, foodstuff, prepared food or drink to the public, section 332.23; the board may revoke such licenses, section 332.27; conducts county elections on issue of liquor by the drink, section 123.27 (e), and fixes hours during which liquor may be consumed on licensed premises, section 124.31 and sold, section 332.28; makes some discretionary adjustments in the compensation of county officers, section 332.21 and chapter 340; issues bonds, sections 346.1, 347A.7; chapter 455 grants extensive powers to the board for the establishment, maintenance, levy of taxes in support of and formulation of rules and regulations governing the operation of levee and drainage districts.

The board adopts a county budget and appropriates necessary funds, sections 344.1, 344.2, appropriates funds for a contingent account, section 344.3, and transfers funds from one departmental budget to another during the year, section 344.6.

The power of the board to levy taxes is provided for generally in chapter 444. Section 444.9 states in part:

"The board of supervisors of each county shall, annually, at its September session, levy the following taxes upon the assessed value of the taxable property in the county . . . "

Summarizing the evolution of county government power, the court concluded that county governments were no longer administrators of state will at the local level. County government also had policy-making, or legislative functions. The court in *Mandicino vs. Kelly*, 158 N.W. 2d 754, 760 (1968) stated that:

Without spelling out the functions we believe reflect the delegation of substantial legislative power, we believe as stated in *Hanlon vs. Towey*, 274 Minnesota 187, 142 N.W. 2d 741, 747 (1966), it is sufficient to say that an examination of the statutes dealing with the power delegated persuades us that the legislature itself does not regard the county as solely the administrative arm of the state government.

The fact that the county also performs administrative functions and is somewhat responsive or subject to the legislature does not justify the denial of the application of the equal representation principle to county boards. *State Ex Rel. Sonneborn vs. Sylvester*, 26 Wisconsin 2d 43, 132 N.W. 2d, 249, 256.

Clearly, in Iowa, boards of supervisors possess the kinds of "governmental powers" which for purposes here necessitate their classification as legislative bodies.

Any judicial discomfort from the long line of precedents applying the Dillon Rule has now been resolved through constitutional action. With the passage of County Home Rule, the restrictive Dillion Rule interpretations of delegated county powers have been expressly reversed. As stated in the third paragraph of the Home Rule Amendment:

The proposition or rule of law that the county or joint county municipal corporation government possesses can exercise only those powers granted in express words is not a part of the law of this state.

THE SELF-EXECUTING COUNTY HOME RULE AMENDMENT

Fortunately, we are not without some prior guidance as to the interpretation of the intent and meaning of the County Home Rule Amendment. The Municipal Home Rule Amendment, Article III [38A] of the Iowa Constitution is identical in its pertinent provisions in that it declares:

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 muncipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state.

The similarity of the basic provisions of the amendments and the legal relationship of the local entities to the state, whether they be city or county, allow us to examine the Iowa Supreme Court's interpretation of the Municipal Home Rule Amendment and its implementation. With this, some general conclusions or propositions can be propounded to resolve your questions.

The courts have held that Iowa's Home Rule Amendment, in and of itself, give a local entity immediate authority to handle its own affairs. In *Green vs. City of Cascade*, 231 N.W. 2d 882 (1973), the court considered whether street construction and repairs and sewage collection and disposal were within the scope of municipal power under the newly enacted Home Rule Amendment. The court states at Page 885:

The Amendment is of the self-executing type. Scheidler, Implementations of Constitutional Home Rule in Iowa, 22 D.L.R. 294, 302, 304. Street construction and repair and sewage and collection and disposal manifestly constitutes local affairs *and the amendment itself gives cities authority to handle such matters.* [Emphasis supplied]

The concept of a self-executing home rule provision might be challenged or brought into question by the wording of Chapter 332.1, 1979 Code of Iowa, which closely resembles the statutory restatement of Dillon's Rule expressed in the powers and duties of the board of supervisors. Current Chapter 332.1 of the 1979 Code reads, in part, as follows:

Each county is a body corporate for civil and political purposes, may sue and be sued, . . . and do such other acts and exercise such other powers as are authorized by law.

While it could be argued that the phrase "authorized by law" refers only to statutory law, we do not agree. We believe that powers sanctioned in the Constitution of Iowa are encompassed within the statutory definition. The County Home Rule Amendment, expressly designed to reject the Dillon Rule, cannot be defeated by previous statute. Any other interpretation would enviscerate the fundamental nature and supremacy of the Constitution over other sources of law.

In sum, it is our opinion that, like its muncipal counterpart, the County Home Rule Amendment is self-executing. This simply means that counties have the "power and authority to determine their local affairs" immediately and without the necessity of any further express legislative act or authorization.

THE FOUR BASIC LIMITATIONS TO COUNTY HOME RULE

The County Home Rule Amendment contains four basic limiting conditions within itself. (See Article III, [39A] of the Iowa Constitution).

First, counties have no power to levy any tax unless expressly authorized by the General Assembly. Second, in the event the power or authority of a county conflicts with that of a municipal corporation, a municipal corporation's power and authority prevails within its jurisdiction. Third, the home rule power exercised by a county cannot be "inconsistent with the laws of the General Assembly". Fourth, home rule power can only be exercised for local or county affairs and not state affairs.

The tax limitation is self-explanatory. The Iowa Supreme Court has considered the tax exception in the context of Municipal Home Rule in the case of *Green*, supra. In its review of municipal powers, the court in *Green*, supra., 885 stated that while municipalities might have the power to authorize revenue bonding under their home rule powers, they could not levy taxes to pay for the bonds without express legislative authority, *Green*, supra. 885.

The second limitation of county powers *vis a vis* municipal authority is also self-explanatory. Basically, where a conflict exists between municipal and county law, the law of the municipality prevails within city limits.

The third limitation is more difficult to delineate and is not easily determined except on a case-by-case basis. The phrase "inconsistent with the laws of the General Assembly" is employed in both the Municipal and County Home Rule Amendments. This limitation can be termed one of "preemption". That is to say that in any given area the state, by broad and comprehensive legislation, has intended to exclusively regulate the subject matter. Where "preemption" is applicable, any local government regulation regardless of content, is inconsistent with the pervasive state legislation. (See Scheidler, Implementation of Constitutional Home Rule in Iowa, 22 D.L.R. 294 (1975).

The courts have interpreted this phrase in the case of *Chelsea Theater Corporation vs. City of Burlington*, 258 N.W. 2d 372 (1977). In that case,

the court held that the state had "preempted" the right of the city to regulate availability of obscene materials generally and not just with respect to minors, thereby denying the defendant city's reliance on municipal home rule power to enact ordinances "not inconsistent with the laws of the General Assembly". The court in *Chelsea* looked to the legislative history to determine whether the state retained exclusive jurisdiction. At page 373-4 in *Chelsea*, supra., the court observed:

When the bill was sent to the Senate, the words "to minors" were deleted from the end of the first sentence of the House version. S-3793, Journal of the Senate, April 17, 1974, p. 1418, and April 26, 1974, p. 1638. The House agreed to this deletion and this version was adopted in the statute. See Acts 65 G.A. ch. 1267 §9. The striking of a provision before enactment of a statute is an indication the statute should not be construed to include it. *Lenertz v. Municipal Court of City of Davenport*, 219 N.W. 2d 513, 516 (Iowa 1974), and citations. *The deletion of the phrase "to minors" by both the House and Senate before enactment of §725.9 lends support to our conclusions that the statute prohibits local governments from regulating the availability of obscene materials generally, and not just with respect to minors.* Cf. Acts 66 G..A. ch. 1245, ch. 1 §2810 . . .

In *Bryan vs. the City of Des Moines*, 261 N.W. 2d 685 (1978), the court emphasized the role of express statutory language in resolving the preemption question. In that case, city police officers brought an action challenging college educational requirements for promotion as established by the City of Des Moines and challenged, in part, the authority of the cities to impose their requirements by resolution. The police officers contended that the authority to impose promotional requirements was vested exclusively in the Civil Service Commission pursuant to Chapter 400.9 of the Code of Iowa. The court, in its review, examined the state satutes to determine if there was an *express limitation* on a city's powers by the state *or* for some evidence of *exclusive authority* of the state to establish promotional qualifications. Justice McCormick stated at Page 687 as follows:

They [the plaintiffs] allege resolution 5561 is invalid because it infringes upon the [state's] commission's exclusive statutory authority. [Inserts added]

We do not agree. Passing a promotional examination is essential to promotion but is not made the exclusive measure of qualifications.

Home rule empowers a city to set standards "more stringent than those imposed by state law, unless a state law provides otherwise." §364.3 (3), The Code. Any limitation on a city's powers by state law must be expressly imposed. §364.2 (2), The Code; *Chelsea Theater Corporation vs. City of Burlington*, 258 N.W. 2d 372 (Iowa 1977). Certain express limitations on a city's authority to establish employment qualifications are fixed by statute. See §§400.16, 400.17, The Code. However, those limitations are not involved here. *Moreover, §400.9 does not expressly purport to divest the city council of authority to establish educational requirements.* [Emphasis Supplied]

We hold the civil service commission's sole prerogative to give promotional examinations does not constitute exclusive authority to establish promotional qualifications.

We believe that the County Home Rule Amendment deserves a similar interpretation in that the language of the two amendments is almost identical and the express powers of municipalities and/or counties preexisting the enactment of Home Rule is very similar. Prior to the enactment of Home Rule, municipalities and counties were limited to acts only

expressly authorized or in the exclusive jurisdiction of the state as determined by review of the legislation and its express history. *After the enactment of Home Rule, municipalities in Iowa appear to be clearly limited only by an express statutory limitation or legislative history which clearly implies an intent to vest exclusive subject matter jurisdiction with the state.* In its analysis of the term "inconsistent with the laws of the General Assembly", the court in *Bryan, supra.*, did (and will) look in part to the legislature for guidance. After the passage and enactment of the Amendment, the Iowa Legislature elected to both define and revamp its legal relationship with the municipalities. It is clear from this analysis that the legislature may engage in such refinements. See discussion below, p. 17-19.

In *Green*, supra, 880, the court also analyzed the definition of the word "inconsistent" and its understanding of legislative intervention in the structuring of the definition and thereby the home rule relationship. While such a state restructuring of the county-state relationship has not yet occurred, the court's interpretation provides guidelines for analysis of the legislature's influence in determining the scope of home rule.

The court in *Green*, supra, 880, states that:

> The Home Rule Amendment grants home rule power "not inconsistent with the laws of the General Assembly". Sec. 11 (3) of the Home Rule act provides "An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law. Plaintiff claims the quoted language of §11 (3) collides with the quoted language of the Home Rule Amendment.
>
> Does "irreconcilable" in Sec. 11 (3) [now Chapter 332.3 of the 1979 Code of Iowa] go further than "inconsistent in the amendment? Irreconcilable means "impossible to make consistent or harmonious" while "inconsistent" means incongruous, irreconcilable, incompatible". (Webster's 3rd International Dictionary 1969).
>
> Apparently, the legislature believed the inclusion of Section 11(3) would constitute an aid in the construction when state law is laid beside an ordinance or a proposed ordinance.
>
> This court is a final arbiter of what the Iowa Constitution means including the word "inconsistent" in the amendment. *Kruidenier vs. McCulloch*, 258 Iowa 1121, 142 N.W. 2d 355. Nonetheless, this court gives respectful consideration in the legislature's understanding of the Constitutional language, especially in the case of the contemporary legislative exposition of such language. *Edge vs. Brice*, 253 Iowa 710, 113 N.W. 2d 755; *Carleton vs. Grimes*, 237 Iowa.
>
> We think, however, that the present problem falls under another rule of law — assuming that "irreconcilable" is stronger than "inconsistent", *the legislature has considerable authority to lay down the rules for the interpretation of its own statutes.* E.g. Code 1975, ch. 4. See 16 Am. Jur. 2d, Constitutional Law, §235 at 486; 16 C.J.S. Constitutional Law 112 at 499. The legislature appears to say in §11 (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 state law prevails. (emphasis supplied)
>
> We hold §11 (3) to be valid as a rule of interpretation.

The determination of whether there is indeed "inconsistency with the laws of the General Assembly" can only be resolved on a case by case basis. From the history of the Iowa court's interpretation and of the Municipal Home Rule Amendment, it would seem fair to conclude that

the counties should liberally construe their powers except in the areas of taxation, exclusive state control, express state prohibition against county involvement, or in matters which are not local affairs. However, the legislature has, as is pointed out in the *Green* case, supra, provided additional direction and definition for the Municipal Home Rule Act, or "City Code" in Chapters 364, 420, 1979 Code of Iowa, which is not yet present in the case of County Home Rule.

The fourth limitation involves a determination as to whether or not a county is engaged in a local affair. Of course, the legislature, in its discretion, may choose to regulate a particular local affair and thus prohibit inconsistent local legislation. However, there are possible proposed county actions which the Code does not expressly forbid or preempt but which may be outside of the scope of county power because they are of state rather than local concern. Identification of the dividing point on the spectrum of state and local concerns is extremely difficult.

Two analyses of the local/state affair determination bear review. In Scheidler's article, "Implementations of Constitutional Home Rule in Iowa", 22 D.L.R. 294 and 3306-7, the author suggests four criteria of analysis to determine whether a particular act on the part of the county is a local matter. First, does the subject matter involve an issue in which it is desirable to have state-wide uniformity. Second, does the proposed county legislation significantly affect persons living outside the county? Third, does the degree or physical nature of the problem addressed require cooperation of governments outside the county boundaries? Fourth, do the historical consideration involved traditionally relate to state, county or city affairs?

A more precise and structured analysis of whether a given subject matter involves a state or local affair is found in an excellent law review article reviewing home rule powers of California municipalities. See Sato, "Municipal Affairs" in California, 60 Calif. L. Rev. 1055. The criteria outlined in this article are useful in analysis of "local affairs" in the county home rule context. Professor Sato states at pages 1076-78:

> The attempts by the courts (to define municipal affairs) have been only partially successful. On the whole, the approach has been ad hoc and has resulted in somewhat inconsistent resolutions. In fact, it has been said that no general rule can be provided to define what is a municipal affair, and one justice has even referred to the term as the "loose, indefinable, wild words." Yet, the present process of "muddling through" is very unsatisfactory, since the result is confusions for both the state and chartered cities. Recognizing that perhaps only fools rush in where courts fear to tread, this Article nevertheless offers three standards that, hopefully, identify the substantial interest of the state and the chartered cities and thereby provide some consistency in approach.
>
> Standard 1: State laws should prevail where such laws deal with substantial externalities of municipal improvements, services, or other activities, regardless of whether the general laws are directed only to the public sector.
>
> This is hardly a novel proposition, inasmuch as the reason for the standard is evident. In the absence of any external institutional control, the municipal decision makers, because they are not responsible to those upon whom the burden is cast, would be subject to no restraint in exporting costs except, possibly, a fear of retaliation. Such a chaotic situation cannot be tolerated in an ordered society. While the courts under constitutional doctrines have policed certain extraterritorial costs, the legis-

lature ought to have the power to adjust the conflicting interests of the city and the larger area that the constitution does not reach.

Two matters should be noted: First, it should be emphasized that the costs must be substantial, since it take little imagination to identify some extraterritorial effect from almost any intraterritorial act. Second, a city, whether chartered or not, might not have the authority to exercise any power extraterritorially unless the legislature has granted such power, except in a very limited situation, consequently, the effect of extraterritorial exercise of power, whether regulatory, property acquisition, or service, can perhaps initially be controlled by the legislature through the definition of delegation.

Standard 2: State laws should govern if their policies are made applicable to the public and private sectors.

This second standard is formulated upon the following two premises: First, the state is at least as concerned with the welfare of the people as is a chartered city. Second, a state policy is pervasive when manifested by its applicability to both the public and private sectors. When the state has indicated a deep concern for the welfare of the people by adopting a pervasive policy, such policy ought not be frustrated by deference to local determination. The converse of this is that state policies directed only to the public sector, absent externalities, lack the strength to override the value of local determination; such policies seek to reach only the relationship between the governmental entitiy and the individual, and this relationship ought to be determined by the local electorate who have opted for autonomy.

Perhaps this is the standard urged by Justice McKinstry, who insisted in the latter part of the last century that the general laws that control a chartered city are those having application within and without the city, although it is as probably that he meant general applicability to city and county governments. Closer to the mark was Justice Fox's argument that only "general laws as affect all the people of the state" would have the effect of supersession.

Standard 3: Matters of intracorporate structure and process designed to make an institution function effectively, responsively, and responsibly, should generally be deemed a municipal affair.

The people look to the government for services and regulatory measures, and they have an interest in seeing that the government functions efficiently, responsively, and responsibly as an institution providing services and enacting regulations. It appears that, at a minimum, the municipal affairs amendment was intended to give local autonamy with respect to the latter interest. The need to extend a state policy dealing with intracorporate structure and process to a chartered city, even if applicable to the public and private sectors, is usually not compelling. However, there are instances when state laws even with respect to the functioning of the institution ought to govern. These are matters that are integral parts of a substantive state policy, such as the claims procedure for tort liability, deemed to apply to a chartered city under the other standards.

The application of these standards will not always provide certainty in result. Judicial judgment is not removed. For example, the substantiality of the externalities must be determined. In addition, it is necessary to decide what policies are pervasive. The existence of a pervasive policy is not precluded merely because there are differences in the detailed application of a policy to the public and private sectors or within the private sector itself. Hopefully, however, these standards will focus the inquiry.

Such criteria outlined in *Soto*, supra, particularly in the cases not involving express or implied legislative declaration would seem to be of use by both the counties and the state legislatures in determining whether or not the issues involve state or county subject matter.

ADDITIONAL GENERAL ASSEMBLY LEGISLATION

Many questionsd relating to the four limitations will only be resolved through history. As time goes on, the legislature could be more express in determining what areas it wishes to retain jurisdiction in and the areas in which it does not. Clearly, the legislature can intervene at any time to override county actions or to provide uniformity in areas of legislation it so desires where it deems it necessary for the public benefit.

In *Bechtel vs. the City of Des Moines*, 225 N.W. 2d 236 (1975), property owners and taxpayers brought an action against the City of Des Moines, their councilmen, the League of Municipalities. The court reviewed the history of municipal law on home rule in Iowa and, after a thorough analysis, rejected the proposition that the Home Rule Amendment somehow restricted or prohibited the legislature from enacting a subsequent law affecting cities and noted as follows on page 332:

The history of the Iowa Home Rule movement demonstrates that the intention of the framers of the amendment was to grant cities power to rule their local affairs in government (other than levy taxes) subject to the superior authority of the General Assembly. Scheidler, Implementation of a Constitutional Home Rule in Iowa, 22 D.L.R. 294, 297, 302 and 302. This means that the General Assembly, in exercise of its authority, may from time to time retain repeal or amend statutes on cities in effect on November 7, 1968, or enact new ones, and that subject to such authority, cities have the power to deal with local affairs in government, except to levy taxes — unless the General Assembly gives them that power too. Thus, the provisions of the Home Rule act repealing and amending existing statutes and enacting new ones affecting cities do not controvene the Home Rule Amendment, but implement it.

Such an implementation statute has not been drafted by the legislature but the comments of the court we think are persuasive as to the relationships of counties and the state as well as the muncipalities and the state. The court, in effect, rejected a restrictive view which would freeze the statutes on cities into continued existence at the time of the enactment of the Home Rule statute. The Courts stated:

"Plaintiffs' restricted view of the 'laws of the General Assembly' would freeze into continued existence the statutes on cities which were in the Code on the effective date of the Home Rule Amendment and would actually elevate those statutes to Constitutional status. Thus, numerous sections covering many details would be locked in, beyond the authority of the legislature to alter with the changing times. This appears contrary to the principle that the Constitution should be a vital, living instrument, designed for an extended period. *Edge vs. Brice*, 253 Iowa 710, 113 N.W. 2d 755, 16 Am. Jur. 2d Const. Law, Sec. 61 at 234; 16 C.J.S. Const. Law, Sec. 14 at 67-68. Plaintiffs' view would also frustrate the very purpose of Home Rule — to grant cities more flexibility to cope with their problems. Cities would have to function within the straitjacket of detailed existing statutes governing their affairs; they would not even obtain relief against those statutes from the General Assembly. The holding at page 233 speaks for itself; we hold, therefore, that under the Home Rule Amendment and general legislative authority, the General Assembly may repeal, amend, enact statutes regarding cities, that the authority of the General Assembly is superior to the cities' powers, and that the Home Rule act is not invalid on the basis urged by the plaintiffs.

In other words, the Constitutional Amendment providing home rule for counties provides a flexible instrument whereby counties have gained enormous power over their local affairs and duties except in the areas of the taxation and the specific areas held to be the exclusive or express domain of the state. Consequently, it is contemplated that the legislature

could at any time enact or alter the sections dealing with the state's relationship to the counties as the state did in its alteration of the state's relationship to the muncipalities as the 64th General Assembly did in Chapter 1088.

Such "enactment" legislation was prepared and passed after the adoption of the "Municipal Home Rule" Amendment. The legislation prepared a comprehensive revision of all the principal chapters of the Code of Iowa dealing with city-state relationships. These revisions, commonly called "The City Code of Iowa", are contained in Chapters 362 through 420, Title XV, 1979 Code of Iowa. A committee was estabilised by House Joint Resolution 15 in the 63rd General Assembly, 1st Session in 1969. This committee was directed to make a comprehensive study of that statute relating to municipal corporations and recommend appropriate provisions which would implement home rule and facilitate the solution of local problems by local initiative and make comprehensive recommendations to the General Assembly by way of the Code revision bills and other reports.

Examples of the legislature's concerns in muncipal home rule areas set out in Sections 364.2 (2), 364.4 (3) and 364.6 of the 1979 Code of Iowa. Section 364.2 (2) provides that a specific enumeration of a power does not limit the general grant of municipal home rule. Section 364.3 (3) provides that a city shall not set standards and requirements lower or less stringent than those set by state law. Finally, §364.6 provides that a city shall substantially comply with a procedure established by state law for exercising a power. If the procedure is not set by state law, a city can determine its own procedure. And since neither the county amendment nor Title XIV of the Code contain such provisions, it is difficult to state whether the counties will have as much power as the cities.

In *Green vs. City of Cascade*, 231 N.W. 2d 882 (1975), the court reviews in detail the history and passage of this legislation revamping the entire title of the Code dealing with municipal corporations in one comprehensive act. Title XIV of the Iowa Code (Chapter 331-361B) is the principal section of the Code dealing with counties' powers which were written prior to the County Home Rule Amendment. Such similar revamping of the County Code provisions, while not being mandated, is clearly possible to provide greater structure and definition of the relationship.

RESPONSES TO GENERAL QUESTIONS

We believe that the general analysis above details the abbreviated responses to your board questions. They are as follows:

(Q) The basic question is how counties should interpret the existing Code and how much autonomous decision-making authority they have immediately?

(A) Counties have immediate and broad authority and power to determine their local affairs subject to four limitations set out above.

(Q) The second question is whether legislative action continues to be necessary to permit counties to undertake specific actions . . .

(A) No legislative action is necessary when local affairs are involved except in the area of tax levying and those areas where the

legislature has retained express or exclusive jurisdiction in the acts of the General Assembly.

(Q) Can a county now take an action in an area that is not specifically addressed by the Code?

(A) Yes, unless the matter clearly involves a state matter as defined in the analysis above, or a tax levy.

(Q) In cases where the general subject matter is discussed in the Code but the specific action or procedure that the county desires to undertake is not prohibited, is the county's action limited to what is prescribed by the Code?

(A) No, unless the General Assembly expressly states in that Code Chapter or provision that the county may not engage in such action or procedure, or unless an intent to create exclusive state regulation is clearly evinced in the legislative language and history.

(Q) To what extent, if any, can the counties immediately begin to utilize the reversal of the Dillon Rule provided in the County Home Rule Amendment?

(A) The counties may immediately utilize the reversal of the Dillon Rule to the maximum extent they desire subject to the four limitations discussed previously.

APPLICATION OF GENERAL CONCLUSIONS TO SPECIFIC INQUIRIES

In Representative Hansen's letter of February 12, 1979, he attaches proposed House File 58 and 121, both of which were assigned to the County Government Committee for consideration. Rep. Hansen requests our opinion as to whether or not county boards of supervisors would have the power to "do the things which are proposed in the two above-mentioned bills" without the necessity of express state legislation. H.F. 58 was submitted to our office as follows:

HOUSE FILE 58

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Section four hundred fifty-five point one hundred thirty-six (455.136), Code 1979, is amended by adding the following new unnumbered paragraph:

NEW UNNUMBERED PARAGRAPH. In a county where there are unencumbered funds on hand in the sinking fund accounts of one or more drainage or levee districts administered by the board of supervisors, the board may transfer all or part of the unencumbered funds to form a common revolving fund from which warrants may be drawn in payment for labor and materials used in repair and maintenance of any drainage or levee district in the county administered by the board of supervisors, and in payment for clerical procedures in any such district. When an expenditure is made from the common revolving fund, an assessment shall be levied in the usual manner in the district for which the expenditure was made and when the assessment is paid the amount advanced from the common revolving fund shall be repaid from the proceeds of the assessment.

House File 58 authorizes county boards of supervisors, which are administering two or more drainage or levy districts, to pool unencumbered funds of the districts in a common revolving fund. The legislation provides an express grant of specific power to the board of supervisors under Chapter 455 of the Iowa Code. Chapter 455 entitled "Levy and Drainage Districts" expressly grants the jurisdiction of the board of

supervisors to establish levy and drainage districts. Prior to the enactment of the County Home Rule Amendment, such an enumerated power on the part of the board of supervisors would have been required to allocate the necessary act or authorization.

In interpreting any contemplated act of proposed legislation or county act the interpretor must initially begin with the premise that the counties have the power and authority to determine their ability to act and then determine whether or not one of the four limitations set out above is involved. First, the specific legislation proposed in House File 58 does not concern the levying of any taxes, consequently, that exception is not of concern in the review of this particular legislation. Second, we do not have any apparent conflict within the municipal jurisdiction in that these common drainage or levy districts have historically been under the jurisdiction of the counties pursuant to Chapter 455, 1979 Code of Iowa. Third, the reviewer can determine that the legislation relates to districts which, by their physical nature, are local in character which fits the concept of County Home Rule. Fourth, such an act would not appear to be "inconsistent with the laws of the general assembly". Chapter 455.1 of the 1979 Code of Iowa indicates that the clear intent of the legislature was to give the counties jurisdiction over the levy and drainage districts and their management. Under County Home Rule, such proposal would not require legislative action as the legislature has not restricted these acts of power to the jurisdiction of the state and has, in fact, expressly granted such jurisdiction to the county board of supervisors.

Therefore, counties could engage in the very acts set out in House File 58 and such legislation would not be required under home rule for the counties to pool unencumbered funds of districts in a common revolving fund. If the policy of the state is to provide uniformity in a particular area, then state intervention would still be required to produce the necessary uniformity which is within the discretion of the legislature.

HOUSE FILE 121

House File 121, as submitted to our office by Representative Hansen, authorizes the board of supervisors to file a lien against the real estate and personal property of any person granted legal representation at county expense to recover the amount of the attorneys fees. As submitted, it stated as follows:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Chapter three hundred thirty-six B (336B), Code, 1979, is amended by adding the following new section:

NEW SECTION. LIEN TO RECOVER ATTORNEY FEE. The board of supervisors may file a lien against the real estate and the personal property of a person provided legal representation at county expense to recover the cost of the attorney fee awarded by the court.

In our analysis, as to whether such legislation is now required, we must begin with the presumption that counties have the power and authority over their own local affairs, however, exceptions must once again be analyzed. Unlike House File 58, H. F. 121 may not involve a local affair and appears to be inconsistent with the laws of the General Assembly.

Liens have traditionally been a charge or security or an encumbrance upon property created at the state level or existing and available through-

out the state as the result of common law doctrine. Liens by their very nature affect property rights which have traditionally been within the confines of state affairs. Furthermore, the consistency of state policy relative to the uniformity of property rights comes into serious question.

Second, the legislation has an impact on the unified court system established throughout the state under Chapter 602 of the Code. Chapter 602.1 of the 1979 Code states specifically that the District Court shall have *exclusive*, general and original jurisdiction *over all actions, proceedings, and remedies.* This creation of a unified general court system clearly indicates the state's express intent to exercise control over the judicial system and its remedies at the state level. The administration of justice under Iowa law is a matter of state-wide concern and does not pertain to local government or affairs. The very presence of such rights to a lien by the county could conceivably limit access to particular counties adopting such lien rights. Here again uniformity of rights and remedies is at issue. We believe that House File 121 could be considered a state affair. The passage of enabling legislation would eliminate any uncertainty as to the power of counties in this area.

SECTION 558.52

Representatives Danker, Binneboese and Hansen's letter propounds, in part, an example of the creation of an additional system of real estate indexing. With reference to §§558.49 through 558.51, Section 558.52 of the 1979 Iowa Code requires separate index books for conveyances. It is provided that such books *shall* show the names of the grantors and grantees in alphabetical order. Home Rule would not change the mandate of that section. In other words, the use of the word "shall" therein, which pursuant to §4.36(a) imposes a duty, makes that requirement mandatory. The Representatives note that some counties would like to index by tract as well as grantor-grantee. They ask whether or not such an index system would have to be granted by specific authority of the Legislature.

Once again, the analysis or determination of whether such an act is in within the county home rule power and authority must begin with the premise that the county indeed does have such authority unless one of the exceptions noted above is evident. Clearly, the central issue to be determined is whether or not such an act would be inconsistent with the laws of the General Assembly. Chapter 558 of the 1979 Code contains no express limitation as to the indexing of recorded documents engaged in by a county. What Chapter 558 does provide is a minimum or state-wide standard of uniformity for indexing of recorded documents which affect real estate. Clearly, the indexing by grantor-grantee must continue as a matter of law, but this by no means means that the county could not have a secondary alternative system of indexing for the convenience of its residents.

It would seem clear that local counties may also impose additional alternative requirements such as indexing by tract as long as they do not, in any way, void or eliminate the required indexing by grantor-grantee and as long as the statute in question does not expressly prohibit the creation of such an alternative indexing system. The fact that an additional requirement is made by the county does not in any way void or prohibit the county from engaging in its home rule powers as long as the act is not inconsistent or irreconcilable with the Iowa Code.

Furthermore, the proposed act on the part of the county would not in any way involve the other possible limitation on the Home Rule Amendment. Consequently, counties may indeed require their own alternative indexing system as they so desire. The State of Iowa by its legislature need not pass such legislation in order ot authorize such an index unless it is necessary for the sake of uniformity, or for the creation of revised minimum standards of indexing as a matter of policy, or for the purpose of expressly denying such power.

SUMMARY

With the passage and adoption of the County Home Rule Amendment, Article III [§39a] of the Iowa Constitution, the counties have been emancipated from the restrictions of the Dillon Rule as of November 7, 1978, and are now free to exercise and determine their local affairs and government without the necessity of express state legislation.

The county Home Rule Amendment contains four basic limitations within itself. First, counties have no power to levy any tax unless expressly authorized by the General Assembly. Second, in the event the power or authority of a county conflicts with that of a municipal corporation, a municipal corporation's power and authority prevails within its jurisdiction. Third, the Home Rule power exercised by a county cannot be "inconsistent with the laws of the General Assembly." Fourth, Home Rule power can only be exercised for local or county affairs and not state affairs.

Based on the language of the County Home Rule Amendment and the Iowa Supreme Court's review of the similar Municipal Home Rule Amendment, the four limitations should be narrowly construed. Conversely, county's powers should be broadly construed and subject to liberal interpretation absent express statutory conflict. The Iowa Legislature may, in its own discretion, promulgate a county home rule act, or county code, similar to the city home rule act, or county code, whereby it defines and restructures its relationship with counties so as to determine the areas of their respective responsibilities, to limit the areas of confusion, and to structure county or joint county municipal corporation government as set out in the county Home Rule Amendment.

April 6, 1979

COUNTIES: §441.5, 441.8, Code of Iowa, 1979. County assessors whose terms expire prior to December 31, 1979, need not take examination and obtain certification under §441.5 of Code in order to be reappointed for a six year term commencing January 1, 1980. (Hagen to Bair, 4-6-79) #79-4-8(L)

April 9, 1979

MENTAL HEALTH: Unauthorized Departure of Involuntarily Hospitalized Mental Patients From Local Facilities. Chapters 226 and 229, 1979 Code of Iowa, §§222.9, 226.16, 227.11, 227.13, 229.1(2), 229.1(10), 229.1(8)(a), 229.1(8)(c), 229.13, 229.14, 229.14(2), 229.14(4), 229.15(4), 229.16, 230.31. An individual who is transferred to an alternative placement facility from a state mental health institute is still under the constructive jurisdiction and custody of the mental health institute. The superintendent of the mental health institute has the authority to issue an order to any peace officer to place the patient in protective custody and return him/her to either the alternative placement facility or the mental health institute. If an individual who is involuntarily

hospitalized in a local facility and who has never been confined in a state mental health institute should depart the facility without authority, such person's return to the facility should be upon orders issued by the court which ordered the initial commitment. (Fortney to Preisser, Commissioner, Department of Social Services, 4-9-79 #79-4-9

Mr. Victor Preisser, Commissioner, Iowa Department of Social Services: You have requested an opinion of the Attorney General regarding the return of the involuntarily hospitalized individuals to a Mental Health Institute or alternative placement facility when such individuals leave the alternative placement facility on unauthorized departure.

Specifically, you inquired as to the following:

1. Would the superintendent of the mental health institute have the authority to issue an order to any peace officer to place the patient in protective custody and return him/her to either the alternative placement facility or the mental health institute?

2. Would such authority for issuance of an order for taking into protective custody and return to the facility be the prerogative of the Court or Judicial Hospitalization Referee?

3. When a person is involuntarily hospitalized locally and has not been a patient at a mental health institute, where does the authority rest within the county to issue an order to take such person into custody for return to the facility from unauthorized departure?

I.

If, upon hearing, an individual is found to be "seriously mentally impaired", as defined by §229.1(2), Code of Iowa, such individual must be hospitalized for evaluation. See §229.13, Code of Iowa. Such evaluation may properly take place at a state mental health institute established by Chapter 226 of the Code. See §229.13; §§229.1(10) and (8)(a), Code of Iowa.

Upon completion of the evaluation contemplated by §229.13, Code of Iowa, the chief medical officer of the mental health institute is required to report to the court as to the psychiatric evaluation and findings made. See §229.14, Code of Iowa. The Code allows four possible findings, to wit:

1. That the individual does not require further treament;

2. That the individual is in need of treatment and, will benefit from full-time hospitalization;

3. That the individual is in need of treatment, but does not require full-time hospitalization; or

4. That the individual is in need of treatment, but will not benefit from hospitalization.

See §229.14, Code of Iowa. Your first question posed presupposes that the second finding of the four has been made. If such a finding is made, the court may order continued hospitalization of the individual for treatment. See §229.14(2), Code of Iowa.

Once an individual is hospitalized pursuant to §229.14(2), Code of Iowa, the mental health institute is expressly given authority to secure

said individual's return to the facility in the event of an unauthorized departure. §226.16, Code of Iowa, states:

It shall be the duty of the superintendent and of all other officers and employees of any of said hospitals, in case of the unauthorized departure of any involuntarily hospitalized patient, to exercise all due diligence to take into protective custody and return said patient to the hospital. A notification by the superintendent of such unauthorized departure to any peace officer of the state or to any private person shall be sufficient authority to such officer or person to take and return such patient to the hospital.

In essence, your first question is whether the authority conferred by §226.16, Code of Iowa, remains in effect once an individual is transferred from the mental health institute to an alternative placement. Such transfers are authorized by §229.15(4), Code of Iowa, "when in the opinion of the chief medical officer the best interest of a patient would be served . . . by transfer to a different hospital for continued full-time custody, care and treatment." The transferee hospital may be a local facility, such as a county care facility, if such hospital "is equipped and staffed to provide inpatient care to the mentally ill." See §229.1(8)(c), Code of Iowa.

Various provisions of the Code of Iowa point to the conclusion that an individual who is transferred to an alternative placement facility pursuant to §229.15(4), Code of Iowa, is still under the constructive jurisdiction and custody of the mental health institute. From this it follows that the authority conferred by §226.16, Code of Iowa, remains in effect.

Section 227.11, Code of Iowa, authorizes local facilities to accept individuals transferred from a mental health institute pursuant to §229.15(4), Code of Iowa. In part, §229.15(4) states:

Patients transferred to a public or private facility under this section may subsequently be placed on convalescent or limited leave or transferred to a different facility for full-time custody, care and treatment when, in the opinion of the attending physician *or the chief medical officer of the hospital from which the patient was so transferred,* the best interest of the patient would be served by such leave or transfer. (Emphasis supplied.)

Thus, the chief medical officer of a state mental health institute can authorize the transfer or convalescent leave of a former patient of the institute even after the patient has been placed in a local facility and is no longer under the direct supervision and control of the institute's staff. This demonstrates a legislative intent that the mental health institute maintain constructive jurisdiction and custody over transferred patients.

If an individual is transferred to a local facility from a state mental health institute, the local facility does not have the authority to discharge the individual. Such a decision can only be authorized by the state director, the immediate superior of the superintendent of a state mental health institute. See §227.13, Code of Iowa. Once again, this demonstrates a legislative intent that jurisdiction over individuals hospitalized at a state mental health institute shall remain with the mental health institute **until a final discharge is made pursuant to §229.16, Code of Iowa.**

Section 226.16, Code of Iowa, provides express authority to the superintendent of a mental health institute to issue orders for the retaking of an individual who departs without authority *directly* from the institute. The Code of Iowa does not contain any analogous provisions governing the case of an individual who departs without authority from a local facility to which he/she had been transferred from an institute. But the Code does demonstrate an intent on the part of the legislature that the institute maintain continuing authority over an individual so transferred. Consequently, the superintendent of the mental health institute has the authority to issue an order to any peace officer to place the patient in protective custody and return him/her to either the alternative placement facility or the mental health institute.

II.

The response to your first question negates the need to address your second question.

III.

The final portion of your letter raises the issue of which individual or institution at the local level has authority to order the return of an involuntarily hospitalized patient who departs the local facility without authorization if such patient has never been hospitalized at a state mental health institute. There is no provision in the Code of Iowa which expressly confers this type of authority on anyone.

The situation you present presumes that the individual has been found to be "seriously mentally impaired" pursuant to §229.13, Code of Iowa, and has been hospitalized for evaluation. Following the evaluation, it is presumed that the hospital's chief medical officer has filed a report as required by §229.14, Code of Iowa, and has found that the individual is in need of full-time custody and care and would benefit from full time treatment in a hospital (see §229.14(2), Code of Iowa) or has found that the individual is in need of full-time custody and care, but would not benefit from continued treatment in a hospital (see §229.14(4), Code of Iowa). Under either of these circumstances the individual may be involuntarily continued in full-time custody at the local level and never be placed in one of the state mental health institutes established by Chapter 226, Code of Iowa.

A number of provisions of the Code of Iowa confer authority for the retaking and confinement of either mentally ill or mentally retarded individuals who depart their respective institutions without authority. Among these are §226.16, Code of Iowa, dealing with departures from state mental health institutes, §222.9, Code of Iowa, dealing with departures from state hospital-schools, and §230.31, Code of Iowa, dealing with departures from institutions in other states. But there is no analogous provision dealing with departures from local facilities if the individual has never been confined in a state institution. The Iowa Legislature has not given any administrator, either state or local, the power to order the retaking of such a patient. One must look to the judiciary to find the appropriate authority. A court must have jurisdiction of both the parties and the subject matter before it can validly act, and jurisdiction of the subject matter must be derived from a valid statute. *Chicago &*

N. W. Railroad Co. v. Fachman, 125 N. W. 2d 210, 255 Iowa 989 (1963). Chapter 229, Code of Iowa, confers subject matter jurisdiction over involuntary hospitalization of mentally ill persons on the local district courts, or the judicial hospitalization referee when acting in place of the district court judges. Jurisdiction of the person in a civil case may be acquired by service of notice pursuant to statute or by general appearance by the defendant. *Emery Transportation Co. v. Baker*, 136 N. W. 2d 529, 257 Iowa 1260 (1965). Section 229.7, Code of Iowa, provides for service of notice upon the respondent and the fact of service would thus give the district court jurisdiction of the person.

Once the district court has subject matter jurisdiction and jurisdiction over the respondent in a Chapter 229 proceeding, this authority continues after the respondent is placed in a local facility pursuant to §§229.14(2) or (4), Code of Iowa. It is the court which orders the respondent's continued hospitalization or placement under §229.14, Code of Iowa. Section 229.16, Code of Iowa, specifically provides that proceedings initiated under Chapter 229 do not terminate until the court issues an order confirming the respondent's discharge. Until this order is issued, the proceedings are on a continuing basis and the court's jurisdiction would be continuing.

In addition to the fact that the court's jurisdiction is continuing, a further element points to the court as the proper authority for ordering the retaking of individuals who depart a local facility. Such individual's confinement is pursuant to order of court under §229.14, Code of Iowa. In order for the court to effectuate and enforce its commitment order, it must have the inherent power to see that the individual remains in the facility to which the court has committed him/her. A district court sitting in equity has the inherent power to issue further orders to fully dispose of the matters properly before it. *Donnelly v. Nolan*, 15 N. W. 2d 924, 235 Iowa 30 (1944).

If an individual who is involuntarily hospitalized in a local facility and who has never been confined in a state mental health institute should depart the facility without authority, such person's return to the facility should be upon orders issued by the court which ordered the initial commitment.

April 10, 1979

OPEN MEETINGS — Public notification of meetings. §28A.4, Iowa Code (1979). The notice provisions of §29A.4 are intended to provide the public at large with timely, adequate notice of the pendency of government's business. The section imposes minimal measures concerning the contents, manner, and time of notice, and does not prevent a governmental body from providing the public with more notice than is statutorily required.

To satisfy the satutory requirements of §28A.4, a governmental body must inform the general public of a pending meeting by (1) posting the date, time, place and tentative agenda of such meeting either "on a bulletin board or other prominent place which is easily accessible to the public and clearly designated for that purpose at the principal office of the body," or, if the governmental body has no principal office, the information must be posted at the building where the meeting is to be held, and (2) notifying news media which have filed a request for notice. If such measures have been taken, the governmental body is free to select additional means "reasonably cal-

culated to apprise the public" of a pending meeting. (Cook to Stromer, State Representative, 4-10-79) #79-4-10

The Honorable Delwyn D. Stromer, Iowa State Representative: You have written the Attorney General requesting an opinion concerning the public notification requirements of Iowa's "open meetings' law, Chapter 28A, Iowa Code (1979). In particular, you have submitted the following question for our consideration:

"Can a board subject to the open meetings law satisfy the requirements of notification of special meetings by telling the inquiry individual that notification of all meetings, special or regular, will be given at a set time each day over a local radio station?"

Extensive legislative work on the open meetings law was completed during the 1978 legislative session. Chapter 28A of the 1977 Code was repealed and replaced with a new law effective January 1, 1979. The revised public notice provisions which relate to your question are found in §28A.4 of the new law, now codified in the 1979 Iowa Code. In parts relevant to your question, the notice statute provides:

"1. A governmental body, except township trustees, shall give notice of the time, date, and place of each meeting, and its tentative agenda, in a manner reasonably calculated to apprise the public of that information. Reasonable notice shall include advising the news media who have filed a request for notice with the governmental body and posting the notice on a bulletin board or other prominent place which is easily accessible to the public and clearly designated for that purpose at the principal office of the body holding the meeting, or if no such office exists, at the building in which the meeting is to be held.

"2. Notice conforming with all of the requirements of subsection 1 of this section shall be given at least twenty-four hours prior to the commencement of any meeting of a governmental body unless for good cause such notice is impossible or impractical, in which case as much notice as is reasonably possible shall be given. * * *

"When it is necessary to hold a meeting on less than twenty-four hours notice, or at a place that is not reasonably accessible to the public, or at a time that is not reasonably convenient to the public, the nature of the good cause justifying that departure from the normal requirements shall be stated in the minutes."

Before addressing your specific question, we note the purpose of the law as declared in §28A.1:

"This chapter seeks to assure, through a requirement of open meetings of government 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 chapter should be resolved in favor of openness."

In this same vein, we believe the words in *Dobrovolny v. Reinhard*, 173 N.W.2d 837, 840 (Iowa 1970), while used to describe the tenor of the former open meetings law, are equally descriptive of the purpose of the new provisions of Chapter 28A:

"It is clear the purpose of [the law] is to prohibit secret or 'star chamber' sessions of public bodies, to require such meetings be open and to permit the public to be present unless within the exceptions stated therein."

The notice provisions of §28A.4 should be construed and applied to promote the stated purpose and intent of the law. It is apparent that the notice provisions are intended to provide the general public with

timely, adequate notice of the pendency of government's business. Thus, §28A.4 imposes minimal notification measures concerning the contents of notice, the manner of giving notice, and the time at which notice must be given, all for the benefit of the public at large. It is further evident that the standards imposed by §28A.4 are to be considered minimal measures only, and do not prevent a particular governmental body from providing more notice than is statutorily required.

According to §28A.4(1), notice preceding a prescribed meeting must be made in a manner "reasonably calculated to apprise the public" of the time, place, date, and tentative agenda of a meeting. This standard is necessarily flexible, permitting discretion in an agency or other governmental body to select an appropriate means of notification. As a minimal measure, however, §28A.4(1) requires a governmental body to take two steps to insure that the public at large receives some notice: (1) news media, which have filed a request for notice, must be notified of upcoming meetings, and (2) notice must be posted, either "on a bulletin board or other prominent place which is easily accessible to the public and clearly designated for that purpose at the principal office of the body," or, if the governmental body has no principal office, notice must be posted at the building where the meeting is to be held.

Pursuant to §28A.4(2), notice, conforming with subsection one, is required to precede commencement of a prescribed meeting by "at least twenty-four hours . . . unless for good cause such notice is impossible or impractical." If twenty-four hour notice cannot be provided, "as much notice as is reasonably possible shall be given," and "the nature of the good cause . . . shall be stated in the minutes" of the meeting. Such minutes are "public records open to public inspection." §28A.3, Iowa Code (1979).

Applying the statutory standards to your question, it is readily apparent that it is not sufficient to merely inform an inquiring individual that "notification of all meetings, special or regular, will be given at a set time each day over a local radio station." To satisfy the statutory requirements, a governmental body must see that the public at large is notified through the posting of notice and notification to news media. If such measures have been taken, an agency or other governmental body is free to select additional means "reasonably calculated to apprise the public" of a pending meeting. An example is found in your question, where it is apparent that notice is provided the general public via a local radio station. In our view, notification of the time, place, date and tentative agenda via a radio broadcast is an appropriate, additional means of informing the public of a pending meeting.

An issue raised by your question is whether a governmental body is required to provide notice of an upcoming meeting to an individual who has requested such notice. As we have pointed out, the notice provisions contemplate that notice be provided the *general public* through posting, and does not expressly require a governmental body to give notice on an individual basis. An exception to this is the requirement that requesting news media be individually notified. However, while such notification is not expressly required by the law, it seems preferable for a governmental body to advise an interested individual of the pertinent information concerning a meeting rather than simply tell the individual to listen to a

local radio broadcast. A procedure instituting notification on an individual basis certainly promotes the underlying policy of the law in favor of open governmental business by insuring notification to those individuals who are interested enough in a particular governmental body's business to request notification. Again, we believe that such measure is an appropriate, additional means of apprising the public of pending meetings.

April 11, 1979

MUNICIPALITIES: Pensions — §410.6, the Code, 1979. When a pension, pursuant to Chapter 410 of the Code, is recomputed and there is an increase in benefits, the increase is equal to one-half the difference between the old pension and the recomputed pension. (Blumberg to Priebe, State Senator, 4-11-79) #79-4-11 (L)

April 11, 1979

COUNTIES: County Board of Supervisors' duty in setting compensation of county elected officials' deputies' salaries and permissibility of Board members using county cars. Article III (Sec. 39A) of the Constitution; §§331.22, 332.3(18), 340.4, and 340.8 (1979). Section 340.4 requires the county board of supervisors to certify to the county auditor the salaries of the elected officials' deputies as long as the salaries do not exceed the maximum fixed in Section 340.4. The board member may use county cars in the performance of their official duties. (Condon to Soldat, Kossuth County Attorney, 4-11-79) #79-4-12

Mr. Mark S. Soldat, Kossuth County Attorney: This letter is in response to your request for an opinion regarding 1) the certification by the county board of supervisors to the county auditor of the salaries to be paid deputies of elected county officials and 2) whether county supervisors may use county cars.

Your question regarding the first issue is as follows:

"During the recent Kossuth County Board of Supervisors Meeting a question arose concerning the power of the Board of Supervisors to set the salaries of other employees of the county. Section 332.3, subsection 10, Iowa Code (1977), allows the county board of supervisors to fix the compensation for all services of county and township officers not otherwise porvided for by law. Section 340.8 allows the county board of supervisors to specifically fix the salary of the first deputy sheriff under subsection 1 and all other deputy sheriffs under subsection 2. However, section 340.4 sets the percentage of salary for the deputies of the county auditor, county treasurer, county recorder, and the clerk of the district court but this section does not include the language found in 340.8 which allows the county board of supervisors to fix the salary. The question is: is it mandatory for the county board of supervisors to certify to the county auditor the amount as a percentage of salary recommended by the elected official for the deputy of the elected official?"

As you say, the county board of supervisors is empowered to set compensation for those county and township officers not otherwise fixed by law. The salaries of the deputies of the county auditor, county treasurer, county recorder, and clerk of the district court are otherwise fixed by law. Section 340.4, Code of Iowa (1979), requires the county auditor, county recorder, county treasurer and clerk of the district court to certify to the board of supervisors the salaries of their deputies. Section 340.4 imposes a maximum on those salaries. This provision is unlike Section 340.8 which authorizes the board of supervisors to set the salaries of deputy sheriffs. Moreover, the last sentence of 340.4, by specifically

stating that the board shall set the compensation of the rest of the employees, implies that the board does not set the salary of the deputies.

All the board of supervisors is required to do is to certify to the county auditor the salaries of those deputies that have been reported to the board by the elected officials. The board cannot be required to certify to the county auditor a salary in excess of the maximum set in Section 340.4. The board is not required by statute to certify the salaries as a percentage.

The second question of your opinion request was posed by you as follows:

"The second question involves the use of motor vehicles owned by the county and used and operated by the board of supervisors. Section 332.3, subsection 18, Code of Iowa (1977), allows the county board of supervisors to own and operate automobiles for the sheriffs department and to 'operate a service garage for the purpose of servicing automobiles or other vehicles owned and operated by the county in performance of its duties'. Therefore, there appears to be authority for the county to operate and repair vehicles for other than sheriff's office. However, section 331.22, as amended by Acts of the 67th General Assembly 1978 Session, chapter 1118, section 1, clearly specifies that the annual salary of the board of supervisors shall be that amount determined under 348.6 of the Code together with reimbursement for mileage expense incurred while engaged in the performance of official duties. Th question is: can the board of supervisors, in lieu, of accepting mileage reimbursement, use county vehicles for traveling to and from official county business?"

Section 331.22 permits the members of the county board of supervisors to be reimbursed "for mileage expense incurred while engaged in the performance of official duties." From this language, we cannot conclude that board members are forbidden to use county cars in the performance of their official duties. It is true that the board members have no specific statutory authorization to use county cars, but this is true regarding all county officials and employees other than members of the sheriff's department. Section 332.3(18) indicates that cars are "owned and operated by the county in the performance of its duties" in addition to those used by the sheriff's office.

With the recent adoption of the County Home Rule Amendment, Article III (§39A) of the Iowa Constitution, counties need no longer seek express statutory authority for each exercise of governmental power in the determination of local affairs. The authority of members of the county board of supervisors to use county cars for county business is a local affair. Since there is no statutory provision which precludes this activity, the board of supervisors may decide to permit members to use cars for county business.

April 11, 1979

IOWA STATE ASSOCIATION OF COUNTIES: STATUTORY RESTRICTIONS ON COLLECTION OF "REGULAR MEMBERSHIP DUES" AND "SERVICE FEE". §332.3 (27), Code of Iowa (1979). A collection once each year of "regular membership dues" and "service fees" in a membership fees statement for 1979", by the Iowa State Association of Counties is in violation of §332.3 (27) of the 1979 Code of Iowa if the total assessment collected from all member counties is in excess of $75,000 per annum. (Hagen to Richard Johnson, Auditor of State, 4-11-79) #79-4-13 (L)

April 12, 1979

CRIMINAL LAW: Disposition of seized property. Section 809.2, Supplement to the Code 1977. A notice of forfeiture hearing must be issued by the clerk of court, although not necessarily served or published, within forty-eight consecutive hours, excluding those falling on a Sunday, after the last official act of possession completing a seizure of the property. At a minimum, service upon known persons must be by mailing; service upon unknown persons must be by publication pursuant to the Iowa Rules of Civil Procedure. (Dallyn to Poffenberger, State Representative, 4-12-79) #79-4-14

The Honorable Virignia Poffenberger, State Representative: You have requested an opinion of the Attorney General concerning the notice provisions of Section 809.2, Supplement to the Code 1977. You pose the following question for our consideration:

"1. How is Section 809.2, Supplement to the Code 1977, requiring that a notice of hearing be issued by the clerk of court within forty-eight hours of the seizure of property via a search warrant, to be construed?"

Chapter 809, Supplement to the Code 1977, entitled "Disposition of Seized Property," is Iowa's general "forfeiture statute" by which property seized upon warrant, or incident to arrest is either returned to its rightful claimant or forfeited to the state for conversion or destruction. Sections 809.1, 809.5, 809.6, Supplement to the Code 1977. Chapters 808 and 809, Supplement to the Code 1977 revise and replace the prior chaptor on search and seizure, Chapter 751, Code of Iowa (1977). Section 809.2 consolidates and significantly abbreviates the provisions for notice and service previously contained in Sections 751.16, 751.17, Code of Iowa (1977). Your question on the forty-eight hour provision necessarily raises several other related issues inherent in Section 809.2, Supplement to the Code 1977. These issues, procedural in nature, involve determining the scope of notice, time, and manner of service required under Section 809.2, which states:

"809.2 NOTICE OF HEARING.

The clerk of court shall issue a notice of a hearing, containing a reasonable description of the property and the time, place, and cause of its seizure, within forty-eight hours of the time of its seizure. Such notice shall be reasonably calculated to apprise affected persons of the pendency of the hearing."

Iowa forfeiture proceedings, though quasi-criminal in nature, are civil in form; therefore, the civil element is procedurally determinative in shaping the form of the action. *State v. Search Warrant*, 234 N.W.2d 874 (Iowa 1975). As the property seized is the subject matter of the litigation, forfeiture proceedings are a classic example of civil "in rem" actions. See *State v. Merchandise Seized*, 225 N.W.2d 921 (Iowa 1975); *Restatement* (2d) *of Conflict of Laws* ch. 3, Explanatory Notes, at 103-104 (1971). By virtue of their civil nature, forfeiture proceedings are thus governed by those Iowa rules and case law relevant to civil procedure.

In construing the notice provisions of Sections 751.16 and 751.17, Code of Iowa 1977) (the precursor of Section 809.2, Supplement to the Code 1977), the Court in *State v. Kaufman*, 201 N.W.2d 722 (Iowa 1972), found that the procedures outlined therein were jurisdictional and mandatory. *Id.* at 724. Noting that forfeitures are not favored in other areas of the law and that forfeiture statutes should be strictly construed, the

Court held that failure to comply with these notice requirements divested the trial court of jurisdiction to forfeit property to the state. *Id.* at 723-724. Absent any language in the present statute to the contrary, the notice procedures of Section 809.2, Supplement to the Code 1977, continue to be jurisdictional and must be strictly followed. That these requirements are mandatory is reinforced by the use of the word "shall" in Section 809.2, which imposes a duty of performance on the actor. Section 4.1(36), Code of Iowa (1979) (The word "shall" imposes a duty). See *State v. Kaufman*, 201 N.W.2d 722 (Iowa 1972).

The first sentence of Section 809.2 requires the clerk to "issue a notice of hearing . . . within forty-eight hours . . . ." The words "issue" and "serve" are not interchangeable terms of art. A notice is "issued" when it is put in proper form and delivered to an officer for service, or mailed to or deposited with a newspaper for publishing, but it is not "served' until all those acts which constitute service have been performed, or the party has waived form and accepted service. *Oskaloosa Cigar Co. v. Iowa Cent. Ry. Co.*, 89 N.W. 1065 (Iowa 1902) (not officially reported). Thus, the clerk need only draft a proper notice and mail it, or deliver the same to an officer, within that initial forty-eight hour period. It is not necessary that the potential claimants receive it within that forty-eight hour period.

The required contents of a notice issued pursuant to Section 809.2 are listed therein. The requisites of process are matters of statutory regulation, and notice must contain whatever the applicable statute prescribes. *Parkhurst v. White*, 254 Iowa 477, 118 N.W.2d 47, 50 (1962). The Court in *State v. Kaufman*, 201 N.W.2d 722 (Iowa 1972), indicated that the requirement in Iowa's prior forfeiture statute, Section 751.16, Code of Iowa (1977), that the notice be addressed, "To all persons whom it may concern," was jurisdictional and an omission of the same could not be cured by actual notice to a known claimant. *Id.* at 723-724. Thus, at a minimum, notice pursuant to Section 809.2 must include a description of the property seized, the time and place where it was seized, and the reason for its seizure. Section 809.2, Supplement to the Code 1977. The notice should also include a description of the hearing, as well as the time, place, and manner in which it will be held, so as to reasonably notify and apprise affected persons of the hearing itself. *Id.*

Such a notice is to be issued "within forty-eight hours of the time of [the property's] seizure." Section 809.2, Supplement to the Code 1977. You raise in your request the potential hardship that a strict construction of this statute would work in rural counties where the magistrate is part time, the clerk's office is of limited staffing, and the newspapers are weekly or bi-weekly. However, the statutory language is clear; issuance shall occur within forty-eight hours of seizure. The Court in *State v. One Hundred Twenty-Six Dollars*, 251 N.W.2d 217 (Iowa 1977) held that a similar forty-eight-hour timetable under the 1973 Code (notice of forfeiture hearing to be issued within forty-eight hours of the return) was mandatory, and that a failure to observe this timetable divested the trial court of jurisdiction to order forfeiture.

Nor is the present forty-eight hour provision qualified by any language suggesting any flexibility in adherence to this time requirement. This

stands in marked contrast to the language of Iowa R. Crim. P. 2(1) which provides that "an officer . . . shall take the arrested person without unnecessary delay before a committing magistrate . . . ." "Unnecessary delay" is then defined by Iowa R. Crim. P. 1(2)(c) as being "any *unexcused* delay longer than twenty-four hours . . . ." (emphasis added). The reasonableness or excuse for delay is then determined based on a number of factors considered by the Court. See [1978] O.A.G. #78-12-22. There is no analogous provision for good cause in Section 809.2 as a justification for delay in the issuance of the notice beyond the forty-eight hour limitation. Iowa has long recognized the rule that where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself. *Dingman v. City of Council Bluffs*, 249 Iowa 1121, 90 N.W.2d 742, 746 (1958). See *State v. Kaufman*, 201 N.W.2d 722 (Iowa 1972) (forfeiture statutes are to be strictly construed. As a practical matter, this means that part-time magistrates or clerks will have to be "on-call" or otherwise available to file a returned warrant and issue a timely notice when necessary to avoid a jurisdictional default.

While the forty-eight hour maximum is fixed, computation of the same is subject to other Code sections. The forty-eight hour period is not subject to extension pursuant to Section 4.1(22), Code of Iowa (1979). That provision deals with time periods measured in days with respect to commencing actions, filing pleadings, or perfecting appeals. Where by the language of a particular statute the last day for the commencement of an action falls on a Saturday, Sunday, or holiday, then the time therefor shall be extended to include the next *day*. Section 4.1(22), Code of Iowa (1979). Section 809.2, Supplement to the Code 1977, does not speak to commencing actions in terms of days; it expressly requires issuance of the notice within forty-eight hours. While the Iowa Supreme Court has not ruled directly on this point, the logical conclusion, supported by sister-state authority, is that this provision of Section 809.2, styled in terms of hours, is not subject to Section 4.1(22), Code of Iowa (1979). See *Ex Parte Schnapka*, 149 Mich. 309, 112 N.W. 949 (1907).

The general rule that fractions of days are not recognized at law does not apply to acts or proceedings under statutes containing requirements measured in hours. 86 C.J.S., *Time*, Section 17 (1954). In computing time under such requirements, the hours are to be counted as they move forward in consecutive order, and, in computing a period of hours, public holidays as well as Sundays are to be included, *except* where the doing of the act in question on Sunday or a holiday is prohibited by statute and hence illegal. *Id.*

While Section 4.1(22) Code of Iowa (1979) is inapposite by its terms, Section 605.18, Code of Iowa (1977), expressly provides that "no . . . judicial business can be transacted on Sunday, except to . . . (4) perform such other acts as are provided by law." No concomitant provision exists in regards to Saturdays or holidays. A reading of relevant acts suggests that these sections permit exceptions for the issuance by the clerk of notices and writs on Sundays only pursuant to express statutory authority and conditions contained in each individual chapter. See Sections 626.6, 626.7, 639.5, 639.16, 643.3, 643.5, 667.2, 667.3, Code of Iowa (1977); Ia. R. Civ. P. 57. Such an express exception is not provided in Chapter

809, Supplement to the Code 1977. Therefore, the proper computation of the forty-eight hours allowed under Section 809.2 is to commence with the first hour after seizure of the property and to count thenceforth in consecutive hourly order. Any computation is to cease with the advent of any Sunday hours, and is to recommence at the point left off with the first hour on Monday. If a seizure occurs on a Sunday, then computation is to initially commence with the first hour on Monday. See Section 605.18, Code of Iowa (1977); 86 C.J.S., *Time*, Section 17 (1954). All days of the week mentioned refer to the 24-hour period beginning at 12:00 a.m. and ending at 11:59 p.m. of said day. It should be noted at this point that Saturdays are not excluded from the computation of time under Section 809.2. Therefore, if the forty-eight hour time limit expires on a Saturday, the clerk must issue the notice prior thereto, even if this means doing so on Saturday itself. This requirement is equally applicable to any other holiday other than one falling on a Sunday.

The requirement that notice be issued within forty-eight hours after the time of seizure of the property raises the problem of when computation of time begins in those situations where multiple items of property are involved in a seizure that necessarily extends over a protracted time period. The term, "seizure of property," as used in Section 809.2, Supplement to the Code 1977, technically means more than merely viewing or searching through the goods; rather, it is the sum of the acts performed by an officer of the law in taking forcible possession of goods or porperty in consequence of a violation of public law. See *Moss v. Williams*, 152 Iowa 686, 133 N.W. 120 (1911); *Carey v. Insurance Co.*, 18 Wisc. 80, 54 N.W. 18 (1893). In view of this, it appears that the "time of seizure" occurs when the last act necessary to complete the transfer of possession of all property seized pursuant to a particular arrest or warrant has occurred. Thus, the running of the forty-eight hours commences with the completion of the last component act of a seizure, notwithstanding the length of time required to reasonably complete that seizure.

Section 809.2, Supplement to the Code 1977, makes no express provision for service of the required notice, except to state that "such notice shall be reasonably calculated to apprise affected persons of the pendency of the hearing." However, there are several constitutional and statutory requirements of notice and service that must be met before an effective forfeiture proceeding can be had. Procedural due process requires that certain procedural steps be taken before a person is deprived of his property, including reasonable notice of the proceedings and the right to be heard. U.S. Const. amend. V, XIV. See *In Re Lemke's Estate*, 216 N.W.2d 186 (Iowa 1974). The U.S. Supreme Court, in *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950), set forth the standard of procedural due process as:

"notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . .

"The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.*, at 314.

The issue in *Mullane* concerned the type of notice of periodic accounting of investment transactions that should have been given to the beneficiaries of a common trust fund. The Court decided that published notice

was not sufficient to apprise those beneficiaries whose names and addresses were known to the trustee or could be ascertained with reasonable diligence since it was not a method which would be employed by "one desirous of actually informing the absentee . . . ." The Court authorized the use of the mails for giving notice to members of this class of known beneficiaries, undoubtedly believing that the mail would provide effective notice in the vast majority of cases. The Court went on to conclude that the statutory notice by publication was sufficient in the case of unknown beneficiaries or contingent beneficiaries whose whereabouts did not come to the trustee's attention in the normal course of business.

As a civil action, manner of service in a Section 809 proceeding is subject to Rule 82 of the Iowa Rules of Civil Procedure. This rule provides that, in an action begun by seizure of property, any written notice required shall be served upon the person having custody or possession of the property at the time of its seizure by delivering a copy to him or by mailing it to him at his last known address. Iowa R. Civ. P. Supplement to the Code 1977, that all "affected persons" be apprised of 82(a), (b). Reading this provision with the requirement of Section 809.2, the action, the *Mullane* standard for service on known parties would be satisfied by that method outlined in Iowa R. Civ. P. 82(b), i.e., personal service or service by mail upon all known persons whose interests may be affected by the hearing.

In the case of property that is unclaimed or for which there are multiple claimants, some of whom are unnkown, service by publication is effective as to those unknown claimants both under the *Mullane* standard and under Iowa case law. *Van Gundy v. Van Gundy*, 244 Iowa 488, 56 N.W.2d 43, 46 (1953). See *Esterdahl v. Wilson*, 252 Iowa 1199, 110 N.W. 2d 241 (1961). As a practical matter, service of the notice should at a minimum be by both mailing (or personal delivery) and publication as this method should reasonably insure legally effective service to known claimants as well as to those unknown persons of which the clerk would be unaware. Posting is no longer an effective means of service, as authorization for posting is not expressly provided for in Chapter 809, Supplement to the Code 1977, and Iowa R. Civ. P. 369 provides that notice by posting shall not have legal effect except where expressly authorized by statute.

The manner of publication of notice is obviously not provided for in Chapter 809, Supplement to the Code 1977. Nevertheless, great care must be taken in effecting this type of notice. Quality of notice by publication, which may never come to the attention of an affected party, is measured with greater strictness than that of notice personally served. *Kraft v. Bahr*, 256 Iowa 822, 128 N.W.2d 261, 263 (1964). Rule 62 of the Iowa Rules of Civil Procedure, together with Chapters 617 and 618, Code of Iowa (1977), provide an indisputably valid method of service by publication in general civil causes. In the absence of statutory authorization to the contrary in Chapter 809, this manner of publication should be followed. Cf. Section 633.40(2), Code of Iowa (1977) (notice of probate to unknown persons may be served by publication within the time and in the manner provided by the Rules of Civil Procedure). As noted earlier, it is not necessary that actual publication occur within that initial forty-eight hour period of Section 809.2. It is only necessary that the clerk

either deliver a notice to the newspaper for publication, or deposit the notice and instructions for publication in a United States mailbox, addressed to the newspaper, within that forty-eight hour period.

In summary, a notice of hearing, pursuant to Section 809.2, Supplement to the Code 1977, must be issued by the clerk of court, although not necessarily served or published, within forty-eight consecutive hours, excluding those falling on a Sunday, after the last official act of possession completing a seizure of the property. At a minimum, service upon known persons must be by mailing; service upon unknown persons must be by publication pursuant to the Iowa Rules of Civil Procedure.

April 17, 1979

STATE FAIR BOARD: Leasing of Fairgrounds — Chapter 173, Code of Iowa (1979). The Fair Board may lease the fairgrounds to private interests although a small part of the land was acquired by condemnation. (Condon to Connors, State Representative, 4-17-79) #79-4-15(L)

April 17, 1979

ANTITRUST: MUNICIPALITIES. Chapter 73, Code of Iowa, 1979. The holding of the United States Supreme Court in the case of *City of Lafayette v. Louisiana Power and Light Company*, 435 U.S. 387, 55 L.Ed.2d 364, 98 S.Ct. 1123 (1978), does not prevent compliance by municipalities with the preference for Iowa products, produce, coal and labor statutorily required by Chapter 73. (Heintz to Rush, State Senator, 4-17-79) #79-4-16 (L)

April 17, 1979

COUNTIES: Compensation of county engineer pursuant to Chapter 28E agreement between county and cities. Article III, Section 31, Iowa Constitution; Chapter 28E and §309.18, Code of Iowa (1979). Pursuant to the Chapter 28E agreement between Kossuth County and several cities in Kossuth County, the money which is reimbursed to the Kossuth County Secondary Road Fund by the cities is a portion of the Kossuth County Engineer's total salary set by the Kossuth County Board of Supervisors, not in addition thereto. The overpayment to the county engineer could be legalized by the legislature. (Condon to Soldat, Kossuth County Attorney, 4-17-79) #79-4-17 (L)

April 19, 1979

TAXATION: Refunding Erroneous or Illegally Exacted Property Tax— §§441.37, 441.38, 445.60, Code of Iowa, 1979. If the assessor has the power and jurisdiction to determine whether all or any part of the property of the taxpayer is taxable, and, thereafter, the taxpayer fails to pursue his or her legal remedies provided for in §§441.37 and 441.38 for any errors or irregularities he or she believes that the assessor or board of review has made, the taxpayer waives his or her right to seek a refund for any taxes paid from the board of supervisors under the provisions of §445.60. (Kuehn to Willis, 4-19-79) #79-4-18

Mr. Kent B. Willis, Calhoun County Attorney: You have requested an opinion of the Attorney General regarding the obligations of the Calhoun County Board of Supervisors to refund real property taxes regarding certain years in which the Good Samaritan Home, located in Calhoun County, filed for an exemption from property tax by claiming to qualify for an exemption within the provisions of §427.1(9), Code of Iowa, 1979. Section 427.1(9) states:

"427.1 Exemptions. The following classes of property shall not be taxed:

* * *

"9. Property of religious, literary, and charitable societies. All grounds and buildings used or under construction by literary, scientific, charitable, benevolent, agricultural, and religious, institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used or under construction with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment. All such property shall be listed upon the tax rolls of the district or districts in which it is located and shall have ascribed to it an actual fair market value and an assessed or taxable value, as contemplated by section 441.21, whether such property be subject to a levy or be exempted as herein provided and such information shall be open to public inspection."

Section 445.60, Code of Iowa, 1979, states:

"445.60 Refunding erroneous tax. The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

However, after the Good Samaritan Home (hereafter referred to as the taxpayer) filed for an exemption from property taxes for the particular year or years in which it claimed an exemption under the provisions of §427.1(23), it failed to appeal to the district court under §441.38, Code of Iowa, 1979, the actions of the board of review which held that the taxpayer did not qualify for an exemption under §427.1(9). Instead of appealing to the district court the board of review's determination to deny an exemption, the taxpayer filed for a refund of taxes it paid for the years it requested an exemption under the provisions of §445.60.

Sections 441.37 and 441.38, Code of Iowa, 1979, state:

"441.37 Protest of assessment-grounds. Any property owner or aggrieved taxpayer who is dissatisfied with his assessment 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 . . . Said protest must be confined to one or more of the following grounds: . . .

"2. That his property is assessed for more than the value authorized by law, stating the specific amount which the protesting party believes his property to be overassessed, and the amount which he considers to be its actual value and the amount he considers a fair assessment.

"3. That his property is not assessable and stating the reasons therefor.

* * *

"After the board of review has considered any protest filed by a property owner or aggrieved taxpayer and made final disposition of the protest, the board shall give written notice to the property owner or aggrieved taxpayer who filed the protest of the action taken by the board of review on the protest.

"441.38 Appeal to district court. Appeals may be taken from the action of the board of review with reference to protests of assessment, to the district court of the county in which such board holds its sessions within twenty days after its adjournment. No new grounds in addition to those set out in the protest to the board of review as provided in section 441.37 can be pleaded, but additional evidence to sustain said grounds may be introduced. The assessor shall have the same right to appeal and in the same manner as an individual taxpayer, public body or other public officer as provided in section 441.42. Appeals shall be taken by a written

notice to that effect to the chairman or presiding officer of the board of review and served as an original notice."

The legislature has made it clear that the assessor has the power and jurisdiction to determine whether all or any part of the property of the taxpayer is assessable and thereafter, if the taxpayer does not agree with the assessor's determination, it can file a protest with the board of review under the provision of §441.37. Section 427.1(23), Code of Iowa, 1979, states:

"23. Statement of objects and uses filed. Every society or organization claiming an exemption under the provisions of either subsection 6 or subsection 9 of this section shall file with the assessor not later than February 1 of the year for which such exemption is requested, a statement upon forms to be prescribed by director of revenue, describing the nature of the property upon which such exemption is claimed and setting out in detail any uses and income from such property derived from such rentals, leases or other uses of such property not solely for the appropriate objects of such society or organization. *The assessor, in arriving at the valuation of any property of such society or organization, shall take into consideration any uses of the property not for the appropriate objects of the organization and shall assess in the same manner as other property,* all or any portion of the property involved which is leased, let or rented and is used regularly for commercial purposes for a profit to any party or individual. *In any case where a portion of the property is used regularly for commercial purposes no exemption shall be allowed upon property so used and the exemption granted shall be in the proportion of the value of the property used solely for the appropriate objects of the organization, to the entire value of the property.* No exemption shall be granted upon any property upon or in which persistent violations of the laws of the state of Iowa are permitted. Every claimant of an exemption shall, under oath, declare that no such violations will be knowingly permitted or have been permitted on or after January 1 of the year for which a tax exemption is requested. Claims for such exemption shall be verified under oath by the president or other responsible heads of the organization." (Emphasis supplied)

In order to determine whether or not the taxpayer can still request a refund under §445.60 in spite of the fact it failed to pursue its remedies provided by law to correct any errors that it believed the assessor and board of review committed, it is necessary to review carefully the Iowa case law interpreting §§441.37, 441.38 and 445.60. Section 445.60, Code of Iowa, 1979, has been a part of Iowa law since *Van Wagenen v. Supervisors of Lyon County,* 1888, 74 Iowa 716, was decided. Said case states:

"In 1886 Miller and Thompson, who reside in Lyon County, were duly assessed for the purpose of taxation with certain bank stock owned by them in banks incorporated under the laws of Minnesota, and situated in that state. In January, 1887, the board of supervisors, by a resolution duly passed, rebated the tax so assessed. The plaintiffs commenced this certiorari proceeding for the purpose of annulling the act of the board.

"1. The first question to be determined, it seems to us, is whether the assessment was void or merely erroneous. Miller and Thompson, as we have seen, were residents of Lyon County, and were liable to be assessed there with all the personal property owned by them. The assessing officer had the power and jurisdiction to determine that the bank shares were assessable in that county. He may have erred, but clearly, we think, the assessment was not void.

* * *

"II. The next question is in what manner such an erroneous assessment can be corrected. The uniform ruling in such a case is that the

aggrieved party must apply to the city or township board of equalization for such correction. Macklot v. City of Davenport, 17 Iowa, 379, and other cases following it. Miller and Thompson did not adopt this remedy, but, long after the time within which they were required to appear before the proper board of equalization, they applied to the board of supervisors for relief. The question is pertinent whether the board (of supervisors) had the power and jurisdiction to grant the relief it did . . . Counsel for the appellee, . . . claim that the requisite power is found in section 870 of the Code, which provides: 'The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion of a tax found to have been erroneously or illegally exacted and paid.'

* * *

"Strictly speaking, as this tax has never been exacted or paid, this statute has no application. But counsel say that, assuming that the bank shares are not assessable, it is clearly unnecessary to pay the money into the treasury and then apply to and obtain an order from the board on the treasurer to repay it. Therefore the error of the board, conceding it to have been an error, was in no respect prejudicial. This argument is specious, but not sound, for the reason that it assumes that a taxpayer who is erroneously assessed must pay the tax and then apply to the board for an order on the treasurer to refund the same, and, if the board refuses, he can maintain an action to recover the tax, although he fails to make application to the proper board of equalization to correct the erroneous assessment. *If the taxpayer is erroneously assessed, he must pursue the remedies provided by law to correct the error*, and the statute in question simply means that when the taxes have been exacted or paid, although the taxpayer has availed himself of all the remedies provided by law without obtaining the relief, the board of supervisors may direct such taxes to be refunded. *If a person pays taxes without availing himself of the remedy provided by law, it cannot be regarded as an illegal exaction*, provided the power and jurisdiction existed to make the assessment and levy. . . . *As the board of supervisors did not have the power and jurisdiction to make the abatement* it did, it follows that the action of the board may be reviewed and corrected by certiorari at the instance of a taxpayer. Collins v. Davis, 57 Iowa, 256. The judgment of the district court is reversed." (Emphasis supplied)

In 1924, the Iowa Supreme Court affirmed *Van Wagenen v. Supervisors of Lyon County* in *Griswold Land & Credit Co. v. County of Calhoun*, 1924, 198 Iowa 1240, 201 N.W. 11. This case involved an action in mandamus, after a demand for refund of property taxes was made upon the board of supervisors but refused, brought by the Griswold Land & Credit Company of Manson, Iowa, against the board of supervisors to compel a refund of certain taxes alleged to have been erroneously and illegally exacted of it. No protest was made to the board of review. In *Griswold Land & Credit Co. v. County of Calhoun*, supra, at 198 Iowa 1243, the Court sets forth the controversy as follows:

"The real nub of the controversy is the right of appellants (Griswold), under the facts admitted by the demurrer, to relief under Section 1417 (now §445.60). The question, therefore, is: What is meant by taxes found to have been erroneously or illegally exacted or paid, within the terms of this statute? *Was the remedy of appellants, of appearing before the board of review with their grievances, and, upon failure to obtain relief, of appealing to the district court, exclusive of all others, or may they maintain the present action*, notwithstanding that the irregularity complained of could have been remedied by that tribunal? The word 'erroneously' has no doubt been somewhat loosely used by this court, particularly in some of its early decisions. (Emphasis supplied)

At 198 Iowa 1244 and 1245 the court stated:

"The board of supervisors is not a taxing body. It has no authority to increase or diminish the valuation of property returned to the board

of review by the assessor in the various assessing districts. The distinction to be observed between the power of the board of review and the power of the board of supervisors is pointed out in Dickey v. Polk County, supra.

"'*If a taxpayer, by failing to pursue a remedy for the correction of irregularities in the assessment and levy of taxes, waives or loses his right to resist the collection of the taxes, the exaction of payment by the treasurer is not illegal or erroneous.* The irregularities having been waived, the assessment stands upon the tax books to be lawfully exacted, and their collection enforced by the treasurer. In that case, it could not be found that they were 'erroneously or illegally exacted or paid.' Thus an assessment which, for certain reasons, is held to be erroneous, must be corrected upon application to the board of equalization; if that remedy is not pursued, the tax may be collected. Macklot v. City of Davenport, 17 Iowa 379. In case of erroneous assessment which is to be corrected by the board of equalization, no action will lie.

* * *

"We further said, in Van Wagenen v. Supervisors of Lyon County, that:

"'If a person pays taxes without availing himself of the remedy provided by law, it cannot be regarded as an illegal exaction, provided the power and jurisdiction existed to make the assessment and levy'."

In 1977, the Iowa Supreme Court, again, upheld these earlier court decisions in *City of Council Bluffs v. Pottawattamie County*, 1977, Iowa, 254 N.W.2d 18. In this case, the city claimed that its urban development property was exempt from property tax, but the assessor did not remove the property from the assessment rolls for 1970, 1971 and 1972. The city refused to pay the taxes for said years. When the assessor refused to remove the property being taxed from the assessment rolls, the city started this action in the district court to establish its tax exempt status. The city did not, however, seek administrative relief from the assessments under §441.37 of the Iowa Code by, first, going to the board of review for relief and if denied, then, appealing to district court under §441.38. The court held that §441.37 contemplates that complaints such as one made by the city shall be first heard and decided by the board of review before judicial relief may be had.

The city argued that the property tax imposed was void because the property was exempt from taxation and, therefore, the city could go directly to the courts without first seeking relief from the board of review. The court responded to this argument at 254 N.W.2d 21 and 22 by stating:

"Whether the property was exempt from taxation under the wording of §403.11(2), of course, is the very question to be decided. The rule that administrative procedures need not be resorted to when the tax is unconstitutional or is levied without authority does not apply to questions such as the one presented here.

"[4] If the city is right, any taxpayer who claimed his property should not have been assessed at all could ignore the Board of Review and go directly to the courts; but this would manifestly be contrary to both the express provisions and the purpose of §441.37 heretofore set out. The statute permits the urban renewal property to be taxed under certain circumstances. The parties disagree as to whether these circumstances are present here. This is a matter well within the authority of the Board of Review. . . .

"[5] Neither is it any objection to say that the case need not have been first submitted to the Board of Review because it involves the

meaning of a statute, a legal issue. Virtually all questions involving a claimed exemption from taxation involve such matters. We cite a few of them only. . . .

"Evangelical Lutheran Good Samaritan Society v. Board of Review of City of Des Moines, 200 N.W.2d 509, 510 (Iowa 1972) (nursing home claiming exemption); . . .

"The only exception we have recognized to the necessity for exhausting administrative remedy before seeking judicial review is stated in Griswold Land & Credit Co. v. County of Calhoun, 198 Iowa 1240, 1245, 201 N.W. 11, 13 (1924):

" 'The rule to be deduced from the various provisions of the statute and the decisions of this court is that, unless the tax is illegal because levied without statutory authority, or levied upon property not subject to taxation, or by some officer or officers having no authority to levy the same, or is in some other similar respect illegal, *the exclusive remedy of the taxpayer is to complain to the board of review, and, in the event he is denied relief, then to appeal to the district court.*' . . .

"In the case before us the tax was levied under a statute permitting the property to be assessed under certain circumstances. The dispute concerns whether such circumstances exist. *Even if erroneously assessed because the statute had been misapplied, the tax would have been applied under color of statutory authority.* It would not be 'illegal' as that term is used in Early and Jewett. This is clearly the very type of case the statute intended to be submitted to the Board of Review in the first instance. . . .

"We hold submission of this dispute to the Board of Review was a condition precedent to the city's right to seek judicial review. Failure to exhaust this administrative remedy is a waiver of the city's right to seek redress from the courts." (Emphasis supplied)

In summary, starting in 1888, the Iowa Supreme Court has made it clear that the words "erroneously or illegally" as used in §455.60 have no application to a situation whereby the assessor has the power and jurisdiction to determine whether all or any part of the property of the taxpayer is taxable if the taxpayer fails to pursue its legal remedies as provided for in §§441.37 and 441.38. Even if erroneously assessed by the assessor because the statute was misapplied, the tax is still applied under color of statutory authority and the failure of the taxpayer to protest the erroneous assessment by following the legal remedies set forth in §§441.37 and 441.38 will result in a waiver of any irregularities or illegalities in the assessment.

Based upon the foregoing, it is the opinion of the Attorney General that the assessor had the power and jurisdiction under the provisions of §427.1(23) to determine whether all or any part of the property of the taxpayer was taxable and, thereafter, when the taxpayer failed to appeal to the district court under §441.38, the board of review's determination that the taxpayer did not qualify for an exemption within the provisions of §427.1(9), it waived its right to seek a refund for any taxes paid from the board of supervisors.

April 20, 1979

OPEN MEETINGS — PUBLIC RECORDS: §§28A.3, 28A.4, 68A.2 and 68A.3, Iowa Code (1979). Section 28A.4 requires that a news agency which has filed a request with a governmental body be provided notification of the date, time, place and tentative agenda of an upcoming meeting of the body. The governmental body is responsible for the necessary costs involved with providing such notification.

The minutes of open meetings of governmental bodies are "public records". A member of the public at large is entitled to examine and obtain copies of such minutes. The record's custodian must provide copies of the minutes only upon payment of the expenses, including the fees for postage, incurred to provide copies. (Cook to Menke, State Representative, 4-20-79) #79-4-19

The Honorable Lester D. Menke, Iowa State Representative: You have written our office seeking an opinion on the notice requirements of Iowa's "open meetings" law and on the provisions relating to "public records". You pose the following questions for our consideration:

"1. Whether §28A.4 requires that notification of the time, date, place and tentative agenda of a meeting would only have to be given to the one making the request and providing the payment for postage?

"2. Whether the law requires a governmental body to provide a copy of the minutes of meetings to individual requestors, and, if so, could the body provide them only to requestors who have provided the payment for postage"?

I.

Your first question focuses upon the manner in which notice of upcoming meetings is to be provided by a governmental body. We recently examined the public notification provisions of §28A.4[1] in our opinion to Representative Delwyn Stromer, issued April 10, 1979 (OAG number 79-4-10). We observed in that opinion that the statute imposes only minimal measures concerning the contents of notice, the manner of giving notice, and the time at which notice must be given, and does not prevent a governmental body from providing more notice than is statutorily required. We further noted that to satisfy the minimum requirements of §28A.4(1), an agency or other governmental body must give notice which includes the date, time, place, and tentative agenda of a meeting (1) to news media which have filed a request for notification with the governmental body, and (2) by posting either "on a bulletin board or other prominent place which is easily accessible to the public and clearly designated for that purpose at the principal office of the body," or, if the governmental body has no principal office, at the building where the meeting is to be held.

Of particular relevance to your question is the following excerpt from our opinion to Representative Stromer:

"The notice provisions contemplate that notice be provided the *general public* through posting, and do not expressly require a governmental body to give notice on an individual basis. An exception to this is the requirement that requesting news media be individually notified. However, while such notification is not expressly required by the law, it seems preferable

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[1] In parts relevant to this opinion, §28A.4 provides:

"1. A governmental body, except township trustees, shall give notice of the time, date, and place of each meeting, and its tentative agenda, in a manner reasonably calculated to apprise the public of that information. Reasonable notice shall include advising the news media who have filed a request for notice with the governmental body and posting the notice on a bulletin board or other prominent place which is easily accessible to the public and clearly designated for that purpose at the principal office of the body holding the meeting, or if no such office exists, at the building in which the meeting is to be held."

for a governmental body to advise an interested individual of the pertinent information concerning a meeting . . . A procedure instituting notification on an individual basis certainly promotes the underlying policy of the law in favor of open governmental business by insuring notification to those individuals who are interested enough in a particular governmental body's business to request notification. (Emphasis in original.)"

Accordingly, if the request for notice is made by an individual, other than a news media representative, a governmental body is not required by the law to provide the requested information. The posting of notice in accordance with §28A.4(1) is minimally sufficient to satisfy notification to the public at large of upcoming meetings. We emphasize, however, that a preferable procedure is to inform members of the general public of the time, date, place and tentative agenda of a meeting upon request.

With respect to the news media, §28A.4(1) requires "advising the news media who have filed a request for notice with the governmental body." By its terms, the statute does not require general notification to all news agencies of upcoming meetings. The language, "who have filed a request for notice," places the responsibility of filing upon those news agencies interested in receiving notification from a particular governmental body. In the absence of such a request, a news agency need not be notified. Thus, to partially answer your first question as it relates to the news media, only those news agencies which have filed a request with a governmental body need to be notified of upcoming meetings. Of course, as is true with members of the general public, the statute does not prohibit a governmental body from providing more notice than is minimally required. Thus, governmental agencies are free to notify any news agency of upcoming meetings even in the absence of a request.

There remains the question of the payment of postage. Can a governmental body refuse notification to a news agency which has filed a request, unless the news agency provides the payment for postage?

The law does not address the question of payment of postage. The language of §28A.4(1), "Reasonable notice shall include advising the news media . . . ," places the burden upon a governmental body to inform requesting news agencies of upcoming meetings. We note that the duty to notify individual news agencies is not limited geographically, nor are there any provisions permitting the recovery of necessary expenses incurred to provide the required notification. In the absence of such statutory authority, it appears that the governmental body is responsible for the necessary costs involved with providing notification in accordance with the duty imposed by the statute. It is thus our opinion that a governmental body cannot refuse notification to a news agency which has filed a request for notification on the basis that the news agency must provide payment for postage. The statute requires that such news agencies be provided notification and the governmental body must assume the necessary costs incident to such notification.

II.

Your second question raises the matter of examination of public records. Pursuant to §28A.3, the minutes of open meetings of governmental bodies are deemed "public records". In part, §28A.3 provides:

"Each governmental body shall keep minutes of all its meetings showing the date, time and place, the members present, and the action taken

at each meeting. The minutes shall show the results of each vote taken and the vote of each member present shall be made public at the open session. *The minutes shall be public records open to public inspection.*" (Emphasis added.)

As a result, your second question is answered by the provisions of Chapter 68A, relating to the examination of public records. Section 68A.2 provides as follows:

"Every citizen of Iowa shall have the *right to examine all public records and to copy such records*, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential. *The right to copy records shall include the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records.* All rights under this section are in addition to the right to obtain certified copies of records under section 622.46." (Emphasis added.)

Additionally, §68A.3 provides:

"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 records 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."

Reading these sections together and applying them to your question, it is apparent that a member of the public at large is entitled to examine and obtain photographic copies of the minutes of meetings of governmental bodies. Section 68A.3 provides the mechanism by which such copies may be obtained. In general, the statute requires that copying of public records be completed under the supervision of the record's custodian or an authorized deputy in a "suitable place" provided by the custodian. If it is impractical to accomplish the copying at the custodian's office, another place may be employed, at the expense of the individual seeking copies of the records. The individual requesting copies must assume "all expenses" incurred to obtain copies, as well as a "reasonable fee for the services of the lawful custodian or his authorized deputy in supervising the records" during copying.

The section imposes the duty upon the records custodian to "provide any person a reasonable number of copies . . . upon the payment of a fee", if copy equipment is available at the office of the record's custodian. The fee for such copies "shall not exceed the cost of providing the service." Thus, in those situations where copying is required to be completed by the custodian, the copies may be provided upon payment of those expenses incurred to provide such copies. The cost of postage is clearly such a cost.

Accordingly, it is our opinion that §§68A.2 and 68A.3 require a governmental body to provide a copy of the minutes of meetings to members

of the public at large who may request copies. Section 68A.3 authorizes the custodian of such minutes to provide copies of the minutes only upon payment of the expenses, including the fees for postage, incurred to provide copies of such minutes.

April 20, 1979

TAXATION: DECLARATION OF VALUE: Declaration of Value Requirements for Eminent Domain Acquisition Contracts. §§428A.1, 428A.2, 428A.4, and 428A.11, Code of Iowa, 1979. Eminent domain land acquisition contracts entered into by the State of Iowa as the grantee are not excepted from the value declaration requirements in Chapter 428A, Code of Iowa, 1979. Eminent domain tenant acquisition contracts are not subject to the value declaration requirements. A declaration of value must be submitted to the county recorder before an eminent domain land acquisition contract may be recorded. No declaration of value is required where a deed is given in fulfillment of a recorded eminent domain land acquisition contract where the deed contains such notation. The Department of Revenue has no statutory authority to except, by rule or order, eminent domain land acquisition contracts from declaration of value statutory requirements. (Donahue to Kassel, Director, Department of Transportation, 4-20-79) #79-4-20

Mr. Raymond L. Kassel, Director, Iowa Department of Transportation: You have requested an opinion of the Attorney General in regard to the applicability of the value declaration requirements of §428A.1, Code of Iowa, 1979, to land acquisitions acquired through eminent domain proceedings initiated by your Department. Specifically, in your letter you asked the following questions:

(1) Are eminent domain land acquisition contract transactions excepted from the value declaration requirements of §428A.1, Code of Iowa, 1979?

(2) Are eminent domain tenant acquisition contracts excepted from the value declaration requirements of §428A.1, Code of Iowa, 1979?

(3) Is the submission of a declaration of value to the county recorder under §428A.1, Code of Iowa, 1979, required before an eminent domain land acquisition contract may be recorded?

(4) Must a declaration of value be submitted to the county recorder when a deed is given in fulfillment of a recorded eminent domain land acquisition contract, where the deed contains a notation that the deed is given in fulfillment of the contract?

(5) May the Department of Revenue by appropriate rule or order determine that value declarations under §428A.1, Code of Iowa, 1979, need not be made for eminent domain land acquisition contracts nor for their resultant deeds or conveyances?

Section 428A.1, Code of Iowa, 1979, provides as follows:

"Amount of tax on transfers. There is imposed on each deed, instrument, or writing by which any lands, tenements, or other realty in this state shall be granted, assigned, transferred, or otherwise conveyed, a tax determined in the following manner:

"When there is no consideration or when the deed instrument or writing is executed and tendered for recording as an instrument corrective of title, and so states, there shall be on tax. When there is consideration and the actual market value of the real property transferred is in excess of five hundred dollars, the tax shall be fifty-five cents for each five hundred dollars or fractional part of five hundred dollars in excess of five hundred dollars. The term 'consideration' as used in this chapter, means the full amount of the actual sale price of the real property involved, paid or to be paid, including the amount of an incumbrance

or lien on the property, whether assumed or not by the grantee. It shall be presumed that the sale price so stated shall include the value of all personal property transferred as part of the sale unless the dollar value of said personal property is stated on the instrument of conveyance. When the dollar value of the personal property included in the sale is so stated, it shall be deducted from the consideration shown on the instrument for the purpose of determining the tax.

"*At the time each deed, instrument, or writing by which any real property in this state shall be granted, assigned, transferred, or otherwise conveyed is presented for recording to the county recorder, a declaration of value signed by at least one of the sellers or one of the buyers or their agents shall be submitted to the county recorder. A declaration of value shall not be required for those instruments described in section 428A.2, subsections 2 to 13.* The declaration of value shall state the full consideration paid for the real property transferred. If agricultural land, as defined in section 172C.1, is purchased by a corporation, limited partnership, trust, alien or nonresident alien, that portion of the declaration of value which lists the name and address of the buyer, the name and address of the buyer, the name and address of the seller, a legal description of the agricultural land, and identifying the buyer as a corporation, limited partnership, trust, alien, or nonresident alien shall be a public record. The county recorder shall not record the declaration of value, but shall enter on the declaration of value such information as the director of revenue may require for the production of the sales/assessment ratio study and transmit all declarations of value to the city or county assessor in whose jurisdiction the property is located. The city or county assessor shall enter on the declaration of value such information as the director of revenue may require for the production of the sales/assessment ratio study and transmit all declarations of value to the director of revenue, at such times as directed by the director of revenue. The director of revenue shall, upon receipt of the information required to be filed under the provisions of this chapter by the city or county assessor, send to the office of the secretary of state that part of the declaration of value which is public record. The county recorder shall not retain any copy of a declaration of value for the recorder's records, except that the county recorder shall retain for public inspection a copy of that portion of the declaration of value which is public record." (Emphasis added.)

Section 428A.2, Code of Iowa, 1979, provides as follows:
"Exceptions. The tax imposed by this chapter shall not apply to:

"1. *Any executory contract for the sale of land* under which the vendee is entitled to or does take possession thereof, or any assignment or cancellation thereof.

"2. Any instrument of mortgage, assignment, extension, partial release, or satisfaction thereof.

"3. Any will.

"4. Any plat.

"5. *Any lease.*

"6. Any deed, instrument, or writing in which the United States or any agency or instrumentality thereof or the state of Iowa or any agency, instrumentality, or governmental or political subdivision thereof is the grantor, assignor, transferor, or conveyor; and any deed, instrument or writing in which any of *such unit of government is the grantee or assignee where there is no consideration.*

"7. Deeds for cemetery lots.

"8. Deeds which secure a debt or other obligation, except those included in the sale of real property.

"9. Deeds for the release of a security interest in property excepting those pertaining to the sale of real estate.

"10. Deeds which, without additional consideration, confirm, correct, modify, or supplement a deed previously recorded.

"11. Deeds between husband and wife, or parent and child, without actual consideration.

"12. Tax deeds.

"13. Deeds of partition where the interest conveyed is without consideration. However, if any of the parties take shares greater in value than their undivided interest a tax is due on the greater values, computed at the rate set out in section 428A.1.

"14. The making or delivering of instruments of transfer resulting from a corporate merger, consolidation, or reorganization under the laws of the United States or any state thereof, where such instrument states such fact on the face thereof." (Emphasis added.)

Section 428A.4, Code of Iowa, 1979, provides as follows:

"Recording refused. The county recorder shall refuse to record any deed, instrument, or writing, taxable under the provisions of section 428A.1 on which documentary stamps in the amount evidencing payment of the tax determined on the full amount of the consideration in the transaction have not been affixed. However, if the deed, instrument, or writing, is subject to an exception provided for in section 428A.2, the county recorder shall not refuse to record the document if there is filed with or endorsed on it a statement signed by either the grantor or grantee or his authorized agent that the instrument or writing is excepted from the tax under section 428A.2. The validity of the effectiveness of an instrument as between the parties thereto, and as to any person who would otherwise be bound thereby, shall not be affected by the failure to comply herewith; nor if an instrument is accepted for recording or filing contrary to the provision hereof, shall the failure to comply herewith destroy or impair the record thereof as notice.

"The county recorder shall refuse to record any deed, instrument, or writing by which any real property in this state shall be granted, assigned, transferred, or otherwise conveyed, except those transfers exempt from tax under section 428A.2, subsection 2 to 13, until the declaration of value has been submitted to the county recorder. A declaration of value shall not be required with a deed given in fulfillment of a recorded real estate contract provided the deed has a notation that it is given in fulfillment of a contract. (Emphasis added.)

It is clear from an examination of the aforementioned statutory provisions that when an instrument, subject to the documentary stamp tax, is presented to the county recorder for recording purposes, a declaration of value signed by at least one of the sellers or one of the buyers or their agents shall also be submitted to the recorder. While a declaration of value is not required for those instruments exempt from the stamp tax as enumerated in subsections two (2) through thirteen (13) of §428A.2, real property contract transfers generally come within the ambit of §428A.2(1), which is not mentioned as excludable from the declaration of value requirements, when such contracts are presented for recordation. In addition, while the State of Iowa and its agencies would not have to submit declarations of value where they are the grantor, assignor, transferor, or conveyor, they would not fit within the exception in §428A.2(6) where they are the grantee or assignee and must pay consideration to the grantor or assignor. Where a statute lists specific exceptions, it is presumed that the legislature intended not to create any others. *Iowa Farmers Purchasing Ass'n, Inc. v. Huff*, 1977, Iowa, 260 N.W.2d 824.

Therefore, it is the opinion of this office that eminent domain land acquisition contract transactions whereby the State of Iowa or its agencies are the grantee are not excepted from the value declaration requirements in Chapter 428A of the Iowa Code.

Your second question asked if eminent domain tenant acquisition contracts would be excepted from the value declaration requirements of §428A.1, Code of Iowa, 1979, as a lease within the meaning of §428A.2(5). As you know, an eminent domain tenant acquisition contract deals with the payment of compensation for the taking of the tenant's leasehold interest in specified real property. I have been informed by the Department of Transportation Right of Way Director that an eminent domain tenant acquisition contract is in essence an assignment of a lease from the tenant to the Iowa Department of Transportation.

Section 428A.1 clearly excepts a lease from the declaration of value requirements. The question now becomes whether the assignment of a lease is also excepted from the declaration of value requirements of §428A.1.

In *Isaacson v. Iowa State Tax Commission*, 1971, Iowa, 183 N.W.2d 693, the Supreme Court of Iowa states at page 695:

"Construction of any statute must be reasonable, sensible and fairly made with the view of carrying out the obvious intention of the legislature enacting it. Construction resulting in *unreasonableness and absurd consequences will be avoided.* Krueger v. Fulton, Iowa, 169 N.W.2d 875, 877; Janson v. Fulton, Iowa, 162 N.W.2d 438, 442, 443; France v. Benter, 256 Iowa 534, 541, 128 N.W.2d 268, 272." (Emphasis added.)

The Iowa Supreme Court in *Northern Natural Gas Company v. Forst*, 1973, Iowa, 205 N.W.2d 692 at 695 stated:

". . . 'the subject matter effect, consequence, and the reason and spirit of the statute must be considered, as well as words in interpreting and construing it.' Dobrovolny v. Reinhardt, 173 N.W.2d at 840. See also Overbeck v. Dillaber, 165 N.W.2d 795, 797 (Iowa 1969)."

To construe the new statutory provisions to require a declaration of value when an assignment of a lease is presented for recordation, whereas no such value declaration was required when a lease is so presented, produces an anomalous and absurd result which would not appear to comport with legislative intent in enacting the declaration of value provisions. It makes no sense for the legislature to require a declaration of value for a lease assignment, but not for a lease. Therefore, no declaration of value is required when an eminent domain tenant acquisition contract is presented for recordation.

Your third question asks if the submission of a declaration of value to the county recorder is required before an eminent domain land acquisition contract may be recorded.

Section 428A.4 states in relevant part:

". . . The county recorder shall refuse to record any deed, instrument, or writing by which any real property in this state shall be granted, assigned, transferred, or otherwise conveyed, except those transactions exempt from tax under section 428A.2, subsections 2 to 13, until the declaration of value has been submitted to the county recorder . . . ."

Since eminent domain land acquisition contracts are not excluded from the value declaration requirements, a value declaration must be submitted to the county recorder before an eminent domain land acquisition contract can be recorded.

By your fourth question, you asked if a declaration of value is required when a deed is given in fulfillment of a recorded eminent domain acquisition contract, where the deed contains a notation that the deed is given in fulfillment of the contract.

Section 428A.4 states in relevant part:

". . . A declaration of value shall not be required with a deed given in fulfillment of a recorded real estate contract provided the deed has a notation that it is given in fulfillment of a contract."

Pursuant to this aforementioned statutory provision, a declaration of value is not required when a deed, given in fulfillment of a recorded eminent domain acquisition contract, contains a notation stating that the deed is given in fulfillment of the contract.

Finally, you asked if the Iowa Department of Revenue, by appropriate rule or order, may determine that value declarations need not be made for eminent domain land acquisition contracts nor for their resultant deeds or conveyances.

Section 428A.11, Code of Iowa, 1979, provides as follows:

"The director of revenue shall enforce the provisions of this chapter and may prescribe rules for their detailed and efficient administration."

In *City of Ames v. State Tax Commission*, 1955, 246 Iowa 1016, 71 N.W.2d 15, the Iowa Supreme Court discussed the rule-making authority of the Iowa State Tax Commission, the statutory predecessor of the Iowa Department of Revenue, at 246 Iowa 1022:

"The function of the commission is an administrative one, and it may enact reasonable rules and regulations necessary in carrying out the legislative enactments. But it may not make law, or by rule change the legal meaning of the common law or the statutes."

Since Chapter 428A clearly requires that value declarations be submitted to county recorders when eminent domain land acquisition contracts are presented for recording, the Department of Revenue has no statutory authority to negate such requirements.

As previously noted in reference to your fourth question, a declaration of value is not required when a deed in fulfillment of a recorded real estate contract is presented for recording, provided the deed has a notation thereon that it is given in fulfillment of such contract.

April 20, 1979

MUNICIPALITIES: Rural Subdivisions—§§306.3(1), 306.21, 409.4, 409.5, 409.14, and 558.65, the Code, 1979. Cities have authority to impose requirements on certain rural subdivisions pursuant to §306.21, Chapter 409 and §558.65, the Code. (Blumberg to Barry, Assistant Muscatine County Attorney, 4-20-79) #79-4-21 (L)

April 20, 1979

STATE OFFICERS AND DEPARTMENTS: Board of Nursing — Advanced Education Programs — §152.5, the Code, 1979. The Board only has authority to approve programs granting the initial nursing degree and advanced programs designed for nurses or which grant an advanced nursing degree. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 4-20-79) #79-4-22 (L)

April 24, 1979

HOUSING LAW. §§413.3(1), 413.4, 413.5, 413.9, 413.10, 413.11, 413.105, 413.125, 103A.3(4), 103A.10, 103A.22(1), 562A.14, 562A.15, Code of Iowa, 1979. The term "hereafter erected" as used in Chapter 413 of the Code refers to construction put in place after passage of that chapter. Unless a governmental subdivision has accepted the state building code as a lawful local building code, it may adopt or enact any building regulations, but such regulations must still comply with those provisions of the state building code which have statewide effect and with Chapter 413 of the Code. The Housing Law, Chapter 413, has been enforceable since 1919. There is no statutory provision in the Code which requires a city to adopt a building code. The Uniform Residential Landlord and Tenant Law requires that at the commencement of a rental term the landlord deliver premises in compliance with applicable building and housing codes materially affecting health and safety. The Housing Law requires that no rent shall be received by the owner of lawfully occupied premises in violation of section 413.105 of the Code. (Johnson to Schnekloth, State Representative, 4-24-79) #79-4-23

Hugo Schnekloth, State Representative: You have requested an opinion of this office on five questions arising from the relationship of the housing law, Chapter 413 of the Code of Iowa 1979, to city building codes. The questions you raised are as follows:

1. In chapter 413 of the Iowa Code the term hereafter erected is used. Is this a grandfather clause that exempts past construction and applies only to construction put in place after the enactment of a city building code?

2. Can a city building code allow lower standards than those required by a state statute, or are state standards minimum standards?

3. What is the date of enforcement of the present State Housing Code?

4. Must a city which does not presently have a building code (Clinton) adopt a building code?

5. Under present Iowa statutes may a landlord raise a tenant's rent to cover the cost of improvements required to bring substandard housing up to state or city standards?

1.

The answer to your first question is that in the opinion of this office the phrase "hereafter erected" as used in Chapter 413 of the Code refers to construction put in place after the passage of that chapter. The operation of that phrase as used in Chapter 413 has no relationship to the enactment or nonenactment of a city building code.

Chapter 413 is the housing law and is primarily applicable to cities with a population of fifteen thousand or more. It provides minimum requirements relative to light, ventilation, sanitation, fire prevention, egress, occupancy, maintenance and uses for "dwellings". Section 413.3 (1) defines a "dwelling" as any house or building or portion thereof which is occupied in whole or in part as the home or residence of one or more human beings, either permanently or transiently.

Chapter 103A is the state building code, which generally addresses the technology, methods and materials in the manufacture and construction of buildings and structures in the state. Chapter 103A is not limited in its application solely to "dwellings" as defined in Chapter 413. The chapters are related and section 413.11 requires that provisions of the housing law in conflict with the state building code shall not apply where the state building code has been adopted or when that code applies throughout the state. The phrase "hereafter erected" however must be examined within the context of Chapter 413 alone.

The phrase "hereafter erected" is not a defined term in section 413.3. It appears in numerous sections and is generally referred to as a group of requirements in section 413.4 as "such provisions of this chapter relative to dwellings hereafter erected as the board of health may require."

Sections 413.5 and 413.10 appear to be the only sections which make reference to dwellings erected prior to the passage of the chapter. Section 413.5 in the first paragraph addresses the alteration of dwellings erected prior to the passage of the chapter. Section 413.10 provides all required improvements upon dwellings erected prior to the date of the chapter's passage be made within one year of said date, unless extended by the health department. The Legislature apparently sought to delineate dwellings hereafter erected from dwellings erected prior to the passage of Chapter 413.

Therefore it is the opinion of this office that it was the intent of the Legislature based upon the statutory language contained with Chapter 413 that the term "hereafter erected" refers to construction put in place after the passage of that chaper. This law was enacted as Chapter 123 of the Acts of the Thirty-Eighth General Assembly in 1919.

2.

The answer to the second question you have posed is twofold.

The provisions of Chapter 413, the housing law, are the minimum requirements for an applicable city as defined in section 413.1. Section 413.9 permits a city to enact and enforce ordinances and regulations imposing requirements higher than the minimum requirements in the chapter. However, it is further provided that no ordinance or regulation shall repeal, amend, modify, or dispense with any of the said minimum requirements. Section 413.125 provides that "all charter provisions, regulations and ordinances of cities are hereby superceded insofar as they do not impose requirements other than the minimum requirements of this chapter, and except in case of such higher local requirements, chapter 413 shall in all cases govern." Therefore, on the basis of these statutory sections of the housing law, a city building code cannot allow lower standards where chapter 413 is applicable because these are minimum requirements. A city could, however, impose higher than the minimum requirements in its building code.

The second portion of our answer to your question arises from the operation of the provisions of chapter 103, the State Building Code.

As previously stated, the state building code generally applies to the technology, techniques, methods and materials in the manufacture and

construction of buildings and structures in the state. Specifically, section 103A.10(1) requires that:

1. The state building code shall, for the buildings and structures to which it is applicable, constitute a lawful local building code.

2. The state building code shall be applicable:

a. To all buildings and structures owned by the state or an agency of the state.

b. In each governmental subdivision where the governing body has adopted a resolution accepting the application of the code.

The code also applies statewide in certain specified instances which are outlined in section 103A.10(3) and (4).

The provisions of the state building code are extensive and thorough. However, section 103A.22(1) provides:

Nothing in this chapter shall be construed as prohibiting any governmental subdivision from adopting or enacting any building regulations relating to any building or structure within its limits, but a governmental subdivision in which the state building code has been accepted and is applicable shall not have the power to supercede, void or repeal or make more restrictive any of the provisions of this chapter or of the rules adopted by the commissioner.

Therefore, on the basis of the statutory language contained in section 103A.22(1), unless a governmental subdivision, which is defined in section 103A.3(4) to include a city, has accepted the state building code it may adopt or enact any building regulations. However, the governmental subdivision which enacts such regulations must still comply with those provisions of the state building code which have statewide effect, see section 103A.10, and with Chapter 413.

3.

As previously stated, the Housing Law, Chapter 413 of the Code, was originally enacted in 1919. This chapter was repealed by Chapter 1088, §199, Acts of 64th General Assembly 1972, effective July 1, 1974 and postponed to July 1, 1975 by Chapter 1212, §1, Acts of 65th General Assembly 1974. The 1972 repealing Act was then amended by Chapter 1096, §29, Acts of 65th General Assembly 1974, by deleting reference to Chapter 413 of the Code of Iowa 1971. Chapter 1096, §30, provided that it is the intent of the General Assembly in enacting §29 of this Act that Chapter 413 of the Code shall not be repealed upon the effective date of Chapter 1088, §199, Acts of 64th General Assembly 1972, and the legal doctrine that the repeal of a repealing Act does not reinstate the original statute does not apply. The original statute as reinstated has been fully effective and enforceable since 1919.

4.

There appears to be no statutory provision in the Code which requires a city to adopt a building code.

5.

Chapter 562A, the Uniform Residential Landlord and Tenant Law, applies to rental agreements entered into or extended or renewed after January 1, 1979.

Section 562A.14 of that chapter requires the landlord at the commencement of the rental term to deliver possession of the premises to the tenant in compliance with the rental agreement and section 562A.15. Section 562A.15(1)a requires that the landlord shall comply with the requirements of applicable building and housing codes materially affecting health and safety. Therefore, a landlord must deliver premises to the tenant at the commencement of the term which comply with all applicable building and housing codes at the rent price specified in the rental agreement. The landlord's obligation to maintain fit premises which comply with the requirements of applicable building and housing codes materially affecting health and safety continues throughout the tenancy, section 562A.15(1)a.

The Housing Law also has some provisions addressing the type of situation you have outlined. Section 413.105 requires that no part of a building hereafter constructed as or altered into a dwelling shall be occupied in whole or part for human habitation until the issuance of a certificate that the dwelling conforms to the requirements of that chapter relative to dwelling hereafter erected. The Supreme Court of Iowa in the case of *Mease v. Fox* 1972, 200 N.W. 2d 791, found that a landlord's implied warranty of habitability with respect to lease of residential property is a representation that there neither is nor shall be during the term of lease a violation of applicable housing law, ordinance or regulation which would render premises unsafe, unfit or unsanitary for living therein. The Court on page 796 of the opinion specifically referred to the provisions of Chapter 413:

This holding gives overdue recognition to the legislative policy for maximum housing standards expressed in Chapter 413, The Code. We are influenced by the language in that enactment, mandating it "shall be held to be the minimum requirements adopted for the protection of health, welfare and safety of the community." Section 413.9, The Code. That chapter further authorized cities to enact additional ordinances or regulations with appropriate remedies and penalties. Id. We have held the statute declaring rent uncollectible on a violation of Chapter 413 a reasonable exercise of police power and not unconstitutional. Section 413.106, The Code; Burlington & Summit Apartments v. Manolato, 233 Iowa 15, 7 N.W. 2d 26 (1942).

Therefore, no rent shall be recovered by the owner of premises during the lawful occupation of a building hereafter constructed as, or altered into, a dwelling being occupied in whole or part for human habitation in violation of section 413.105 of the Code. It would follow that a landlord may not arise a tenant's rent to cover the cost of improvements required to bring substandard housing into compliance with code requirements during the period of the present lease. However, we see no obstacle in these statutes to raising the rent in subsequent lease periods.

April 24, 1979

COST OF TREATMENT OF SUBSTANCE ABUSER: §§125.2(11), 125.47, 125.33, 204.409(2); 321.281, Code of Iowa, 1979. A county is not obligated to pay for treatment of a substance abuser who has not established residence within the county even though a court ordered the substance abuse treatment as part of a sentence in a criminal case. The Department of Substance Abuse should pay for the cost of care in this event. (Robinson to Robbins, 4-24-79) #79-4-24 (L)

April 25, 1979

COUNTIES: Publication of notices. Sections 618.3, 618.7, Code of Iowa (1979). To be eligible for designation by county officers as a newspaper to publish county notices, a newspaper must have complied with the United States postal laws regarding paid circulation for at least two years. (Condon to Neas, Audubon County Attorney, 4-25-79) #79-4-25

David M. Neas, Audubon County Attorney: This letter is in response to your request for an opinion regarding newspapers in which county notices may be published. In your request you refer to an opinion issued by this office on January 28, 1954.

Section 618.7, Code of Iowa (1979), permits county officers to "designate the newspapers in which the notices pertaining to their respective offices shall be published." Section 618.3 defines "newspaper". In so doing, two requirements are imposed. First, the newspapers must be "of general circulation that have been established, published regularly and mailed through the post office of current entry for more than two years." Secondly, the newspaper must "have had for more than two years a bona fide paid circulation recognized by the postal laws of the United States."

The 1954 opinion to which you refer in your request does not conclude that a paper must have a second class permit to qualify. Rather, it reserves that issue since the paper in question had neither the postal permit nor the "bona fide paid circulation" for two years prior to the issuance of the opinion.

Eligibility for a second class permit involves many factors other than circulation and we do not believe the legislature intended that a newspaper comply with all the requirements before it can publish county notices. Rather, it must comply only with the postal requirements regarding paid circulation.

Regarding circulation, the United States postal laws require as follows:

137.225 List of Subscribers Publications must have a legitimate list of persons who have subscribed by paying or promising to pay at a rate above nominal (see 132.228) for copies to be received during a stated time.

132.227 Free Circulation Publications Publications designed primarily for free circulation may not qualify for second-class privileges.

.228 Nominal Rate Publications Publications designed primarily for circulation at nominal rates may not qualify for second-class privileges. Persons whose subscriptions are obtained at a nominal rate shall not be included as a part of the legitimate list of subscribers required by 132.225. Copies sent in fulfillment of subscriptions obtained at a nominal rate must be charged with postage at the applicable rate in 132.13. Nominal rate subscriptions include those which are sold:

a. At a token subscription price that is so low that it cannot be considered a material consideration.

b. At a reduction to the subscriber, under a premium offer or any other arrangements, of more than 50 percent of the amount charged at the basic annual rate for a subscription which entitles the subscriber to receive one copy of each issue published during the subscription period. The value of a premium is considered to be its actual cost to the

publisher, the recognized retail value, or the represented value, whichever is highest.

Post Office Services (Domestic) 7L-44, 8-21-78, Issue 120, Sections 132.225, .227, .228.

To be a newspaper with "a bona fide paid circulation recognized by the postal laws of the United States" as required in §618.3, it must comply with the above regulations and it must have done so for two years. If the paper meets these requirements and is a newspaper "of general circulation that has (have) been established, published regularly and mailed through the post office of current entry for more than two years," county officers may select it to publish county notices.

April 25, 1979

IOWA CONST. ART. III §31; Iowa Code Sections 740.20 (1975); 721.2 (1, 5), (1979). A retirement dinner sponsored by and paid for by a municipal utility may, depending upon the circumstances, be for a "public purpose" and thus not violative of Iowa Constitution, Art. III, Section 31. (Salmons to Miller, State Senator, 4-25-79) #79-4-26

Honorable Alvin V. Miller, State Senator, Sixth District: This office is in receipt of your opinion request of March 20, 1979, concerning proper use of public utility funds. You state: "A municipally owned electric utility is planning a recognition dinner for a retiring electric superintendent. May electric utility funds be used to pay for the dinner of the superintendent and other retiring or retired trustees who are also being recognized for their community contributions?

In 1975, then Attorney General Turner wrote an opinion to State Auditor Smith in which Smith quoted:

"There appears to be a growing tendency throughout the State for Hospital Trustees, School Boards, City Councils and/or similar agencies to authorize and pay for out of public funds such affairs as parties, banquets and entertainment for employees of the agencies involved. Your opinion is respectfully requested as to whether or not Hospital Trustees, School Boards, City Council and/or similar agencies of the State have authority to expend public moneys in payment for social functions, parties, or other forms of entertainment for employees of the agency making or proposing to make such expenditures."

76 O.A.G. 69.

While failing to note that penal statutes are strictly construed in favor of the accused, *State v. Lawr*, 263 N.W.2d 747 (Iowa 1978), Mr. Turner concluded the questioned activities were in violation of Iowa Code Section 740.20 (1975), prohibiting the private use of public property, (see comparable Section 721.2 (1, 5) Code, 1979), and, in addition, possibly constituted an embezzlement.

The matters about which you inquire, however, seem different in kind from the activities of which Mr. Turner wrote. While an expenditure of public monies strictly for the gratification of public workers, their entertainment, parties, social affairs and other pleasures can be said to violate criminal laws, a retirement dinner for those who have served the public long and faithfully, sometimes no doubt beyond the call of duty with little public attention for such acts seems a small honorarium in recognition. The character and purpose of such a dinner highlights a wide contrast to the activities about which Mr. Turner wrote.

But such questions are never free from the pale of doubt. Your request presents this office with little of the facts and circumstances surrounding the proposed recognition dinner. One would have no reason to believe that those in charge of a municipal utility would spend pubilc funds frivously or unwisely on the private gatherings and merriments of those employed by it; for to do so could run close to activity construed as criminal. And there should be no suspicion that the public officers running such utilities would allow corporation resources to be spent on such things; for the suspicion undermines the trust instilled with such positions and calls into question the presumption that these officers execute their duties honestly and faithfully.

The key is 'public purpose'; public monies may be spent only for the public benefit. Iowa Constitution, Article III, Section 31; *Love v. City of Des Moines*, 210 Iowa 90, 230 N.W. 373 (1930), 64 C.J.S. *Municipal Corporations* §1835(b) (1950); 56 Om. Jur. 2d *Municipal Corporations* §591 (1971); O.A.G. March 9, 1972, at 395. And the general rule, seemingly applicable to this case is:

It si generally conceded that a municipal corporation has no implied power to expend its funds for providing refreshments, entertainment, and dinners for delegates to a convention; or for entertaining guests at a supper or ball; or for the purpose of extending hospitality or furnishing social pleasures either to citizens or invited guests.

56 Om. Jur. 2d *Municipal Corporations*, §204, at 262.

But this rule has several variants by which public funds may legitimately be spent. It has been recognized that a public purpose is served and public funds may be spent in commemorating those important historical, military and civil events in which all citizens should take an interest. *Id.*, at 263. In *Kingman v. Brockton*, 153 Mass. 255, 26 N.E. 98 (1891), the court said:

That statute authorizes the ctiy to appropriate a sum of money for the erection of a memorial hall, to be used and maintained as a memorial to the soldiers and sailors of the War of the Rebellion. This may properly be deemed to be a public purpose, and a statute authorizing the raising of money by taxation for the erection of such memorial hall may be vindicated on the same grounds as statutes authorizing the raising of money for monuments, statutes, gates or archways, celebrations, the publication of town histories, parks, roads leading to points of fine natural scenery, decorations upon public buildings, or other public ornaments or embellishments, designed merely to promote the general welfare, either by providing for fresh air or recreation or by educating the public taste, or by inspiring sentiments of patriotism or of respect for the memory of worthy individuals.

Numerous cases have held a public purpose is served in the purchase, construction and erection of public parks, monuments and memorials and commission of other public events. *United States v. Gettysburg Electric R. Co.*, 168 U.S. 668 (1896) (purchase and commemoration of battlefield); *Vrooman v. City of St. Louis*, 88 S.W.2d 189 (Mo. 1935) (construction of memorial park); *Hutcheson v. Atherton*, 99 P.2d 462 (N.M. 1940) (commemoration of centennial); *Hoyt v. Broome County*, 258 N.Y. 402, 34 N.E.2d 481 (1941) (payment of soldier's bonus); *State ex. rel. Singelman v. Morrison*, 57 So.2d 238 (La. App. 1952) (erection of statute); *Sears v. Hopely*, 103 Ohio St. 46, 132 N.E. 25 (1921) (highway monument); *Powell v. Thomas*, 52 S.E.2d 782 (S.C. 1949) (war memorial building); *Thomas v. Daughters of Utah Pioneers*, 197 P.2d 477 (Utah

1948) (pioneer museum); *Conley v. Daughters of the Republic of Texas*, 151 S.W. 877 (Tex. App. 1912) (Texas' independence memorial building); *City of Greensboro v. Smith*, 241 N.C. 363, 85 S.E.2d 292 (1955), (war memorial building and playground); *Allied Architects' Assn. of Los Angeles v. Payne*, 192 Cal. 221 P.209 (1923) (memorial hall); *Hubbard v. City of Townton*, 140 Mass. 467, 5 N.E. 157 (1886) (band concerts); *Stegmier v. Goerginger*, 218 Pa. 499, 677 A. 782 1907) (centennial celebration); *Stephens v. Chambers*, 34 Cal. App. 660, 168 P. 595 (1917); *State ex. rel. American Legion etc. v. Smith*, 235 Wis. 443, 293 N.W. 161 (1940) (American Legion convention). See, *Annot.*, 30 A.L.R. 1035 (1923); 56 Am. Jur. 2d *Municipal Corporations* §204 (1971); 65 C.J.S. *Municipal Corporations* §1835(b) (1950); 15 McQuillen, Municipal Corporations §39.21 at 38-42 (Rev. Ed. 1970).

In *Dickinson v. Porter*, 240 Iowa 393, 35 N.W.2d 66, (1948), the Supreme Court upheld the Agricultural Land Tax Credit Act against a challenge under Iowa Constitution Article III, Section 31, and established a standard, applicable here, that has been followed since. It quoted extensively 1 Cooley, Taxation, Fourth Ed., Section 189 to this effect:

> It is only in a clear case that a statute imposing a tax will be held invalid on the ground that the tax is not for a public purpose. The question is one not 'of exclusive legal logic, but is one more or less of policy and wisdom, properly determinable in light of public welfare, present and future, in a broad sense, and hence is not a pure judicial law question, except in those cases clearly outside of the twilight zone.'
>
> Money for a particular purpose may be raised by tax, it is said in one case, if there be the 'least possibility' that it will be promotive in any degree of the public welfare. . . . And still another presents the same idea in language but little different: 'To justify the court in . . . declaring the tax void, the absence of all possible public interest in the purpose for which the funds are raised must be clear and palable; so clear and palable as to be perceptible by every mind at first blush.' . . . .
>
> *Id.*, at 417.

Recently in *John R. Grubb v. Iowa Housing Finance Authority*, 255 N.W.2d 89, 93 (Iowa 1977), the Supreme Court upheld the Iowa Housing Finance Authority Act against an Article III Section 31 challenge and quoting the above-quoted language of *Dickinson v. Porter*, supra, said:

> An examination of Dickinson, supra, and decisions from other jurisdictions discloses a plain judicial intent to permit the concept of 'public purpose' to have that flexibility and expansive scope required to meet the challenges of increasingly complex social, economic, and technological conditions.

In *Talbott v. Independent School District*, 230 Iowa 949, 962, 299 N.W. 556, (1941), the Supreme Court considered the character of public employees' pensions, in a discussion that bears repeating here:

> The conclusion to be deduced from all 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 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.

If a public purpose is met by the extension of pensions which foster the creation and maintenance of an efficient and dedicated body of public servants, how may it be said it is less served when public funds are used to pay tribute to a man's years of honorable public service? Seemingly a retirement dinner is at least possibly promotive of the public welfare when the public is called to give praise to a servant's life of work in the public sector by a dinner for that purpose. Arguably, it is not clear and palpable to every mind at first blush that the small honorarium paid in a public dinner is not conducive to the maintenance of a spirited, inspired and motivated body of public workers. If the greater cost of erection of halls, statues, memorials and the celebration of great events serves to inspire a citizenry's motives of patriotism, love of country and community concern, the expenditure of far smaller amounts to commend one's community contributions can be productive of the same ends.

Under the best circumstances a recognition dinner can be seen to benefit the public, even though indirectly and intangibly. But the fear is that one retirement dinner will become many, and its high purposes lost to a moment's impulse to celebrate events and occasions of lesser deserving. The weakness is not in our laws but in ourselves. As was remarked quite early by a court granting an injunction against the expenditure of public funds to commemorate the surrender of Cornwallis:

> If fireworks and illuminations can be permitted, so may dinners, balls, and fetes of every description. It is obvious that such a power would open a door for great abuses and expenditures of the most wasteful character.

Hood v. Lynn, 1 Allen 103, (1861), quoted in 30 A.L.R. 1035, 1042 (1923).

The line to be drawn between those expenditures which may be said to violate criminal statutes and those truly yielding of public benefit cannot properly be drawn by this office. Courts have grappled with these problems for decades and no clear trend in the cases appears. Aside from saying that potential abuses in these cases can be checked by appropriate legislation, perhaps all that can be said presently is that a retirement dinner under proper circumstances and with proper motives would be upheld as 'for a public purpose'; and it is the motive for the expenditure that may insulate an officer from criminal liability. Iowa Code Section 721.2 (1979). But any retirement dinner will certainly be subject to a deserved close scrutiny and one is well advised to consider carefully the expenditure of public monies for such a purpose.

April 27, 1979

CRIMINAL LAW: BRIBERY: GIFTS AND GRATUITIES: PUBLIC OFFICIALS, §722.1, 2, Code of Iowa, 1979. Where value of business gift is very small, is given to a large group of people and not exclusively to public employees, and has obvious advertising benefits, it is unlikely that a jury or judge would find the required intent necessary to obtain a conviction under Iowa's bribery statutes. (Appel to Thompson, 4-25-79) #79-4-27

The Honorable Patricia Thompson, State Representative: We are in receipt of your opinion request of January 22, 1979, concerning the giving of pencils, letter openers, calendars, and the like by businesses to past customers, friends, other businesses, as well as to government officials, employees, and agencies. You ask whether these gifts run afoul of Iowa's

bribery statutes, §722.1 and 722.2, Code of Iowa 1979. These code sections define bribery as the giving of any benefit of value for the purpose of influencing the official acts of a public official.

As you point out in your letter, many business firms give away small items with their names and logos prominently displayed for advertising purposes. In order for an individual to be guilty of bribery, under Iowa law, the prosecution must demonstrate beyond a reasonable doubt that the offering party gave the benefit "with the intent to influence" the public official in the course of his or her official duties. Where the value of the gife is very small, is given to a large group of people and not exclusively to public officials, and has obvious advertising benefits, we think it highly unlikely that a jury or judge would find the required intent necessary to obtain a criminal conviction under the bribery statutes. If intent to influence could be proved beyond a reasonable doubt, however, convictions for violation of the bribery laws could technically occur when even small gifts are involved. Whether criminal charges would ever be brought in such circumstances would rest with the sound discretion of the county attorney. *See* O.A.G., Turner to Daggett (12-27-77, #77-12-13), Letter, Miller to Pelton and Johnson, March 21, 1979 (refusing to overrule prior bribery ruling).

We would like to renew our appeal to the legislature to modify the present unworkable statute. The felony penalties in the statute are far too harsh when the provisions arguably include even giving a calendar to a public official when only a vague, general intent to influence has been proved. If the legislature wishes to retain the inclusive character of its bribery statutes, we urge that the penalties be altered in order to make the provisions realistic and enforceable. Statutes that are openly flouted and unenforceable breed contempt for the law and are prejudicial to the administration of justice.

April 26, 1979

IOWA CODE SECTIONS 341A.18 (1979); 364.29 (1971); 400.29(4) (1979). CIVIL SERVICE; SHERIFFS AND DEPUTIES; ELECTIONS. Iowa Code Sections 341A.18 (1979); 400.29(4) (1979); 365.29 (1971). A candidate for elective office is required to take a thirty-day leave of absence before both a primary and general election. Salmons to Jensen, 4-26-79) #79-4-28

Mr. Michael Paul Jensen, Monona County Attorney: This office is in receipt of your opinion request concerning Iowa Code Section 341A.18. That section reads in material part:

any officer or candidate subject to civil service who shall become a candidate for any partisan elective office for remuneration shall, commencing thirty days prior to the date of the primary or general election and continuing until such person is eliminated as a candidate, either voluntarily or otherwise, automatically receive leave of absence without pay and during such period shall perform no duties connected with the office or position so held.

You ask:

Does the statute require a candidate, subject to civil service, to take a leave of absence from 30 days prior [to] the primary election until he/she is eliminated in the November general election *or* does the statute merely require a 30 day leave prior to the primary election and prior to the general election?

While §341A.18 has been construed neither by the courts nor this office, Iowa Code Section 365.29 (1971) has been construed to require an employee to take leaves of absence both thirty days before the primary and general elections and not one leave of absence commencing thirty days before the primary election and continuing through the general election where that employee was successful at the primary. O.A.G. August 23, 1972, a copy herewith attached.

Iowa Code Section 365.29 (1971), since repealed and reenacted with modifications in Iowa Code Section 400.29 (4) (1979), then read in material part:

Any employee who shall become a candidate for any elective office shall, commencing thirty days prior to the date of the primary or general election and continuing until such person is eliminated as a candidate, either voluntarily or otherwise, automatically receive leave of absence without pay and during such period shall perform no duties connected with the office or position so held.

Because Section 341A.18, last paragraph, is virtually identical in substance to Iowa Code Section 365.29 (1971), and because the opinion of August 23, 1972, is not clearly erroneous, it is the opinion of this office that Section 341A.18 contemplates two leaves of absence for an employee successful at a primary election, one commencing thirty day prior to the primary and the second beginning thirty days before the general election.

April 26, 1979

ADMINISTRATIVE LAW: Practice of Chiropractic. §§17A.4, 17A.8, 17A.19, 151.1, Code of Iowa (1979). Proposed rules 141.1(6) and 141.1 (17), published in 1 Iowa Administrative Bulletin, No. 19 (21 Feb. 1979), exceed the rule-making authority of the Board of Chiropractic Examiners. (Schantz to Iowa Administrative Rules Review Committee, 4-26-79) #79-4-29 (L)

April 26, 1979

COURTS: Witness Fees for Police Officers — §622.71, the Code, 1979. Where a police officer is paid by the city for testifying during off duty hours, the officer is not entitled to witness fees. (Blumberg to Miller, State Senator, 4-26-79) #79-4-30 (L)

April 26, 1979

HIGHWAYS: PRIMARY ROAD FUNDS: CONSTITUTIONAL LAW. Article 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 constitutional. O.A.G. Turner to Drake and Van Gilst (5-5-78, #78-5-3) holding §312.2 violative of Art. VII, §8 of the Iowa Constitution is overruled. (Miller and Appel to Scott, 4-26-79) #79-4-31

Senator John Scott, Iowa State Senate: We are in receipt of your letter of January 10 concerning the constitutional validity of §312.2(9), Code of Iowa, 1979, which allocates $500,000 from the Road Use Tax Fund to the Iowa Department of Soil Conservation for the acquisition of property right in land for the purpose of planting or maintaining wind erosion barriers designed to reduce wind erosion interfering with the maintenance of highways and the safe operation of vehicles. A previous opinion of the Attorney General in 1977 held that the legislation violated

Article VII, §8 of the Iowa Constitution, or the antidiversion amendment, which bars expenditures of road use tax funds for other than highway purposes. O.A.G., Turner to Drake and Van Gilst (5-5-78, #78-5-3).

As was outlined when we declined to disturb the previous ruling of the former Attorney General construing Iowa's bribery laws, the policy of this office is not to overrule previous opinions unless they are clearly erroneous. State officers and legislators are entitled to rely on the opinions of the Attorney General in the conduct of their public duties. A less rigorous approach would undermine the authority of the opinions, decrease reliance upon them, and substantially lessen their value. We, therefore, review the previous opinion with this standard in mind.

I.

On May 2, 1978, the legislature completed action on H.F. 491, Ch. 1108, Acts of the 67th G.A. (1978). The legislation provided that:

> The treasurer of state, before making the allotment provided for in this section, shall credit annually to the Iowa department of soil conservation five hundred thousand 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 of 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. (emphasis added)

Shortly after the passage of the legislation, State Senators Richard Drake and Bass Van Gilst requested an opinion of the Attorney General concerning the validity of the statute. Three days later, on May 5, the Attorney General issues a brief three page opinion which held that the statute violated Article VII, §8 of the Iowa Constitution. This constitutional provision states:

> All motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, except the 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.

The Attorney General's legal analysis was presented in the last page of the opinion. First, the Attorney General noted that the land to be purchased under the statute was not located on rights-of-way and therefore not clearly part of the highways. Cases and previous opinions of the Attorney General were then cited for the proposition that Iowa's antidiversion constitutional provision should be narrowly construed. Second, the Attorney General challenged what was characterized as the legislature's factual determination that "wind erodes them [the highways?] to the extent of interfering with the maintenance of highways in the state or the safe operations of vehicles thereon."

II.

There are three generally accepted principles of law that shape our approach to the question of whether H.F. 491 violates Article VII, §8. The first principle, rooted in the doctrine of separation of powers, is that, courts do not declare acts of the legislature unconstitutional unless there is no alternative, particularly where individual rights are not involved. Any lesser standard would fail to recognize the prerogatives of a coordinate branch of government whose members, like that of the judiciary,

are sworn to uphold the constitution. *See* O.A.G., Schantz to Rush and Walter (2-23-79, #79-2-9) (upholding combination of share drafts and usury).

This principle has been consistently applied since the early days of Iowa statehood and has been frequently affirmed in recent decisions of the Iowa Supreme Court. The language which articulates the principles can only be characterized as sweeping. The Supreme Court has declared that legislation must "be clearly, palpably, and without doubt, unconstitutional" before it is invalidated, *State v. Guardsmark, Inc.*, 190 N.W. 2d, 397, 400 (Iowa, 1971); that where the constitutionality of a provision was "only doubtful," it would not interfere, *Board of Supervisors of Linn County v. Department of Revenue*, 263 N.W. 2d 227 (Iowa 1977) that "fairly debatable" constitutionality was sufficient given the presumption of validity, *State v. Vick*, 205 N.W. 2nd 727, 279 (Iowa 1973), and that the attacking party is "required to negate every reasonable basis on which the statutes could be sustained," *Chicago Title Insurance Co. v. Huff*, 256 N.W. 2d 17, 25 (Iowa, 1977), citing *State v. Kueny*, 215 N.W. 2d, 215, 216-17 (Iowa, 1974).

The second principle, also based on separation of power doctrine, is that legislative statements of purpose and findings of fact should generally be accepted by the courts unless wholly unsupportable. As the Iowa Supreme Court recently observed, a legislative declaration of purpose is accepted "except where such absence is so clear as to be perceptible to every mind at the first blush." *John Grubb, Inc. v. Iowa Housing Finance Authority*, 255 N.W. 2d 89, 93 (Iowa 1977), citing *Dickinson v. Porter*, 240 Iowa 393, 35 N.W. 2d 66, 80 (1948). With respect to findings of fact, the courts generally accept legislative findings unless they are arbitrary on their face or have no reasonable basis, *see Harvey v. Blewett*, 151 Md. 427, 443 P. 2d 902, (Mont., 1968) (burden of proof beyond a reasonable doubt to prove legislative findings are erroneous), *Madison Metropolitan Service District v. Water Pollution Control Board*, 260 Wis. 229, 50 N.W. 2d, 424, 437 (Wisc. 1951) (unless court can say law appears unreasonable on its face and unnecessary, it must find that the facts before the legislature were sufficient to justify requirement).

The third principle is that constitutions represent broad frameworks of government. Constitutional provisions are generally interpreted broadly to achieve their underlying purpose and flexibly interpreted to meet changing times. *Bechtel v. City of Des Moines*, 225 N.W. 2d 326 (1975). With respect to highway construction, a previous Attorney General's opinion has noted that expenditures prompted by changing perceptions of human need and technology do not run afoul of the antidiversion amendment as long as the purposes are not unrelated and foreign to the highways, 68 O.A.G. 494, 501. The generous approach should apply to the construction of other terms in the antidiversion provision.

III.

With these principles in mind, we now focus on the specific question of whether H. F. 491 violates the antidiversion amendment. The 1977 Attorney General's opinion noted that the land to be acquired was not on the highway right-of-way and implied that it therefore violated the antidiversion amendment because Iowa courts had narrowly construed its scope.

We simply cannot agree. Contrary to the implication of the previous Attorney General's opinion, Iowa case law interpreting the antidiversion amendment has not run counter to this general principle that constitutional provisions are broadly construed to effectuate their purposes. For instance, the 1977 opinion relies heavily on *Frost v. State*, 172 N.W. 2d 575 (1969). But this case is wholly inapposite. In *Frost*, expenditures from the road use tax fund on an interstate highway bridge project were struck down on the ground that the funds "would not be spent exclusively within the state." This case simply applies a very specific constitutional prohibition. It has nothing to do with proper interpretation of potentially expansive terms such as "construction, maintenance, and supervision" as used within Article VII, §8. It plainly does not stand for the proposition that these general terms should be given a restrictive reading.

Indeed, the other case law cited in the 1977 opinion shows that courts in Iowa have taken a contrary approach. For instance, in *Edge v. Brice*, 253 Iowa 710, 113 N.W. 2d 755 (1962), the question presented was whether funds could be expended upon the costs of relocating displaced public utility facilities as part of a highway construction project. The jurisdictions which had previously considered the question were split with some deciding that the funds could not be spent on the ground the relocation of utility had nothing to do with highway operations, *Opinion of the Justices*, 152 Md. 449, 132 A 2d 440, (1957), *Mulhey v. Quillian*, 213 Ga 507, 100 S.E. 2d 268 (1957). But the Iowa court did not adopt a restrictive approach to the constitutional provision. Instead, the court found that the term "construction" as used in the antidiversion provision includes "all things necessary to the completed accomplishment of a highway for all uses properly a part thereof" and concluded that expenditures for relocating a utility were within its scope, 253 Iowa at 719, 113 N.W. 2d at 759. If anything, this case supports a relatively broad reading of the constitutional language.

Nothing in *Slapnicka v. City of Cedar Rapids*, 258 Iowa 382, 139 N.W. 2d 179 (1965), also cited by the 1977 opinion, suggests that the antidiversion provision should be given a narrow construction. In that case, the Iowa Supreme Court held that services under an engineering planning contract fell within the scope of the term "construction" as used in a statute passed pursuant to Article VII, §8, which provided that monies "received by municipal corporations from road use tax funds shall be used solely for the construction, repair, and maintenance of roads and streets . . . ," §312.6, Code of Iowa, 1962. Technically, of course, planning is not construction. Nothing is excavated. No concrete is laid, and no activity occurs on the right of way. But the Iowa court, relying by analogy on broad reading of the antidiversion amendment in *Edge v. Brice*, held that the term engineering planning could be paid for out of the road use tax funds. Contrast *State ex rel. O'Connell v. Slavin*, 75 Wa. 2d 554, 452 P. 2d 943 (1969).

Most opinions of the Attorney General prior to the 1977 amendment followed the lead of the Iowa Supreme Court in construing the antidiversion amendment. For instance, in 1968, the Attorney General, in upholding the use of road use trust funds for the construction of rest areas along the state's highways, observed that "the courts and the attorney general have all given a liberal interpretation to the 1942

amendment." 1968 O.A.G., at 499. This opinion cited favorably a case which upheld the expenditures of road use tax funds for the construction of off street parking, a project clearly not technically related to the construction, use or maintenance of roads. In re *Opinion of Justices*, 14 N.H. 501, 51 A. 2d 836 (1947). Similarly, in 1971, the Attorney General, in upholding the constitutionality of using road use tax funds to pay for the highway patrol, noted that the terms of the 1942 amendment was given "a somewhat liberal construction," 1972 O.A.G. at 116.

The first retreat from this approach in the Attorney General's opinion came in 1972, when he ruled that road use tax funds could not be used to purchase billboards, signs, and junk yards in an effort to beautify highways, 1972 O.A.G. 362. This apparent change in philosophy was not triggered by recent court developments. Indeed, in *Newman v. Hjelle*, 133 N.W. 2d 549 (1965), the Supreme Court of South Dakota sustained such expenditures from challenge under a similar constitutional provision. In that case, the Supreme Court of South Dakota noted that "the purpose of the amendment was to prevent any use of earmarked revenues for anything but righway purposes and not to restrict the terms of the amendment by a narrow construction of the purpose for which the revenues may be used within the area designated," 133 N.W. 2d at 557. At least one academic commentator has viewed the *Newman* approach as the soundest. *See* R. Cunningham, "Billboard Control under the Highway Beautification Act of 1965," 71 Mich. L. Rev. 1296, 1356-63 (1971).

Whatever the merits of the Attorney General's billboard opinion, we think it clear that the case before us does not begin to stretch the boundaries of the antidiversion amendment in the same fashion as beautification legislation. Here, the legislature specifically directed that the funds be expended for erosion control projects "designed to reduce wind erosion interfering with the maintenance of highways in the state or the safe operation of vehicles thereon." Surely such projects are far more closely and directly related to the "construction, maintenance, and supervision" of highways than the acquisition of highway billboards. In our view, expenditures for the purpose of reducing wind erosion "that interferes with the maintenance of highways or the safe operation of vehicles thereon" is, on its face, clearly within the scope of authorized expenditures under Article VII, §8. The fact that funds will not be expended on land located within the right of way, found so crucial in the 1977 opinion, is irrelevant.

IV.

The second argument in the 1977 Attorney General's opinion was that the legislature's factual determination that wind erosion interfered with highway maintenance or operation of vehicles was unsupportable. The opinion stated that "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." With these words, the opinion implied that the legislation was a sham effort to divert funds from the road use tax fund for unauthorized purposes.

We are not certain that the statute actually contains any factual predicates upon which validity of the statute depends. Under the legislation, the department of soil conservation is directed to expend the appro-

priated funds only for control of wind erosion that interferes with highway safety and maintenance. It may not expend funds for any other purposes. The legislative language under this approach represents a condition rather than a factual finding. If none or only a part of the money reserved can be spent for the expressed purpose, the balance must remain unexpended. Under this conditional language analysis, the statute would be valid on its face, but expenditures on specific projects could be challenged if the projects were not fairly related to wind erosion affecting the state's highways.

But even accepting the doubtful view that the factual relationship between wind erosion and highway safety and maintenance is a factual finding which is essential to the statute's validity, we do not believe a court would strike down the statute on the basis of the invalidity of the finding. Courts on rare occasions may strike down legislative findings when they are arbitrary or unreasonable on the fact of the statute or if there is no possible ground upon which the findings can be supported. *Lawton v. Stewart Dry Goods*, 197 Ky. 247 S.W. 14 (1923). But there is certainly nothing illogical on its face about the legislature's factual determination that wind blown silt from neighboring fields which blows across the highways and accumulates on road surfaces and in ditches causes maintenance and safety problems. In addition, we note that according to the Comptroller's Office, the Department of Transportation expends substantial sums each year cleaning and restoring ditches where wind blown soil accumulates with other debris. The Comptroller's figures show that DOT spent $657,359 in FY 1977, $395,080 in FY 1978, and $326,365 in the first nine months of FY 1979 for ditch cleaning purposes. (direct costs only). It is interesting to note that in FY 1977, when ditch cleaning expenditures were unusually high, Iowa was experiencing a record 15 month long dry spell -- a meteorological condition that would encourage wind erosion. *See 1977 Planting to Harvest*, Annual Crop Weather Summary (Iowa Department of Agriculture) at 2. We think these figures provide a rational basis for assuming that wind blown erosion is a major factor contributing to ditch maintenance problems along the state's highways. This view is confirmed by a recent proposal for a National Soil Center prepared by Iowa State University, which stated that "with less soil erosion, there will be large savings in the cost of removing windblown and water blown sediment from roadside ditches and drainage ways." *Soil Tilth, an Investment in the Future, A Proposal for a National Soil Tilth Center at Iowa State University of Science and Technology, Ames, Iowa*, at 5.

In addition to maintenance, we also note that wind blown soil erosion causes a safety problem on the state's highways, particularly during seasonal dust storms that occur during the first thaws in spring. We have had an opportunity to view slides of Iowa roadsides prepared by the Iowa Department of Soil Conservation. These slides not only confirm that wind erosion can be a serious maintenance problem (massive accumulations in ditches that blocked culverts; heavy equipment removing accumulation of wind blown debris on a road which would plainly pose a threat to a traveling vehicle.

Of course, there may be questions about the constitutionality of expenditures as applied under the statute. We note, however, that the soil conservation commission, in its discussions with DOT concerning the

statute being considered here, indicated it would require that conservation tlilage projects extend to affected road fences in order to qualify under the program, and that all other practices such as planting of grass strips and trees muts be adjacent to affected roads. *See* Memorandum, Wind Erosion Control Practices to be Approved for Road Use Tax Funding, 10-2-78. We think these requirements will help insure that the expenditures are actually made for highway purposes and not for collateral objectives that have no relationship to the state's highway system.

V.

In their letter requesting the 1977 Attorney General's opinion, Senators Drake and Van Gilst stated that:

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 is it 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 conflict with the provision of Article 7, §8.

Article 7, §8, contains no express restriction as to which agency in state government administers road use tax funds provided they are expended for a proper purpose. In this regard, it contrasts with the similar constitutional provisions of other states which expressly name the arm of state government that supervises the expenditures of funds. *See* Mo. Const., Art. 4, 630 (b), (funds "shall be spent under the supervision and direction of the Commission"). The case law further indicates that where there is no express restriction, none should be implied. For instance, in *Kansas ex rel Smith v. Highway Commission*, the court held that the transfer of authority for state road building from the county commissions to the state highway commission involved no substantial diversion of monies, 132 Kan. 327, 295 P. 2d 986, (1931). *See also Weeks v. Georgia State Highway Authority*, 217 Ga. 14, 120 S.E. 2d 620 (1961).

We wish to stress, however, that while any bureaucracy in state government may constitutionally administer road use tax funds, they must be spent on highway purposes. The funds cannot constitutionally be used, for instance, for the creation of ecological reserves that have no relationship to highway construction, maintenance, and supervision." And, as is clear from the express language of the present statute, the funds cannot be spent on projects where wind erosion has not posed a problem to highway operations.

VI.

To summarize, courts strain to uphold the constitutionality of legislative enactments. The impact of this rule is magnified by Iowa case authority which holds that the constitutional provisions relating to use of the road use tax funds should be broadly construed. The control of soil erosion affecting highways plainly falls within the purposes for which the funds constitutionally may be spent on highway related projects.

We think there is little doubt as to legal soundness of the above propositions. As a result, the previous opinion of the Attorney General, declaring that H.F. 491 violated Article VII, Section 8 of the Iowa Constitution is overruled. We hold that H.F. 491 meets the constitutional requirements that road use tax funds be used for highway purposes.

April 27, 1979

SCHOOLS: Art. III, §31, Constitution of Iowa, §§274.1, 274.7, 279.8, Code of Iowa (1979). Commercial photographers on school grounds. The school board of directors may permit commercial photographers to photograph students on school property. (Condon to Menke, State Representative, 4-27-79) #79-4-32 (L)

April 27, 1979

WAGES: Deductable losses §91A.5(2)(c) The Code (1977) employer may deduct from employees wages for loss of tools and equipment acknowledged as received by the employee; and for other losses as enumerated, whenever the employee demonstrates a willful or intentional disregard of the employer's interests. An employer may not deduct for damage to a third party's property. (Powers to Johnson, Deputy Commissioner, Bureau of Labor, 4-27-79) #79-4-33

Mr. Walter H. Johnson, Deputy Commissioner of Labor, Bureau of Labor: You have requested an attorney general's opinion concerning the interpretation of §5(2)(c) of the Iowa Wage Payment Collection Law, Chapter 91A, The Code (1979). More specifically, you ask whether in order to lawfully deduct from an employee's wages a loss due to breakage, loss or theft of the property, an employer must demonstrate both that an employee acknowledges receipt in writing of tools and equipment and that a loss occurred as a result of the employee's willful or intentional disregard of the employer's interest. You also raise the question of whether the property referred to in that section is limited to only the property of the employer or extends to third persons and/or customers of the employer.

The Wage Payment Collection Law creates a statutory right in employees to collect wages due them and limits deductions employers may make to certain specific items. The law began as House File 351 introduced in the 66th General Assembly (1975). The section in question as originally proposed read:

[2. The following shall not be deducted from an employee's wages:] . . . c. losses due to breakage, defective or faulty workmanship, lost or stolen property, damage to property, default of customer credit, or nonpayment for foods or services rendered so long as such losses are not attributable to the employee's willful or intentional disregard of the employer's interests.

Senate amendment 3539, concurred with by the House in House amendment 3584, amended this section to its current language:

[2. The following shall not be deducted from an employee's wages:] . . . c. losses due to breakage, lost or stolen property, unless such tools and equipment are specifically assigned to and their receipt acknowledged in writing by the employee from whom the deduction is made, damage to property, default of customer credit, or nonpayment for goods or services rendered so long as such losses are not attributable to the employee's willful or intentional disregard of the employer's interests.

The statute permits the employer to deduct for all losses enumerated in the section *whenever* the loss results from the employees willful or intentional disregard of the employer's interests. An employer may also deduct for lost or stolen property "whenever such tools and equipment are specifically assigned to and their receipt acknowledged in writing by the employee from whom the deduction is made," even though the employee has not exhibited a willful or intentional disregard of the em-

ployer's interest. If an employer had to demonstrate a willful and intentional disregard in every instance, it would be anomolous to require written acknowledgment of receipt in order to deduct for lost or stolen property, but to require none in order to deduct for breakage or damage to property. Clearly, where tools and equipment are signed for, the employee becomes responsible for their loss without requiring the employer to show willful or intentional disregard of the employer's interest. The tools and equipment referred to in the section include the tools and equipment the employee needs to perform the job duties. It would not, for instance, refer to an entire inventory. In other words, the employer cannot deduct for any of the losses enumerated in section 5(2)(c), with two exceptions:

1. Whenever the employee exhibits a willful and intentional disregard for the employer's interests or

2. Where the employee is assigned and acknowledges receipt in writing of tools and equipment which have been lost or stolen.

As to the second part of your question, in our opinion, the use of the word property in the section does not ordinarily refer to the property of a third party. An exception would be where the employer rents or leases tools or equipment for the employee to use to perform the job duties. In this circumstance, where damage or loss occurs, the employer may deduct for the damage or loss if there is a demonstration of willful or intentional disregard of the employer's interest or in the case of loss, where the employee has been assigned the equipment and acknowledged its receipt in writing. The statute was not designed to provide an automatic indemnification for all losses of the employer. If an employee has broken or damaged a third party's property, the law provides adequate remedies in tort. If the employer is held accountable for the loss, he may seek indemnity from the employee. *Graham v. Worthington*, 146 NW2d 626, (Iowa 1966). The Wage Payment Collection Law is not the vehicle for such a recovery.

April 27, 1979

SCHOOLS: Teacher termination decisions Chapter 68A, §279.15, §279.16, §279.17, The Code (1977). Decisions of neutral adjudicators rendered pursuant to §279.17, The Code (1977) are personal information in confidential personnel files and are confidential public records. (Powers to Beamer, Chairman, Public Employment Relations Board, 4-27-79) #79-4-34

Mr. John E. Beamer, Chairman, Public Employment Relations Board: You have requested an opinion of the Attorney General with respect to the status of adjudicator's decisions rendered in teacher termination hearings pursuant to Chapter 279 of the Code (1979). More specifically your request states:

Are the decisions of the adjudicator open records subject to public examination under Section 68A.2 of the Code, or confidential under 68A.7(11) or Chapter 279?

Chapter 279, The Code (1977), in Sections 15 through 18 provides a procedure to be followed by school districts in order to terminate the otherwise continuing contract of a teacher. Section 279.15 provides for a notice of recommendation of termination to be served upon the teacher not later than March 15 and grants the teacher the right to request a

private hearing before the school board. Section 279.16 provides a hearing where a majority of the members of the school board must be present. If the nonprobationary teacher is dissatisfied with the board's decision, an appeal may be taken pursuant to Section 279.17.

This appeal is to be heard by a neutral adjudicator jointly selected by the parties or selected from a list supplied by the Public Employment Relations Board. The adjudicator reviews the record made before the school board, giving weight to the findings of fact of the board. A copy of the decision of the adjudicator is given to the teacher and the secretary of the board. The decision is binding on the parties unless rejected by either party within ten days. If a party rejects the adjudicator's decision, the party must appeal to District Court within thirty days of the filing of the decision.

Chapter 68A of the Code (1977), the Public Records Act, which is an expression of legislative intent favoring full disclosure of governmental records, states in Section (2):

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. . . .

However, public records may be designated as confidential for one of eleven reasons, and thus not ordinarily subject to public disclosure. §§68A.7 The Code (1977).

A public record is defined as ". . . all records and documents of or belonging to this state or any county, city, township, school corporation, political subdivision or tax supported district in this state, or any branch, department, board, bureau, commission, council or committee of any of the foregoing. §68A.1 The Code (1977).

According to Section 279.17, three persons are entitled to a copy of the adjudicator's decision: the adjudicator, the teacher and the Board secretary.

In determining whether the decision is a public record, it is helpful to examine the language chosen to exempt the board hearing, record and decision from disclosure. §279.16 makes reference to the "private" hearing before the board and specifically exempts the board's decision and record of the hearing from Chapter 68A. Without such express exemption the board hearing would be clearly subject to the Open Meetings Law, Chapter 28A The Code (1977), since a majority of the board is required to be present. Minutes would have to be kept and the board's decision would automatically be a public record. Thus specific reference is made to Chapters 28A and 68A The Code (1977) to maintain confidentiality regarding the record and the rationale of the board's decision.

Such language is not necessary to shield the adjudicator's decision from public view. The adjudicator is an independent contractor hired by the parties to provide a neutral determination of whether a particular teacher's contract should be terminated. The adjudicator is not a ". . . state, county, city, township, school corporation," etc., thus the adjudicator's decision initially is not subject to Chapter 68A. The copy of the decision given to the teacher does not "belong to" the school corporation, it is the teacher's personal property and thus not subject to Chapter 68A.

However, the copy of the decision given to the Board secretary is a "public record" because it "belongs to" the school corporation. §68A.1 The Code (1977).

The next question is whether this copy of the adjudicator's decision falls within any of the eleven statutory exemptions which would require the record to remain confidential. Section 68A.7(11) states:

The following public records shall be kept confidential, unless otherwise ordered by the court, by the lawful custodian of the records, or by another person duly authorized to release information:

. . .

11. Personal information in confidential personnel records of public bodies including but not limited to cities, boards of supervisors and school districts.

Under the Federal Freedom of Information Act, 5 U.S.C.A. §552, disclosure is not required for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy". 5 U.S.C.S. §552(b)(6).

The courts have interpreted the section to require information to satisfy a three-part test in order to remain confidential: (1) The information must constitute a personnel, medical or similar file; (2) disclosure of information must constitute an invasion of personal privacy; (3) the severity of invasion of personal privacy must outweigh the public interest in disclosure. *Metropolitan Life Insurance Co. v. Usery*, 426 F.Supp. 150 (D.D.C. 1976).

The Supreme Court, in *Department of Air Force v. Rose*, 425 U.S. 352 (1975), explained the meaning of personnel files in holding case summaries of academy honor code violations were "similar" files and not "personnel" files.

But these summaries . . . do not contain the vast amounts of personal data, . . . which constitute the kind of profile of an individual ordinarily to be found in his personnel file: showing, for example, where he was born, the names of his parents, where he has lived from time to time, his high school or other school records, results of examinations, evaluations of his work performance.

Rose, supra at 377.

The Iowa exemption does not exempt all confidential personnel files, but merely *personal* information in confidential personnel files. §68A.7 (11) The Code (1977). Thus, in order to be exempted, the information must be personal.

The courts have not interpreted this section of the Code, but it has been interpreted in an attorney general's opinion to prohibit disclosure of the names of participants and the extent of participation in deferred pay plans. Robinson to Selden, 1974 OAG 430.

The adjudicator's decision is arrived at by reviewing the confidential record of the hearing before the school board, which was private. In most instances, the work record of the teacher will be fully aired at the hearing. Periodic evaluations of the teacher's performance will be discussed. This type of information is clearly personal in nature.

Support for this conclusion may be drawn from the statute and rules governing records of the State Merit system. Section 19A.15, The Code (1977), declares certain records public except for "personal information in an employee's file if the publication would serve no proper public purpose." By rule, the Merit Department has included service records within this exemption. IAC §570-17.4. Service Records are performance evaluations. IAC §570-13. Thus, under the merit system, employee evaluations would be material exempt from disclosure.

Unlike the federal Act, the Iowa statute merely requires the information to be personal in nature in order to remain confidential. Once the determination is made that material is personal, it qualifies as a confidential public record. Thus, the adjudicator's decision is a confidential public record and is not subject to public examination unless ordered by a court, the lawful custodian of the records, or by another person duly autohrized to release information. §68A.7 The Code (1977).

April 27, 1979

TAXATION: PERSONAL PROPERTY TAXES — Limit of Assessment, §427A.11, Code of Iowa, 1979; Ia. Const. art. III, §30; U.S. Const. amend. 14. The operation of §429A.11 results in assessed valuations which vary among assessing jurisdictions; such disparity in assessed values in turn results in nonuniform taxation in violation of the Iowa and the United States Constitutions. (Ludwigson and Griger to Jesse, 4-27-79) #79-4-35

The Honorable Norman G. Jesse, State Representative: We acknowledge receipt of your letter in which you have requested an opinion of the Attorney General regarding the constitutionality of §427A.11, Code of Iowa, 1979. Said section reads as follows:

"427A.11 Limit on assessment. For each annual assessment of personal property through the final assessment, the total assessed value of all personal property in each assessing jurisdiction shall not exceed the total actual value of all personal property in the assessing jurisdiction as of January 1, 1973, excluding livestock. The assessor shall determine the assessed value of all taxable personal property in accordance with chapter 441. If the total assessed value exceeds the limitation established by this section, the assessor shall reduce the assessed value of each taxpayer's personal property after the board of review adjourns and prior to certifying values to the county auditor, by the same percentage, so that the total assessed value of all personal property in the assessing jurisdiction shall be equal to the total actual value of all personal property in the assessing jurisdiction as of January 1, 1973, excluding livestock. The assessor shall inform taxpayers of any percentage that the value of personal property is reduced in the assessor jurisdiction by publication of notice in a newspaper of general circulation in the city or county. This section shall prevail over all inconsistent statutes."

You state that the method outlined has resulted in the application of percentages of reduction which differ among the various assessing jurisdictions, with the result that two identical pieces of personal property are assessed at different values depending upon the assessing jurisdiction in which they are located. You ask, "[i]s Section 427A.11 of the 1979 Code constitutional in that its net effect is to mandate unequal taxation of personal property?"

An examination of the operation of §427A.11 is necessary. The assessor must first assess each piece of personal property at actual or market value pursuant to §441.21, Code of Iowa, 1979. The total market values

of all property in the jurisdiction is then compared to the total assessed values as of January 1, 1973. The result of the comparison is the percentage by which the market value of each taxpayer's personal property value is reduced to arrive at current assessed value. Materials compiled and supplied by the Department of Revenue establish that the percentages of reduction employed in valuation years 1977 and 1978 varied throughout the assessing jurisdictions. For example, the percentages in throughout the assessing jurisdictions. For example, the percentages for 1978 ranged from 5% to 65%. The reasons for the disparities are twofold. First of all, it is established by the materials supplied by the Department that the aggregate values of personal property as of January 1, 1973, varied among the 118 assessing jurisdictions. Secondly, the materials show that the fluctuation in aggregate values has also varied since 1973. Thus only through pure coincidence would two assessing jurisdictions apply identical percentages of reduction in any given year. Disparity in assessed values is thus the ordinary result of, and, indeed, is invited by, the practical operation of §427A.11.

The assessing jurisdictions in Iowa consist of counties and some cities. Although many taxing districts will overlap into two or more assessing jurisdictions, all levies are ultimately consolidated into a single tax list for each county. §443.1 - .2, Code of Iowa, 1979. Thus, due to the disparity in assessed values, persons possessing taxable personal property located in taxing districts embracing two or more assessing jurisdictions will pay a different tax depending upon in which juridiction the property is located.

For example, the West Des Moines School District embraces parts of both Polk and Dallas counties. For valuation year 1978, the percentage of reduction applied in Polk County was 62% and in Dallas County was 49%. In other words, personal property was assessed at 38% of its market value in Polk County and 51% of its market value in Dallas County. Thus, for every $1.00 of market value, personal property in Dallas County was assessed 13% higher than in Polk County. The levy for any one taxing district is constant throughout the district. The disparity in values thus translates into a disparity in taxes paid.

The Iowa Supreme Court has consistently held that Art. III, §30 of the Iowa Constitution and the Equal Protection Clause of the 14th Amendment to the United States Constitution require that taxation be equal and uniform. In *Pierce v. Green*, 1940, 229 Iowa 22, 29, 294 N.W. 237, 243, the Iowa Supreme Court stated the following:

"To accomplish the purpose of the equality and uniformity provisions of the constitution it is necessary that there be uniformity, not only in the rate or percentage of taxation, but also in the rate or percentage of the valuation of property, which is taken as the base to which the rate of taxation is to be applied. It needs no mathematical calculation to demonstrate that if there be lack of uniformity in either factor of the problem of taxation, there will be lack of uniformity in the tax burden, . . . The essential of uniformity is effected whether a full or one hundred percent valuation, or a less percentage of valuation, is taken, if the same percentage is used with respect to all property of the same class."

See also *Chicago and North Western Railway Co. v. Prentis*, 1968, Iowa, 161 N.W. 2d 84, 96 and cases cited therein. Of all the Iowa case authority *Hanselman v. Humboldt County*, 1969, Iowa, 173 N.W. 2d 75,

is most applicable. In *Hanselman*, a school district included parts of both Humboldt and Kossuth counties. For the valuation year 1968, the valuations of real property were increased by approximately 34% over 1967 valuations in Humboldt County by order of the Director of Revenue. A similar increase in valuations in Kossuth County was enjoined by the Polk County District Court. Humboldt County landowners sued to enjoin the collection of taxes in both counties alleging discrimination in violation of the Iowa and United States Constitution. The Court found that "[t]he difference in valuations as between the counties of Kossuth and Humboldt results in owners of lands in Humboldt County within the school district paying $1.00 per acre more in taxes than would owners of lands of similar actual value in Kossuth County," *Hanselman v. Humboldt County*, supra, 173 N.W.2d at 78. The court held:

"It is well settled the systematic and intention valuation of a particular kind of property at a higher percentage of its actual value than that at which other kinds of property are valued, or the systematic and intentional assessment of taxes on a particular kind of property at a higher rate than that imposed on property of the same kind cannot be upheld. Raymond v. Chicago Union Traction Co., 207 U.S. 20, 42, 28, S.Ct. 7, 14, 52 L.Ed. 78; 51 Am.Jur. 229; Constitution of Iowa Art. III sec. 30. It could not be said the methods of valuation employed by Kossuth and Humboldt Counties were not systematic, nor that they were not intentional; indeed, a more 'systematic' or 'intentional' method could not be contrived. Being so systematic, intentional and deliberate, the result is grossly and unmistakably unconstitutional."

Hanselman v. Humboldt County, supra, 173 N.W.2d at 78-79.

The operation of §427A.11 results in precisely the same type of discrimination and nonuniformity as the Iowa Supreme Court found in *Hanselman*. Due to disparity in values resulting from the operation of §427A.11, uniformity of taxation is lacking in taxing districts embracing two or more assessing jurisdictions.

It is true that §427A.11 states, "[t]his section shall prevail over all inconsistent statutes." Thus, the fact that assessed value of personal property deviates from actual or market value is immaterial. However, the percentage of market value at which personal property is assessed is not uniform, and therein lies the evil. As disparity in value is the ordinary result of the operation of §427A.11, the nonuniformity is systematic. The values differ among assessing jurisdictions, and such discrimination is indeed arbitrary.

Local assessing officials cannot refuse to enforce §427A.11 on the grounds that they believe the section is unconstitutional. *See Board of Sup'rs of Linn County v. Department of Revenue*, 1978, Iowa, 263 N.W. 2d 277, 234; O.A.G. Miller to Palmer (#79-3-13, March 29, 1979). However, it is the opinion of this office that, assuming proper standing of the litigant, a court would find §427A.11 to be in violation of the Iowa and United States Constitution.

April 27, 1979

CRIMINAL LAW: Deducting court costs from cash bond. Chapter 765, Code of Iowa (1977); Chapter 811, Code of Iowa (1979). Prior to the 1978 criminal code revision, court costs incurred during criminal trial and on appeal could be deducted from a cash bond on deposit at the time of judgment, whether or not so ordered by the court. As of the

effective date of Chapter 811, Code of Iowa (1979), court costs can no longer be deducted from a cash bond posted by a defendant or third party, irrespective of whether the costs were incurred at trial or upon appeal. (Dallyn to Wilson, Marion County Attorney, 4-27-79) #79-4-36

Mr. Terry L. Wilson, Marion County Attorney: You have requested an opinion from the Attorney General concerning the deduction of court costs from a cash bond posted by a defendant under the 1979 Code of Iowa. Your specific questions were:

"1. Under the new criminal code, can the court costs of a criminal action be deducted from a cash bond that has been posted, before the balance of the cash bond is refunded?

"2. Must such be ordered by the Judge?

"3. Does it matter if the cash bond was posted by someone other than the defendant?

"4. Is the same true of a bond on appeal to Supreme Court where the original conviction is affirmed?

"5. Does it matter if the original cash bond was collected at the time the old criminal code was still in effect?"

For purposes of continuity, questions one through four will first be analyzed under the relevant provisions of the Iowa Code in effect prior to the 1978 criminal code revision, as per your fifth request above. These same four questions will then be re-examined for any changes wrought by the 1978 revision, as codified in the 1979 Code of Iowa.

Traditionally, the primary purpose of a "bail bond" has been to secure the appearance of the defendant in court when his presence is required in order to answer to that charge for which bond is given. Section 811.2, Code of Iowa (1979); *State v. Clark*, 234 Iowa 338, 11 N.W.2d 722 (1943). Iowa law has long permitted the defendant or a third party, in lieu of executing an appearance bond, to deposit with the clerk of court the cash equivalent of the sum mentioned in the court's order granting bail. Section 811.2(1)(d), Code of Iowa (1979); Section 3232, Code of Iowa (1851); See *Simmons v. Beeson*, 201 Iowa 144, 206 N.W. 667 (1926). In one of the first instances involving a cash deposit (or "cash bail") provided for a defendant by another, the supreme court construed together the forerunners of since-repealed §§765.1 and 765.4, Code of Iowa (1977), and announced the rule that a cash deposit provided by a party other than the defendant may be applied by the clerk to payment of a fine and costs assessed against the defendant, and the surplus, if any, can then only be returned to the defendant himself. *State v. Owens*, 112 Iowa 403, 84 N.W. 529, 530-531 (1900).

The rule of *State v. Owens* was recently reaffirmed, specifically as to subjecting cash bail advanced by the defendant or a third party to the statutory deduction for fine and costs provided in since-repealed §765.4, Code of Iowa (1975). *State v. Schultz*, 245 N.W.2d 316, 318 (Iowa 1976). The language of §765.4, as retained in the 1977 Code, stated:

765.4 *Disposition of deposited money.* When money has been deposited by the defendant, if it remain on deposit at the time of a judgment against him, the clerk, under the direction of the court, shall apply the money in satisfaction of so much of the judgment as requires the payment of money, and shall refund the surplus, if any, to him, unless an

appeal be taken to the supreme court, and bail put in, in which case the deposit shall be returned to the defendant.

Thus, in the case of offenses committed before January 1, 1978, cash bail deposited with the clerk of court by a defendant or a third party and unreturned at the time of judgment was, and is, subject to payment of a fine or costs adjudged against the defendant. Apparently, the clerk could enter costs in the judgment book against the defendant even where the judgment entry by the court contained no reference to the matter of costs. See *Hayes v. Clinton County*, 118 Iowa 569, 92 N.W. 860 (1902). Where the original cash bail was continued pending appeal, any costs incurred during appeal were automatically taxed to the defendant, if his conviction was affirmed, irrespective of the absence of any such provision in the appellate court's judgment entry. Iowa Rule of Appellate Procedure 28 (1977); Iowa Supreme Court Rule 23 (1977) ("All taxable fees and costs shall . . . be taxed to the unsuccessful party . . . "). Pursuant to §625.18, Code of Iowa (1977), the supreme court clerk then prepared a bill of costs which was filed with the trial court clerk and taxed with the costs of the original trial. Bail maintained on appeal was thus rendered subject to the statutory deduction contained in §765.4 for costs incurred on appeal as well as those at trial.

With the 1978 criminal code revision, the former bail provisions found in chapters 763 through 766, Code of Iowa (1977) were deleted, and chapter 811, Supplement to the Code 1977, now Code of Iowa (1979), was enacted in its place. While chapter 811 did re-enact in substance some of the sections of the old Code, the provision for deduction of court costs from cash bail, formally contained in §765.4, Code of Iowa (1977), is noticeably absent in the present Code. In fact, the Sixty-Sixth General Assembly expressly repealed chapter 765, thus clearly evincing its intent to abrogate the effect of chapter 765 as of January 1, 1978. Laws of the 66th G.A., Vol. 2, Ch. 1245, Ch. 4, §526 (1976).

With the repeal of chapter 765, Code of Iowa (1977), the rule of the line of cases from *State v. Owens*, 112 Iowa 403, 84 N.W. 529 (1900) through *State v. Schultz*, 245 N.W.2d 316 (Iowa 1976) is no longer applicable. This is because the holding of those cases, that fines and court costs can be deducted from a cash bail on deposit with the clerk at time of judgment, was expressly premised on the existence of statutory authority for such a deduction. Section 765.4, Code of Iowa (1977), quoted in *State v. Schultz*, 245 N.W.2d 316, 318 (Iowa 1976). With the repeal of the statute, the rule based thereupon is likewise abrogated.

A possible exception to this result may lie if the common law, as in effect prior to the predecessor of chapter 765, recognizes independent authority for the deduction of costs. See *State v. Buck*, 275 N.W.2d 194 (Iowa 1979). The legislature is presumed to know the common law before the original statute was enacted, and so the repeal of that statute, without a subsequent re-enactment pre-empting the matter, revives the common law as it was before the original statute. *State v. Buck*, 275 N.W.2d 194, 197 (Iowa 1979).

The initial problem with this analysis is that the statutes comprising chapter 765, Code of Iowa (1977), have been a part of Iowa law from the beginning. *State v. Schultz*, 245 N.W.2d 316, 318 (Iowa 1976), citing chapter 196, Code of Iowa (1851). Thus, prior common law holdings of

the Iowa Supreme Court on this matter are virtually non-existent. However, in looking to cases from other jurisdictions, it is clear that, in the absence of statutory authority, the trial court has no inherent or common law authority to apply a cash bail deposit to the payment of the fine and costs incurred during trial. *Isbell v. Bay Circuit Judge*, 215 Mich. 364, 183 N.W. 721, 722-723 (1921); 8 C.J.S., *Bail* §53 (1962) (cited in *State v. Schultz*, 245 N.W.2d 316, 318 (Iowa 1976). In *Isbell v. Bay Circuit Judge*, the Michigan Supreme Court reversed a trial court's order applying a cash deposit in lieu of bail bond to the payment of the fine and costs assessed against the defendant upon conviction. Noting the absence in the Michigan bail statute of any provision for the deduction of fines or costs, the court then made a detailed analysis of the common law of bail. The court determined that "under common-law criminal procedure, in the absence of special statutory provisions, the scope and purpose of bail in such cases is the appearance of the party accused at the time and place specified." *Isbell v. Bay Circuit Judge*, 215 Mich. 364, 183 N.W. 721, 722 1921). Thus, the court held that, in the absence of a statute expressly so providing, money deposited in lieu of bail cannot be taken at common law in satisfaction of a fine or costs imposed on the accused. *Id.* at 722-723.

The sole purpose of bail expressed in the 1978 criminal code revision is to "reasonably assure the appearance of the person for trial." Section 811.2(1), Code of Iowa (1979). In the absence of any further statutory grant, the common law provides no authority for deducting payment of fines or court costs from bail posted by the defendant or a third party. Thus, in answer to your questions, court costs cannot be deducted from a cash bond posted by a defendant or a third party, irrespective of whether the costs were incurred at trial or upon appeal.

April 27, 1979

STATE OFFICERS AND EMPLOYEES: Department of Revenue; decision of hearing officers. Sections 17A.15, 17A.18, 18A.19, 421.1, 422.53 (5), 1979 Code of Iowa; §§730-7.17(1), 7.17(5), Iowa Administrative Code. The decision becomes final when all administrative remedies have been exhausted. The decision of the hearing officer is a proposed decision that becomes a final decision absent a timely request for an appeal. When a timely request for appeal is made, the hearing officer's decision remains a proposed decision, unenforceable as a final decision. The decision of the Director of Revenue, on appeal, is a final decision and is enforceable as such, notwithstanding the filing of a petition for judicial review, unless the Board's decision is stayed pursuant to §17A.19(5), Code of Iowa. (McDonald to Bair, 4-27-79) #79-4-37

Mr. Gerald D. Bair, Director, Iowa Department of Revenue: You have requested an opinion of the Attorney General with respect to revocation orders issued by hearing officers pertaining to sales tax permits. Specifically, you have asked at what point in the administrative process does a contested case decision become enforceable as a final decision.

Revocations of sales tax permits are expressly made contested cases by §17A.18(3), 1979 Code of Iowa. The statutory authority governing such revocation hearings is found in §422.53(5), 1979 Code of Iowa, and reads as follows:

Whenever the holder of a permit fails to comply with any of the provisions of this division or any orders or rules of the department prescribed and adopted under this division, the director upon hearing after

giving ten days' notice of the time and place of the hearing to show cause why his permit should not be revoked, may revoke the permit. The director shall also have the power to restore licenses after such revocation.

The finality of contested case proceedings is addressed in §17A.15, 1979 Code of Iowa. Because the Iowa Department of Revenue does not preside at the reception of evidence, but rather employs a hearing officer to so preside, §17A.15(1) is inapplicable.

When the agency does not preside at the reception of the evidence in a contested case, the presiding officer shall make a proposed decision. See §17A.15(2), 1979 Code of Iowa. This proposed decision then becomes the final decision unless there is an appeal to, or review on the motion of, the agency within the time provided by rule. See §17A.15(3), 1979 Code of Iowa. On appeal, the agency renders the final decision. See §17A.15(3), 1979 Code of Iowa.

Pursuant to §§422.53(5) and 17A.11(1), Code of Iowa, the Director of Revenue has designated a hearing officer to preside at hearings concerning revocations of sales tax permits. See §730-7.17(1), Iowa Administrative Code. The decision of the hearing officer is a proposed decision which becomes a final decision absent a request for an appeal. When a timely appeal is filed, the proposed decision is automatically stayed pending the outcome of the appeal.

Appeals of sales tax revocation orders are heard by the Director of Revenue. See §730-7.17(5), Iowa Administrative Code. The decision of the Director of Revenue is a final decision, and is enforceable as such.

The filing of a petition for judicial review does not automatically stay execution or enforcement of any agency action. However, upon application, the court or the agency may order such a stay pending the outcome of the judicial review proceedings. **Therefore, an agency may enforce a final decision, notwithstanding the filing of a petition for judicial review of the final agency action, unless such final action is stayed pursuant to §17A.19(5), Code of Iowa.**

Therefore, the decision becomes enforceable as a final decision when all administrative remedies have been exhausted. The decision of the hearing officer is a proposed decision that becomes a final decision absent a timely request for an appeal. When a timely request for appeal is made, the hearing officer's decision remains a proposed decision, unenforceable as a final decision (note that the earliest time that the hearing officer's decision can become final is when the time for requesting an appeal has run without such a request).

Upon appeal of the hearing officer's decision, the decision of the Director of Revenue will be the final decision, and enforceable as such. The decision of the Director of Revenue remains a final decision despite the filing of a petition for judicial review pursuant to §17A.19, Code of Iowa, unless the Board's decision is stayed pursuant to §17A.19(5), Code of Iowa.

April 30, 1979

STATE OFICERS AND DEPARTMENTS: Department of Substance Abuse — Chapter 204, Code of Iowa (1979); 21 C.F.R. §291.505 (1978).

Under both federal and Iowa law, a physician is not required to be physically on the premises of a narcotics addiction rehabilitation program when methadone is administered to an addict undergoing treatment if the physician has delegated the authority to so administer to a pharmacist, registered nurse, or licensed practical nurse, and that individual is in fact administering the methadone. Take-home dosages of methadone are permitted if dispensed pursuant to a physician's prescription and within federal guidelines. A physician need not be on the premises when take-home dosages of methadone are dispensed if a pharmacist is present and dispensing the methadone. (Dallyn to Riedmann, Director, Iowa Department of Substance Abuse, 4-30-79) #79-4-38

Mr. Gary P. Riedmann, Director, Iowa Department of Substance Abuse: You have requested an opinion of the attorney general concerning the Uniform Controlled Substances Act, Chapter 204, Code of Iowa (1979). You pose the following questions for our consideration:

1. Is a licensed physician required to be on the premses of a state licensed and federally approved narcotics addition rehabilitation program whenever methadone is administered to a narcotic drug dependent individual for the purpose of continuing his or her dependency upon such drug in the course of providing drug abuse treatment?

2. Are "take home" dosages of methadone permitted to be dispensed by such a rehabilitation program to a narcotic drug dependent individual for his or her ultimate use off the premises of the dispenser?

3. If the answer to number 2 is yes, is a licensed physician required to be on the premises of a rehabilitation program whenever such "take home" dosages of methadone are dispensed to narcotic drug dependent individuals?

Chapter 204, Code of Iowa (1979), entitled, "Uniform Controlled Substances Act," is a comprehensive piece of legislation intended both to be a plenary intrastate regulation of the manufacture, distribution, and dispensing of controlled substances, and to be an impetus for a scheme of complementary federal-state control of the distribution of controlled substances. See *State v. Rasmussen*, 213 N.W.2d 661 (Iowa 1973). Division I states a number of definitions relevant to the act; division II schedules various drugs according to certain standards of abuse potential and medical use, and division III contains regulations for the manufacture, distribution, and dispensation of controlled substances.

Your questions involving the administering and dispensing of methadone, a synthetic narcotic drug, necessarily involve an examination of federal as well as Iowa law. Congress has been quite active in regulating narcotic drug distribution and in regulating state drug treatment programs. See Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, 84 Stat. 1236 (1970), and relevant provisions of volume 21 of the Code of Federal Regulations.

Under section 4 of the 1970 Act, the Secretary of HEW, and by delegation the Commissioner of Food and Drugs, is granted authority to determine by regulation the appropriate methods of professional practice in the medical treatment of narcotics addiction. Pursuant to 21 C.F.R. §310.304(b) (1978), the Commissioner has determined that the conditions established in 21 C.F.R. §291.505 (1978) constitute the appropriate methods of professional practice in the medical treatment of narcotics addiction with respect to the use of methadone. See also 21 C.F.R. §291.501(b) (1978).

As your request assumes the fact that the methadone treatment program has been licensed by the state and federally approved, such will not be considered as an issue in this opinion. Suffice it to say that federal law and regulation in this area create a minimum standard of control below which no program can go; state requirements then either build on this minimum or fill in gaps left in the federal legislation. To qualify for approval, a treatment program must first conform to all State requirements; the Food and Drug Administration will then consider approval only after determining the applicant's compliance with federal controlled substances laws. 21 C.F.R. §291.505(c)(5) (1978).

Your first question involves the issue of whether a licensed physician is required to be on the premises of an approved program whenever methadone is administered to an individual as treatment. "Administer" is defined similarly under both federal and Iowa law as the direct application of a controlled substance, by whatever means, to the body of the patient by either the practitioner or the patient himself. 21 U.S.C. §802 (2) (1970); §204.101(1), Code of Iowa (1979). Thus, "administering" would typically be the situation where the patient comes to the treatment premises, receives his dosage of methadone, and has ingested the same prior to leaving the premises.

Under federal regulation, a methadone treatment unit is a facility from which licensed private practitioners and community pharmacists are permitted to administer and dispense methadone. 21 C.F.R. §291.505(b)(2)(i) (1978). A "practitioner" is defined by 21 U.S.C. §802.(20) (1970) as a:

"physician dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research."

A methadone treatment program must employ a licensed *physician* for the position of medical director, but the administering of methadone need only be by a practitioner, which can be a person other than a physician as long as he is permitted to do so by the jurisdiction in which he practices. 21 C.F.R. §291.505(c), (d)(6)(d) (1978). Administration may also be effected by an agent of the practitioner if done subject to the order and supervision of the practitioner. This agent may only be a pharmacist, registered nurse, or licensed practical nurse. 21 C.F.R. §291.505(d)(6)(d) (1978).

As noted above, there is a federal requirement that a licensed physician hold the supervisory position of medical director in a program. There is also a minimum staffing requirement that there be one medical or osteopathic physician available to supervise the patient medication schedules for each 300 patients. 21 C.F.R. §291.505(d)(4) (1978). However, there is no apparent requirement that a physician be physically present on the premises during the administering of methadone by a non-physician practitioner or his agent.

As indicated earlier, Section 204.101(1), Code of Iowa (1979) defines "administer" as

"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."

Section 204.101(22) defines "practitioner" as:

"a. A physician, dentist, podiatrist, veterinarian, scientific investigator or other person licensed, registered or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this state."

Section 204.101(1), after defining "administer," then adds the following disclaimer:

"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 premise with which one begins an analysis of an issue involving controlled substances regulated under chapter 204 is that it is illegal for a person to possess or deliver a controlled substance unless *expressly* authorized by chapter 204 or state law incorporated therein. Section 204.401, Code of Iowa (1979). Physicians and their counterparts have long been accorded broad latitude in the pursuit of their practice, and, in the absence of some restriction placed thereon by the legislature, the whole field of medicine and surgery is open to the physician. *State v. Boston*, 226 Iowa 429, 284 N.W. 143, 144 (1939). The disclaimer paragraph of §204.101(1), while contained in a definitional section, is substantive in effect in that it evinces the legislature's recognition of the fact that physicians have the inherent authority by nature of their practice to delegate the administration of drugs to qualified individuals and that this authority is not to be abrogated by the effect of chapter 204. Thus, this paragraph creates a narrow exception to the general definition of "administer" by permitting those practitioners that are licensed physicians (or dentists or podiatrists) to delegate the administration of controlled substances to a "nurse, intern, or other qualified individual." Once delegation has occurred, there is no statutory or agency requirement that the physician subsequently be present or on the premises during actual administration of the drug to the patient. See 1972 O.A.G. 308, 310.

By agency rule, the Board of Pharmacy Examiners has designed as "qualified individuals" persons who have completed an approved medication administration course, advanced emergency medical technicians and paramedics, and registered physician assistants. 620 I.A.C. §8.16 (1978). See §204.301, Code of Iowa (1979). Thus, these persons are authorized to administer controlled substances pursuant to the valid delegation of a physician in most instances. However, in the context of a methadone treatment program, federal regulations expressly restrict administration by a practitioner's agent to pharmacists, registered nurses, or licensed practical nurses. 21 C.F.R. §291.505(d)(6)(d) (1978). The federal Comprehensive Drug Abuse Act provides that where there is an

inconsistency between applicable federal and state law, the federal law will prevail. 21 U.S.C. §903 (1970). Thus, in a state methadone treatment program, the administration of methadone in the absence of a physician is limited to pharmacists, registered nurses, or licensed practical nurses. See 1972 O.A.G. 505, 507. This reading of the Iowa act is consistent with the federal scheme which envisions a methadone treatment program whose services of initial evaluation, diagnosis, treatment plans, and overall supervision are the responsibility of licensed physicians, but whose ministerial functions involving the periodic administration of methadone are left to those non-physicians as authorized by law. 21 C.F.R. §291.505(b), (c), (d) (1978). See §125.33(3), Code of Iowa (1979).

Your second question involves the issue of whether "take-home" dosages of methadone are permitted. Under federal law, take-home medication is expressly permitted under certain conditions. 21 C.F.R. §291.505 (d)(7) (1978). The Food and Drug Administration recognizes that daily attendance at a program facility may be incompatible with gainful employment, education, and responsible homemaking. Thus, those patients enrolled in a maintenance treatment program only, see 21 C.F.R. §291.505 (a)(2), (3) (1978), may, after at least 3 months of progress, be permitted to reduce to three times weekly the times when they must ingest the drug under observation. They shall receive no more than a 2-day take-home supply at any one visit. After 2 years of progress, such patients may be permitted twice weekly visits to the program for drug ingestion under observation with a 3-day take-home supply. 21 C.F.R. §291.505 (d)(7) (1978).

Although not specifically mentioned in Chapter 204, Code of Iowa (1979), "take-home" dosages are impliedly permitted upon reading several related provisions consistently with the federal regulations. Section 204.101(9), Code of Iowa (1979), defines "dispense" as the "delivery of a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner . . . " Subsection (8) defines "delivery" as the "actual, constructive, or attempted transfer from one person to another of a controlled substance." Thus, to give out take-home dosages of methadone to a patient at a treatment program would be "dispensing" within the meaning of the statute.

Section 204.308, Code of Iowa (1979) provides that:

"1. Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, no controlled substance in schedule II may be dispensed without the written prescription of a practitioner."

Section 155.3(9), (11) defines "prescription" as "a written order . . . of a physician, dentist podiatrist, veterinarian . . . for a [controlled substance] or medicine." Thus the clear implication is that controlled substances listed in schedule II, *i.e.*, methadone, may indeed be delivered on a "take-home" basis either directly by a practitioner or upon the written prescription of a physician.

This conclusion is buttressed by a reading of §204.401, Code of Iowa (1979) which provides that:

"3. It is unlawful for any person knowingly or intentionally to possess a controlled substance *unless* such substance was obtained directly from, or pursuant to, a valid prescription or order of a *practitioner while act-*

ing in the course of professional practice, or except as otherwise authorized by this chapter." (Emphasis added)

Regulation 620 I.A.C. §8.12 (1976) provides that:

"The administering or dispensing directly (but not prescribing) of narcotic drugs listed in any schedule to a narcotic drug dependent person for the purposes of continuing his dependence upon such drugs in the course of conducting a federally authorized clinical investigation in the development of a narcotic addict rehabilitation program shall be deemed to be within the meaning of the term 'in the course of his professional practice or research' . . . ."

Since the statute makes it illegal to possess a controlled substance *without* a prescription, the implication is that it is acceptable to possess controlled substances with a prescription, i.e., "take-home" methadone dosages. Furthermore, the agency rule expressly deems the dispensing of narcotic drugs to an addict enrolled in a treatment program to be within the meaning of the term "in the course of his professional practice or research." Thus, by incorporation, §204.408(3), Code of Iowa (1979), would authorize the transfer of a take-home dosage of a controlled substance (methadone) into the possession of a person pursuant to a narcotic addict rehabilitation program.

While take-home dosages of methadone are authorized generally under Iowa law, frequency of dispensation must conform to those minimum federal guidelines mentioned above. Thus, at an Iowa treatment facility, those persons enrolled in a maintenance program may, after 3 months of satisfactory progress, be permitted to reduce to three times weekly the times when they must ingest the methadone at the treatment facility, with a maximum of a 2-day take-home dosage supplied at any one visit. After 2 years of progress, these patients may be permitted twice weekly visits to the facility with a maximum 3-day take-home dosage supplied at each visit. See 21 C.F.R. §291.505(d)(7) (1978).

Your third question raises the issue of whether a physician need be on the premises during the dispensing of such "take-home" dosages of methadone. The federal considerations relevant to this issue are similar to the first. 21 C.F.R. §291.505(d)(6)(d) (1978) provides that:

"Methadone will be administered or dispensed by a practitioner licensed or registered under appropriate State or Federal law to order narcotic drugs for patients or by an agent of the practitioner, supervised by and pursuant to the order of the practitioner. This agent may only be a pharmacist, registered nurse, or licensed practical nurse depending upon the State regulations regarding narcotic drug dispensing and administering."

This rule clearly permits practitioners, licensed or registered under State or Federal law, to dispense methadone. It also permits dispensing by an agent of the practitioner, supervised by and pursuant to the order of the practitioner, but not necessarily in his presence. This agent may be a pharmacist, registered nurse, or licensed practical nurse, if otherwise permitted to dispense by applicable state regulations.

Section 204.101(9), Code of Iowa (1979) defines "dispense" as "to deliver a controlled substance to an ultimate user . . . by or pursuant to the lawful order of a practitioner . . . ." Section 204.101(8) then defines "deliver" as "the actual, constructive, or attempted transfer from one person to another of a controlled substance . . . ." As noted above, take-

home dosages of methadone are permitted to be dispensed either directly by a practitioner or upon the written prescription of a physician. It follows that a physician can do the actual dispensing himself, or he can have a methadone prescription filled, and, upon his lawful order, this dosage can be transferred to the addict by a non-physician.

However, the Iowa Code contains no parallel provision authorizing "a nurse, intern, or other qualified individual" to dispense controlled substances, as opposed to administering the same. The operative language of chapter 204 provides that only those persons registered by the board of pharmacy examiners may dispense controlled substances, and that those persons so registered may only be those practitioners independently authorized under Iowa law to dispense controlled substances. Sections 204.302(2); 204.303(3) Code of Iowa (1979). Chapter 204 expressly excepts from its effect the inherent authority of a physician to delegate the administration of controlled substances to his qualified agent; however, no such exception exists in the context of dispensation.

A licensed pharmacist is expressly authorized by the Iowa Code to dispense drugs, including controlled substances, pursuant to a valid prescription of a physician. Sections 147.2, 155.1, Code of Iowa (1979). Thus, a licensed pharmacist is a "practitioner" [as defined in §204.101 (22)] for purposes of dispensing and may transfer "take-home" dosages of methadone to an addict in a treatment facility. However, there are no parallel Code sections permitting registered nurses or licensed practical nurses to dispense controlled substances either as a practitioner or as the agent of a practitioner, nor is any authority to do so recognized in Chapter 204. Nor does this chapter authorize agents of practitioners to dispense controlled substances, as opposed to federal regulation. However, since the federal regulations expressly condition the authority of agents to dispense on State approval, Iowa law controls. Therefore, Iowa law, as more restrictive than federal law, permits dispensation of "take-home" dosages of methadone only by physicians or other practitioners so licensed, *i.e.*, pharmacists in the context of a methadone treatment program.

Further support for the conclusion that physicians need not be on the premises during actual dispensation is found in §204.308(1), Code of Iowa (1978), which states:

"1. Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, no controlled substance in schedule II may be dispensed without the written prescription of a practitioner."

Since a physician is a practitioner within the definition of the statute, it is clear that he may dispense methadone directly to a patient without a prescription. It is also clear that only a physician, or his equal, may issue prescriptions pursuant to §155.3(8), (11), Code of Iowa (1979). It logically follows that if the legislature had intended that schedule II substances could only be dispensed directly by a physician, it would not have included the provision for allowing dispensation by prescription. But it did so provide, and the implication is that non-physician practitioners may dispense methadone pursuant to a valid prescription of a physician, whether or not he is on the premises of the treatment center at the time of dispensation.

The limitation of Section 204.308(2) prohibiting refills of schedule II drugs also supports the conclusion that a physician's presence is not required when methadone is dispensed. Since a physician may dispense methadone to a patient directly anytime, the implication is that there would be no need for the refill prohibition unless the Legislature had intended that the patient would obtain methadone from a practitioner other than a physician.

In summary, the answers to your questions are as follows. Under both federal and Iowa law, a physician is not required to be physically on the premises of a rehabilitation program when methadone is dispensed to an addict undergoing treatment if the physician has delegated the authority to so administer to a pharmacist, registered nurse, or licensed practical nurse and that individual is in fact administering the methadone. Take-home dosages of methadone are permitted if dispensed pursuant to a physician's prescription and within federal guidelines. A physician need not be on the premises when take-home dosages of methadone are dispensed if a pharmacist is present and dispensing the methadone.

April 30, 1979

STATE OFFICERS AND DEPARTMENTS: Revocation of a license to operate a motor vehicle — Senate File 221, 68th G.A.; Section 17A.18 (3) Code of Iowa (1979). Proposed bill to require the Department of Transportation to revoke the driver's license of any person found by process of chemical analysis to have been operating his or her motor vehicle with .10% or more by weight of alcohol in the blood is constitutional. However, the administrative hearing required prior to revocation may constitutionally be held prior to a pending criminal trial for the same offense only where the licensee so consents or where an emergency exception for the protection of the public health or safety applies. (Dallyn to Gallagher, State Senator, 4-30-79) #79-4-39

The Honorable James V. Gallagher, State Senator: You have requested an opinion from the Attorney General concerning the constitutionality of Senate File 221, 68th G.A., a bill relating to the revocation of motor vehicle licenses. You pose the following question for consideration:

"Whether the General Assembly can constitutionally mandate the Department of Transportation to revoke the driver's license of any person found by process of chemical analysis to have been operating his or her motor vehicle with .10% or more by weight of alcohol in his or her blood, prior to an actual criminal conviction for operating a motor vehicle while under the influence of alcohol?"

Senate File 221 would amend §321.209, Code of Iowa (1979), which provides for mandatory revocation by the Department of Transportation of a driver's license upon the operator's *conviction* of any of an enumerated list of serious offenses. Section 1 of S.F. 221, the section relevant to your question, would add the following new paragraph to §321.209:

The department shall forthwith revoke for a period of one hundred twenty days any license or permit to operate a motor vehicle of a person who shows evidence in a chemical analysis conducted pursuant to chapter three hundred twenty-one B (321B) of the Code of having ten hundredths of one percentum or more by weight of alcohol in the blood.

As an initial matter, the power to grant or revoke licenses to operate motor vehicles in the public highways is clearly within the police power of the state. *Danner v. Hass*, 257 Iowa 654, 134 N.W.2d 534, 540 (1965).

This police power is inherent in the sovereign status of the state and is given expression by the legislature. *Schnieders v. Incorporated Town of Pocahontas*, 213 Iowa 807, 234 N.W. 207, 209 (1931). A person's continuing enjoyment of a driver's license depends on compliance with reasonable conditions prescribed by law and is always subject to such regulation and control as imposed under the police power to rationally promote the interests of public safety and welfare. See *Sueppel v. Eads*, 261 Iowa 923, 156 N.W.2d 115, 118 (1968); Accord *Bisenius v. Karns*, 42 Wisc.2d 42, 165 N.W.2d 377 (1969).

To promote public safety, the General Assembly has mandated that every operator of a motor vehicle must be in possession of a valid license (evincing compliance with certain standards of competency and responsibility) prior to driving on the public highways. Section 321.174, Code of Iowa (1979). In the exercise of its regulatory powers, a rational legislature could obviously decide that the operation of a motor vehicle while intoxicated is grounds for the revocation of a person's driver's license. To effect this decision, a rational legislature could also determine that a certain minimum level of alcohol in the blood is sufficient to establish intoxication for purposes of a non-criminal revocation of a driver's license. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (upholding state's compulsory retirement age of 50 for police officers as being rationally related to furthering a legitimate state interest in assuring physical fitness, notwithstanding fact that individual plaintiff had passed physical exam four months prior to his 50th birthday.) As the General Assembly could in fact rationally conclude that a person with .10% or more of alcohol in the blood could not operate a motor vehicle on the public highways without endangering public health or safety, the revocation of the driver's license of a person found to be operating a motor vehicle with .10% or more of alcohol in the blood is constitutionally permissible.

That the proposed bill seeks to delegate the authority to revoke licenses, absent criminal conviction, to the Department of Transportation would likewise be contsitutional. With the tremendous growth in the number of state agencies in recent years, there has been an increasing recognition in the law of the need and justification for the delegation of both legislative and adjudicatory functions to executive agencies. See Bonfield, *The Iowa Administrative Procedure Act*, 60 Iowa L. Rev. 731, 733-735 (1975). The General Assembly has delegated authority to the Department of Transportation to issue, suspend, and revoke licenses [§§321.174, 321.209, 321.210, Code of Iowa (1979)] as well as to promulgate rules governing the exercise of any rights held under a valid license. Section 321.4, Code of Iowa (1979). The Iowa supreme court has consistently upheld in recent years similar delegations of legislative and adjudicatory powers to agencies where sufficient statutory or internal standards to insure against arbitrary or unfair action are present. See *Cedar Rapids Human Rights Commission v. Cedar Rapids School District*, 222 N.W.2d 391 (Iowa 1974); *State v. Watts*, 186 N.W.2d 611 (Iowa 1971). With respect to the proposed bill, there are a number of concomitant procedural and substantive safeguards present under Chapter 321, Code of Iowa (1979); the Iowa Administrative Procedure Act (Chapter 17A); and departmental regulations (820 I.A.C. ch. 13).

That the proposed bill imposes the sanction of license revocation for driving with .10% or more of alcohol in the blood without affording the operator the benefit of a criminal trial may be immaterial. The same motor vehicle offense may give rise to two separate and distinct proceedings: (1) a civil and administrative licensing procedure instituted by the Department of Transportation to determine whether a person's license to drive shall be revoked; and (2) a criminal action instituted by the State in the appropriate court to determine whether a crime has been committed. Each proceeds independently of the other, and the outcome of one action is of no consequence in the other. *Gottschalk v. Sueppel*, 258 Iowa 1173, 140 N.W.2d 866, 870 (1966). As the sanction provided for in the proposed bill is not penal in nature, any imposition of such a sanction by the agency in the absence of criminal proceedings is constitutionally valid.

While the Department may revoke a driver's license absent a criminal trial under the proposed bill, it does not follow that it may revoke absent a prior evidentiary hearing of its own. As a matter of constitutional due process, benefits enjoyed as a matter of statutory entitlement are in the nature of a "property" interest protected by the Fourteenth Amendment and thus cannot be revoked without a prior evidentiary hearing on the grounds for revocation. *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 262, 264 (1970). The United States Supreme Court has held that a driver's license, once issued to a person satisfying state statutory requirements, is an important interest protected by due process. The Court has specifically stated: "Once [driver's] licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U.S. 535, 539 (1971). The Iowa Administrative Procedure Act, which is legislation prescribing uniform minimum procedures for *all* state agencies, expressly provides that no license shall be suspended or revoked absent a prior evidentiary hearing in which the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license. Section 17A.1(2), 17A.18(3) Code of Iowa (1979).

Not only must the Department provide the licensee an opportunity for hearing prior to revocation, but the component procedural protections afforded the licensee must be sufficiently broad to comport with due process. The United States Supreme Court has held that such a hearing on license revocations must include consideration of all elements essential to the decision whether licenses shall be revoked. *Bell v. Burson*, 402 U.S. 535, 542 (1971). (Agency must consider issue of liability in a hearing conducted pursuant to a state's uninsured motorist law, where the statute itself spoke only to the absence of insurance or failure to post security as grounds for license revocation.)

The Iowa Administrative Procedure Act, the effect of whose provisions are not expressly excluded by Senate File 221 and are therefore necessarily applicable to the bill, prescribes the following procedures for revocation proceedings:

3. No revocation, suspension, annulment or withdrawal, in whole or in part, of any license is lawful unless, *prior* to the institution of agency proceedings, the agency gave written, timely *notice* by personal service as in civil actions or by restricted certified mail to the licensee of facts or conduct and the provisions of law which warrant the intended action, and the licensee was given an *opportunity to show*, in an *evidentiary hearing* conducted according to the provisions of this chapter for *contested cases*, compliance with all lawful requirements for the retention of the license. Section 17A.18(3), Code of Iowa (1979) (emphasis added).

The provisions for "contested cases", outlining further procedural protections to be afforded, are contained in §§17A.10-17A.17 of the Code. Thus, prior to any effective revocation order, a licensee must be afforded, *inter alia*, the rights to: notice, opportunity to be heard, presentation of evidence, and a decision based on the record, as well as the right to contest the elements essential to the revocation (i.e., identity, non-compliance, accuracy of the chemical analysis, presence of the blood alcohol level).

Section 17A.18(3) does authorize temporary "suspension," but *not* revocation, of a license in some very limited "emergency" situations:

If the agency finds that public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

However, such a temporary suspension may be invoked only pending "proceedings for revocation or other action" that must be "promptly instituted and determined" in accordance with the previously noted requirement that such determinations be made after a contested case hearing.

Moreover, such a suspension of a person's license summarily denies him his statutory entitlement to a license without benefit of due process, and may immediately adversely affect his pursuit of a livelihood. Therefore, any such agency action will be closely scrutinized by the courts for constitutional infirmities. See *Goldberg v. Kelly*, 397 U.S. 294 (1970). In *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court held that suspension of public school students for violations of school discipline must normally be preceded by the due process guarantees of notice and hearing. The Court did state, however, that summary suspension is permissible for students whose presence poses a *continuing* danger to persons or property or an *ongoing* threat of disrupting the academic process. In light of this precedent, a temporary suspension of a license, pending a revocation hearing pursuant to S.F. 221, would probably be unconstitutional if invoked for an allegation of an isolated instance of driving with .10% or more of alcohol in the blood. At a minimum, such a suspension would be warranted only where the agency made an initial finding, based on reliable evidence (Code §17A.14) that the licensee was repeatedly or continually operating a motor vehicle while intoxicated, and creating an immediate and present threat to the public health or safety.

Notwithstanding the foregoing analysis, there remains a serious constitutional problem involved in the spectre of revoking licenses for the presence of alcohol in the blood prior to a criminal conviction, or pending criminal trial, for O.M.V.U.I. This involves the issue of *timing* in schedul-

ing the agency hearing vis-a-vis the criminal trial. In a leading federal case, a taxicab operator was arrested and charged with two separate instances of rape and robbery at gunpoint. While the criminal charges were pending, the agency that licensed taxicab operators charged him with being of unfit character to hold a license because of the rape and robbery incidents. The agency held a hearing in which the operator was faced with the choice of refuting the charges or necessarily losing his license. The agency subsequently revoked his license, and, after acquittal in the criminal case, the operator sued to have his license restored. *Silver v. McCamey*, 221 F.2d 873, 874-875 (D.C. Cir. 1955). The appellate court found in favor of the operator, holding that "due process is not observed if an accused person is subjected, without his consent, to an administrative hearing on [the elements of] a serious criminal charge that is pending against him. His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial." *Id.*

The United States Supreme Court has not ruled directly on the issue raised in *Silver v. McCamey;* however, there is a split in the federal circuit courts on this point. Compare *Arthurs v. Stern*, 560 F.2d 477 (1st Cir. 1977) with *Polcover v. Secretary of Treasury*, 477 F.2d 1223 (D.C. Cir. 1973). While neither the Eight Circuit Court of Appeals or the Supreme Court of Iowa has ruled on this matter, the holding of the District of Columbia Court of Appeals in *Silver v. McCamey* remains the most persuasive analysis and is adopted as controlling precedent in this opinion.

As the presence of ".10% or more by weight of alcohol in the blood" is exactly the same element to be established in both S.F. 221 proceedings and in criminal O.M.V.U.I. (Code §321.281) trials, any attempt to revoke a license on these grounds pursuant to an administrative hearing while the criminal trial is pending is constitutionally suspect. The court in *Silver v. McCamey* did suggest possible solutions to this problem: postponing the administrative hearing until after the criminal trial; proceeding with the full-blown revocation hearing if the licensee so consents and desires to contest the charges; or holding an abbreviated hearing resulting in a temporary suspension of the license pending the outcome of the criminal trial, at which time a full-blown revocation hearing could be held. *Id.* at 875.

However, for purposes of S.F. 221 and the Iowa Administrative Procedure Act, the latter alternative would not be available absent a showing that such a temporary suspension was warranted by a finding, based on reliable evidence, that the licensee was repeatedly or continually operating a motor vehicle while intoxicated, and creating an immediate and present threat to the public health or safety. See §17A.18(3) and authorities cited above. While §17A.18(3) normally requires that formal revocation proceedings be "promptly instituted" (*i.e.*, as soon as is administratively feasible(after "summary suspension," there necessarily is a narrow exception implied here where a constitutional impediment to an administrative revocation hearing pending criminal trial exists. In this limited situation, "promptly instituted" should be read as requiring a formal revocation hearing following summary suspension "as soon as is constitutionally feasible," *i.e.*, as soon as the criminal proceedings have

terminated. See *Polcover v. Secretary of Treasury*, 477 F.2d 1223, 1232 (D.C. Cir. 1973).

This result is impliedly consistent with that of *Silver v. McCamey*, where the court approved temporary suspension on the facts of that case, *i.e.*, that the licensee had allegedly perpetrated repeated crimes of violence on different persons, presumably while operating his taxi, as that was where his weapons were found. *Id.* at 874.

In conclusion, an administrative hearing to revoke a driver's license pursuant to S.F. 221 may constitutionally be held pending a criminal trial on the same set of operative facts only where the licensee so consents, or where the narrow exception for temporary suspension applies (Code §17A.18(3)). Otherwise, any revocation ordered pending criminal trial violates due process and is invalid.

April 30, 1979

STATE OFFICERS AND DEPARTMENTS: GOVERNOR: DIRECTOR OF GENERAL SERVICES: AUTHORITY TO EXECUTE CONTRACT FOR STATE BUILDING. Art. III, §§1 and 24, Constitution of Iowa, §§7.9, 8.2, 8.39, 18.6, 18.12, 18.13, 18A.1, 18A.3, 72.1, Code of Iowa (1979). Section 1, ch. 34, Acts of the 67th G.A. (1977). The Director of the Department of General Services had implied authority, as the designee of the Governor, pursuant to §§7.9 and 8.39 of the Code to contract for the construction of the new Vocational Rehabilitation Center. Funds may be transferred from departmental funds, or from the unexpended appropriation of another agency, pursuant to §8.39, to satisfy the difference between the amount of the federal grant and the contract price. Constitutional questions are raised by resort to §7.9 in these circumstances. The legislature may, if it chooses, alleviate doubts about the director's statutory authority by appropriating the balance or by retrospectively validating the contract. (Miller, Schantz and Haskins to Rush, State Senator, and Anderson, State Representative, 4-30-79) #79-4-40

The Honorable Bob Rush, The Senate; The Honorable Robert Anderson, House of Representatives: You have asked our opinion concerning the legality of a contract entered into by the Director of the Department of General Services to construct a new Vocational Rehabilitation Center.[1] A brief history of the center project is necessary to place your specific questions in context.[2]

I

The Department of Public Instruction initially raised the question of a new building for Vocational Rehabilitation. Pursuant to Chapter 259, Code of Iowa (1979), the state board of public instruction is designated the state board for vocational education for the purpose of administering funds received under the Federal Vocational Rehabilitation Act of 1954 and The Rehabilitation Act of 1973. Dr. Robert Benton, Superintendent of Public Instruction, first sought federal funds for the center in November, 1976, during round I of the grant process authorized by the Local

[1] This opinion will employ the terms "director," "department," and "new center" for the Director, the Department and the new Center respectively.

[2] Additional background concerning the project was obtained by interviews with the Director and Mr. Dennis Nagel, Administrative Assistant to Governor Robert D. Ray.

Public Works Contract Development and Investment Act of 1976, 42 U.S. C.A. §§6701-6708. This application was unsuccessful.

Governor Ray included a $2,000,000 capitol request for the center in his January, 1977, budget message. On May 18, 1977, the Iowa Senate passed and sent to the House a bill, S.F. 407, appropriating to both the department and the Board of Public Instruction the sum of $150,000 for planning an addition to the Vocational Rehabiiltation Center located at 1029 Des Moines Street, Des Moines, Iowa. On May 20, 1977, the House adopted H.F. 4324, an amendment to S.F. 407, which appropriated to the Capitol Planning Commission the sum of $25,000 to be used for the preparation of a schematic architectural and engineering design for the addition. Also on May 20, 1977, an amendment, H.F. 4334, was filed to H.F. 4324 providing a $2,000,000 appropriation for the actual construction of the addition. This amendment was promptly ruled not germane. H.F. 4324 then passed the House and was immediately sent to the Senate. The Senate refused to concur in the House amendment and the House insisted on its amendment. The session was drawing to a close and no further action was taken. Thus, while on an unofficial basis the General Assembly indicated an interest in the project, the legislature neither formally approved nor disapproved the construction of the center.

In the summer of 1977, round II of the grant process commenced for federal funds available under the Local Public Works Contract Development and Investment Act of 1976. Up to $3,000,000 was available to the State of Iowa for construction projects designated by the Governor in areas of high unemployment. Polk County was such an area. The Governor decided to allocate $2,600,000 of the potential funds to the construction of the center and delegated responsibility for the project to the director. A grant application was prepared in August, 1977.[3] A contract contingent upon receipt of the grant was signed with an architectural firm at a cost of $162,500. On September 26, 1977, notification of approval of the grant was received from federal authorities and the Governor and the director subsequently signed the grant.

The center project was divided into two phases. Phase A was essentially site preparation, involving demolition and new mechanical and tunnel work. Bids for phase A were advertised on November 28 and 30, 1977. Phase A bids were opened on December 12, and on December 13, a contract for Phase A was signed involving a cost of $284,000. Bids for Phase B were advertised on November 24 and December 1, 1977.

No state funds for the center were requested by the Governor in his January, 1978, budget message. On January 31, 1978, the Phase B bids were opened and the low bid for Phase B was in excess of $2,600,000.

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[3] Effective March 1, 1977, the Financial Management Division of the Comptroller's Office promulgated Procedure No. 300.00 providing a pre-plan and pre-application procedure for federal funds. This procedure was designed to provide a central review of state agency applications and other requests for federal funds. Agencies are required to forward a copy of a prescribed form to the Comptroller's Office at least 15 days prior to submitting an application. A variety of review mechanisms are built into the procedure, including routing the form to the legislature for review and comment. On July 15, 1977, a form relating to the application for the center was prepared and forwarded through channels.

The bids had to be accepted or rejected within 30 days. At this point it became clear that the cost of the center would substantially exceed earlier estimates. The shortfall was then estimated at up to $750,000. In discussions among the Governor's staff, Comptroller, and director, it was determined that sufficient funds were available for transfer under the authority of §8.39 of the Code and that such a transfer would be the best means of making up the shortfall. The director was advised to accept the bid and a contract was signed with Vawter and Walter on February 28, 1978, for Phase B construction at a cost of $2,656,921.

II

You ask whether the director had the statutory authority to enter into these contracts, specifically whether he could bind the State for the sums in excess of the federal funds, and whether, if he did lack such authority, the contracts are void and unenforceable.[1] You also ask whether the director may now obtain a transfer of funds under §8.39, Code of Iowa (1979), to satisfy the $850,000 shortfall.

The only acquisition authority which the director possesses is to purchase "items." Section 18.6(3), Code of Iowa (1979), states:

"The director shall have the power to contract for the purchase of *items* by the department. Contracts for the purchase of items shall be awarded on the basis of the lowest competent bid. Contracts not based on competitive bidding shall be awarded on the basis of bidder competence and reasonable price." [Emphasis added]

"Item" is a term with many shades of meaning that takes its connotation from the context. Here, the dictionary definition most applicable would be "something produced by manufacturing or manual labor or in some other way: a piece of goods: product, commodity." Webster's Third New International Dictionary (1961). Plainly, in the context of §18.6(3), a state building is not an "item."

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[1] Note should be taken of §72.1, Code of Iowa (1979), which states:

"Officers empowered to expend, or direct the expenditure of, public money of the state shall not make any contract for any purpose which contemplates an expenditure of such money in excess of that authorized by law. However, the state or an agency of the state may enter into a contract of not exceeding ten years in duration for the purchase of coal to be used in facilities under the jurisdiction of the state or the state agency. The execution of the contract shall be contingent upon appropriations by the general assembly in sufficient amounts to meet the terms of the contract."

See also, §8.38, Code of Iowa (1979), which provides:

"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 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."

Nor may the director find authority in §18.12(7), Code of Iowa (1979), authorizing him to contract for the repair, remodeling, or demolition of buildings. That section states:

"In addition to his other duties the director shall:

"7. Contract, with the approval of the executive council, for the repair, remodeling or, if the condition warrants, demolition of all buildings and grounds of the state at the seat of government for which no specific appropriation has been made, if the cost of repair, remodeling or demolition will exceed one hundred thousand dollars when completed. The cost of repair projects for which no specific appropriation has been made shall be paid from the fund provided in section 19.29."

The above section clearly does not authorize the initial erection of buildings, as opposed to their repair, remodeling, or demolition.

The director sits on the eleven-member capitol planning commission. *See* §18A.1, Code of Iowa (1979). However, the extent of the power of that commission is to advise upon the location and the type of architecture and construction of new state buildings. No authority is conferred actually to contract for or to construct them. Section 18A.3, Code of Iowa (1979), states in relevant part:

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

Because of his lack of general authority, the director must obtain the authority to construct a building from specific statutes. An example of a specific statute conferring such implied authority is Ch. 1057, §1, Acts of the 67th G.A. (1974), appropriating funds for what is now the Wallace State Office Building. That statute states:

"There is appropriated from the general fund of the state the sum of seven million eight hundred thousand (7,800,000) dollars, or so much thereof as may be necessary, to the department of general services for the construction of a state agricultural building."

By granting the funds to construct a building to the department, implied authority is plainly granted actually to construct it.

The department, however, has never been appropriated funds specifically earmarked for the new center. Thus, the usual analysis for implied authority is not available in this instance. We are faced with novel and difficult questions concerning whether other implied authority existed.

As previously noted, at the inception of the new center project, it was expected that the federal grant would cover 100 per cent of the cost. The General Assembly has typically included in the appropriation bill for the department a provision reappropriating federal grant monies for the purposes specified in the grant. *See, e.g.*, Section 4 of Chapter 1012, Acts of the 67th G.A. (1978):

"All federal grants to and the federal receipts of the agency appropriated funds under this division are appropriated for the purposes set forth in such federal grants and receipt."

See also §4, ch. 1031, Acts of the 66th G.A. (1976); §7, ch. 29, Acts of the 66th G.A. (1975). Curiously, no such provision was included for the fiscal year beginning July 1, 1977, the fiscal year in which the contract for the center was executed. Although a reason for the omission of such authorization in a particular year does not leap to mind, a court would not lightly attribute the omission to legislative oversight.

However, the Governor has been granted general authority to accept federal funds and to designate an agency to administer them. Section 7.9, Code of Iowa (1979), provides:

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

As previously noted, the director was designated by the Governor to seek and to administer these funds. The authority to "administer" funds, would include, in common usage, the authority to spend them. Webster's definitions of "administer" include the following: "to manage the affairs of: to direct or superintend the execution, use or conduct of." In a statute which refers to accepting *and* administering federal funds, the authority to administer would be superfluous if it did not refer to the authority to spend the funds. Thus, in the absence of circumstances negating the implication, the award of the federal grant and the Governor's designation afforded the director implied authority to execute a contract for the amount of the grant.

It will be recalled, however, that the contract was executed after it was learned that the federal grant would be insufficient to construct the new center. The director was then advised by the Comptroller and the Governor's Office that a transfer of funds pursuant to §8.39 could be made available to cover the balance. Such an assurance could cause a reasonable person in the director's position to believe he had authority to execute the contract.

Whether §8.39 actually affords such authority in these circumstances is a more difficult question and is closely related to your question of whether funds may now be transferred to satisfy the shortfall. Section 8.39, Code of Iowa (1977), provided:

"No appropriation nor any part thereof shall be used for any other purpose than that for which it was made except as otherwise provided by law, provided that the governing board or head of any state department, institution, or agency, may, with the written consent and approval of the governor and state comptroller first obtained, at any time during the biennial fiscal term, partially or wholly use its unexpended appropriations for purposes within the scope of such department, institution, or agency.

Provided, further, when the appropriation of any department, institution, or agency is insufficient to properly meet the legitimate expenses of such department, institution, or agency of the state, the state comptroller, with the approval of the governor, is authorized to transfer from any other department, institution, or agency of the state having an appropriation in excess of its necessity, sufficient funds to meet that deficiency.

Any transfer made under the provisions of this section shall be reported to the legislative fiscal committee on a monthly basis. The report shall cover each calendar month and shall be due the tenth day of the following month. The report shall contain the following: The amount of each transfer; the department to which the transfer was made; the department and fund from which the transfer was made; a brief explanation of the reason for the transfer; and such other information as may be required by the committee. A summary of all transfers made under the provisions of this section shall be included in the annual report of the legislative fiscal committee.

This section actually provides for two types of transfers. First, the governor and comptroller may authorize a transfer of a department's own *unexpended appropriation for purposes within the scope of such department.* Second, the comptroller may transfer funds from another department having an appropriation in excess of its necessity to a department *whose appropriation is insufficient to meet its legitimate expenses.* With respect to *intra-departmental* transfers, the only limitation is that the transferred funds be used "for purposes within the scope of the department." In this particular situation that limitation is satisfied. As previously noted, the Governor designated the director as the proper person to administer the federal grant. Moreover, there can be little question about the propriety of designating the director for such a project because it has been the recent custom for the director to superintend construction of new state buildings.

With respect to *inter-departmental* transfers, however, we note two limitations. The transferred funds must be used to meet "legitimate expenses" of a department "whose appropriation is insufficient." We interpret this to mean that inter-departmental transfers may be made only to supplement an existing appropriation. See 1968 OAG 132, 150. At the time the contract was executed, no specific appropriation for the new center existed. However, Section 1 of Chapter 34, Acts of the 67th G.A. (1977), provided, insofar as relevant, the following appropriation:

"There is appropriated from the general fund of the state for the fiscal period beginning July 1, 1977 and ending June 30, 1981 the following amounts, or so much thereof as is necessary, to be used for the purposes designated:

1: DEPARTMENT OF GENERAL SERVICES—Division of Buildings and Grounds

a. For capital improvements and repairs . . . . . $500,000."

There can be little question that construction of the new center is a "capital improvement." The term "improvement," standing alone, generally includes new buildings: "A valuable addition made to property (usually real estate) or an amelioration in its condition. . . . *"Black's Law Dictionary,* p. 890 (Rev. 4th Ed. 1968). Webster defines "improvement" as "the enhancement or augmentation of value or quality" and uses the following illustration: "an improvement of the property by building several outbuildings and a new barn." Other Iowa statutes employ the term improvement in contexts which indicate it includes buildings. *See e.g.,* §§384.7, 384.37, 386.2, 471.1, 573.2, Code of Iowa (1979). "Capital" in this context would suggest a long-term investment and remove any doubt that a new building is a capital improvement. Although it may well be doubted whether the legislature specifically anticipated that these particular funds would be used to supplement

federal funds for the construction of a major building, we must be mindful of the admonition that legislative intent is to be sought first in the plain meaning of the statute. *In re Johnson's Estate*, 213 N.W.2d 536 (Iowa 1973); *Consolidated Freightways Corp. v. Nicholas*, 258 Iowa 115, 137 N.W.2d 900 (1965). And, an examination of appropriations measures makes abundantly clear that the legislature is fully capable of expressing limitations on the objects for which funds may be expended. We can but conclude that the executive branch was entitled to treat this appropriation as available for any "capitol improvement" to which the director, in his discretion, chose to apply it. Assuming, as we are informed, that a substantial proportion of this appropriation was available in January, 1978, to supplement the federal grant, then the Governor and Comptroller legally could have transferred either intra-departmental or inter-departmental funds to supplement this appropriation. Having no reason to doubt the assurance of the Comptroller that sufficient funds would be available, we conclude that §8.39 provides the additional implied authority relating to the shortfall. As noted, the contemplated transfer fell within the letter of the authority provided by §8.39, and, viewed from one perspective, it falls within the spirit of that section. Section 8.39 is obviously designed to provide fiscal flexibility to cope with unforeseen contingencies. Here, because of increased costs, a substantial federal grant would have been lost if a transfer of funds could not have been contemplated. We note in this regard that the legislature has directed in very strong terms that the director avoid the loss of federal funds. Section 18.13, Code of Iowa (1977).

We note, however, that the transfer was not actually made prior to the execution of the contract. While in the ordinary course of business, transfers need not be made before obligations mature, here, the failure to commit funds prior to execution of the contract weakens the case for the director's implied authority to contract in several respects.

First §§8.38 and 72.1, set forth above, at least suggest a general legislative intent to avoid contractual obligations extending into the future beyond the appropriation planning horizon. Certainly, had the transfer been made prior to execution of the contract, doubts about whether the contract "contemplates an expenditure of such money in excess of that authorized by law," within the meaning of §72.1, would have been removed and no argument that the spirit of that section negates the director's implied authority would have been available.

Second, a transfer prior to the execution of the contract would have involved the legislature more fully in the process. Section 8.39, as it then existed, provided that a transfer of funds be reported to the legislative fiscal committee on a monthly basis. Had this been done, the legislature might have substituted a specific appropriation for the transfer or even have forbad the transfer. Had it done nothing at all, with notice of the transfer, the case for implied authority would be significantly strengthened.

The desirability of legislative involvement seems particularly strong when one stands back from technical legal arguments which build implied authority upon implied authority. The rather clear tradition in this state and others is that major capitol improvements, which do or will in the future involve the expenditure of substantial state tax revenues, are

not built without rather specific legislative authorization. Strong policy reasons support this tradition. The legislative branch in our constitutional system has the primary responsibility for raising revenue and authorizing its expenditure. An Iowa court may be reluctant to accept the argument for implied authority when the bottom line is a major capital expenditure lacking the express imprimatur of the legislature.

Related to this point, of course, is the fact that while the contract itself involves a one-time expenditure, the construction of a major building also entails operation and maintenance expenses over a long period. In this instance, the center replaces other quarters for an ongoing program in vocational rehabiiltation. Thus, it is not self-evident that these long-range expenses will rise dramatically because of the new quarters. But the possibility of a commitment not only to a major building, but also to the long-range expenses entailed as a practical matter,[5] almost entirely on the basis of a decision by the executive branch, may also give an Iowa court pause.

To summarize our analysis of the director's statutory authority, we note that he had no express authority to execute a contract for the new center. Although the question is not free from doubt, in our opinion the director had implied statutory authority, delegated from the governor pursuant to Section 7.9, based upon the federal grant, to expend federal funds for this purpose. Accepting that proposition, then, in our opinion the director acquired the additional implied authority needed for the "shortfall" from the informal commitment of the governor and comptroller to transfer funds pursuant to §8.39.[6] This conclusion would be substantially strengthened had the transfer been made formally prior to execution of the contract.

III

Your requests inquired only whether the director had *statutory* authority to execute the contracts for the new center. We feel obligated to note, however, that the analysis underlying our conclusion that such authority existed may raise a significant question concerning the validity, under the Iowa Constitution, of §7.9 as applied in this situation. Because the constitutional question does not seem fully ripe and because we will not reach out to decide constitutional questions, we will not offer an opinion on the question. However, it may be helpful if we at least outline the relevant issues as we perceive them.

A possibly analogous situation arose a decade ago and was considered in 1968 OAG 132. There, Governor Hughes, on behalf of the State of Iowa, accepted federal funds for the treatment of alcoholism from the Office of Economic Opportunity and the Vocational Rehabilitation Administration. These grants required state matching funds and the Governor directed that funds be transferred pursuant to §8.39 from an appropriation to the then-existing Board in Control. To initiate the program,

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[5] The legislature has the authority, of course, to forbid occupancy of all or any portion of the center to avoid these costs.

[6] Because we have determined that the director had statutory authority to contract for the new center, we need not address the question whether the contracts would be void and unenforceable had he lacked such authority.

the Governor established the Iowa Comprehensive Alcoholism Project with its own personnel and a director appointed by the Governor, rather than accepting the funds on behalf of the Alcoholism Study Commission or the Board in Control. The legislature had given the Governor no specific authorization, other than §§7.9 and 8.39, to spend the federal funds, to provide the state matching funds, or to create a new agency to administer the funds.

In an opinion of professorial length, Attorney General Turner held that these developments violated the Iowa Constitution in several respects.

As related to present purposes, he specifically concluded that if §7.9 were construed to grant the Governor authority to create a new state agency to administer the funds, the result would be an unconstitutional delegation of legislative authority to the executive in violation of Art. III, §1 of the Iowa Constitution, because of the absence of "guidelines" or standards restricting the authority to "administer" federal funds. In addition, he concluded that funds received from the federal government become state funds for purposes of Art. III, §24 of the Iowa Constitution; that, therefore, they could not be expended except pursuant to an appropriation by the legislature; and that §7.9 did not constitute an implied appropriation even of the federal funds.

With that background, the potential constitutional issues in this situation can be stated as follows: First, does the authorization of the Governor by §7.9 to seek and to expend substantial federal monies for a major state building without a specific appropriation constitute an invalid delegation of legislative power to the executive branch in violation of Art. III, §1 of the Iowa Constitution? Second, does the expenditure of federal funds authorized by §7.9 violate the requirement of Art. III, §24, that "no money shall be drawn from the treasury but in consequence of appropriations made by law?

A.

Article III, §1, 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."

This provision expresses the theory of separation of powers and has been implemented by the "delegation" doctrine, which forbids one department from exercising the powers of another department even with the express authorization of the other. Once quite rigidly applied, the doctrine has evolved to permit adjustment to the realities of modern government. At the time 1968 OAG 132 was written, to avoid a delegation problem the courts insisted that the legislature provide detailed standards or guidelines for the executive branch. More recently, the courts have moved to a complex balancing test which takes into accounts standards and their degree of specificity, the presence of procedural safeguards to protect against arbitrary exercise of the granted authority, and necessity, the difficulty of requiring the legislature to function in a particular

area. *Compare Lewis Consolidated School Dist. v. Johnston*, 256 Iowa 236, 127 N.W.2d 118 (1964), with *Warren County v. Judges of Fifth Jud. Dist.*, 243 N.W.2d 894 (1976). *See generally* Note, "Safeguards, Standards and Necessity: Permissible Parameters for Legislative Delegation in Iowa," 58 Ia.L.Rev. 974 (1973).

Application of this multi-factor analysis to §7.9 would present a complex question. On its face, §7.9 contains no standards to guide the Governor in seeking federal grants, nor does it contain any procedural safeguards. With respect to standards, §7.9 could be interpreted as a legislative direction to *maximize* federal assistance. Moreover, it may be interpreted as a legislative determination to *adopt* federal standards for the expenditure of the funds. Generally speaking, categorical grants from the federal government contain rather detailed specifications for the use of federal funds and reporting requirements and/or auditing to determine that the funds are expended for the purposes intended.

With respect to procedural safeguards, we note that the Governor is not covered by the requirements of the Iowa Administrative Procedure Act. *See* §17A.2(1), Code of Iowa (1979). In most circumstances, compliance with the IAPA would provide a substantial defense to a claim of unlawful delegation. Here, however, the decision to seek a particular federal grant and to spend the funds would usually be an ad-hoc decision to which the rule-making requirements would not apply. Nor is it obvious how the contested case procedures would come into play. We note with respect to the Governor, however, that the political process itself may provide substantial safeguards against arbitrary decision-making. The legislature's control over state funds, upon which the executive branch vitally depends, would seem to provide substantial deterrent and retributive potential. In this respect, note should be taken of §8.44, Code of Iowa (1977), which requires agencies to notify the comptroller upon receipt of federal funds, and the voluntary procedure previously noted, by which agencies are to report to the legislative fiscal director, via the comptroller, of the intention to apply for federal funds. These devices provide at least a potential mechanism for legislative oversight of the use of federal funds.

Finally, with respect to necessity, we note that a strong case can be made for a broad delegation to the Governor to pursue federal grants. It would be virtually impossible for a legislature simultaneously to maximize federal funding, to retain complete control over federal grantsmanship, and to maintain the tradition of a part-time general assembly. Given the difficulties of predicting the nature and timing of federal funds, it would also be difficult to provide detailed standards for the executive branch. Moreover, it is not obvious what additional procedural safeguards might be utilized, other than perhaps more detailed reporting requirements such as those now found in §8.39.

B.

Article III, §24, provides that "no money shall be drawn from the treasury but in consequence of appropriations made by law." When read in conjunction with Art. III, §1, supra, it plainly commits to the legislature the control of the purse strings of government:

"The appropriation of money is essentially a legislative function under our scheme of government. The classic statement of the doctrine followed throughout the country was made in a Mississippi decision, Colbert v. State, 86 Miss. 769, 776, 39 So. 65, 66:

'Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and not to be surrendered or abridged, save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people. The right of the Legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means, both of their collection and disbursement, is firmly and inexpugnably established in our political system. This supreme prerogative of the Legislature, called in question by Charles I., was the issue upon which Parliament went to war with the King, with the result that ultimately the absolute control of Parliament over the public treasury was forever vindicated as a fundamental principle of the British Constitution. The American commonwealths have fallen heirs to this great principle, and the prerogative in question passes to their Legislatures without restriction or diminution, except as provided by their Constitutions, by the simple grant of the legislative power'."

Welden v. Ray, 229 N.W.2d 706, 709-10 (Iowa 1975).

Provisions similar to Art. III, §24, may be found in most state constitutions. Generally speaking, the requirement of an appropriation is limited to the so-called "general fund" of the treasury and not to certain "special funds," even though the state treasurer may act as custodian of the funds. 81A C.J.S., *States*, §233. Certain custodial funds are deemed held in trust by the state and thus beyond the legislature's appropriative power. This distinction is implicitly recognized in Chapter 8 of the Code of Iowa, relating to Budget and Financial Control. Section 8.2 provides in pertinent part:

"2. 'State funds' means any and all moneys appropriated by the legislature, or money collected by or for the state, or an agency thereof, pursuant to authority granted by any of its laws.

3. 'Private trust funds' means any and all endowment funds and any and all moneys received by a department or establishment from private persons to be held in trust and expended as directed by the donor.

4. 'Special fund' means any and all government fees and other revenue receipts earmarked to finance a governmental agency to which no general fund appropriation is made by the state."

See also *Farrell v. State Board of Regents*, 179 N.W.2d 533, 546 (Iowa 1970) (receipts from tuition fees and university enterprises may be statutorily separated into special trust funds for bond retirement and are not then "state funds" requiring legislative appropriations).

As previously noted, Attorney General Turner took the view that federal funds received pursuant to §7.9 pass directly into the state treasury and can emerge only by legislative appropriation. If that view is correct, then of course the federal funds for the new center cannot, by virtue of Art. III, §24, be spent constitutionally without a legislative appropriation. Without specifically passing on the question, we observe that a majority of courts addressing it have concluded that most federal funds are held in trust for the purpose specified in the grant and are not subject to the appropriative power of the legislature. See *Board of*

Regents of Univ. of Neb. v. Exon, 256 N.W.2d 330, 333-34 (Neb. 1977); *Cochise County v. Dandoy*, 567 P.2d 1182, 1187 (Ariz. 1977); *MacManus v. Love*, 499 P.2d 609, 610 (Colo. 1972); *Opinion of the Justices to the Senate*, 378 N.E.2d 433, 436 (Mass. 1978); *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 986 (N.M. 1974). Indeed, in *MacManus*, the Colorado Supreme Court struck down a statute which forbad the expenditure of federal funds in excess of an agency's appropriation as exceeding the legislative power under the state constitution. But see *Shaff v. Sloan*, 381 A.2d 595 (Pa. 1978); *Opinion of the Justices*, 381 A.2d 1204 (N.H. 1978).

Given the strong presumption of constitutionality applied by the Supreme Court of Iowa, *see, e.g., City of Waterloo v. Selden*, 251 N.W.2d 506, 508 (Iowa 1977), and legal developments since 1967, the prospects for the constitutionality of §7.9 appear rather more sanguine than they would have to Attorney General Turner. However, the constitutionality of §7.9 as applied in this instance may be sufficiently questionable to cause the court to construe §7.9 more narrowly than we have in order to sustain its constitutionality. *See Iowa Nat. Indus. Loan Co. v. Iowa State Dept. of Revenue*, 224 N.W.2d 436, 442 (Iowa 1974).

IV

We trust it is evident from the length of this opinion and the time required for its preparation that we regard the questions you pose as both difficult and important. The reconciliation of legislative fiscal accountability with the need for executive fiscal flexibility presents one of the most difficult dilemmas for modern state government. The existing statutory framework does not provide completely clear guidelines concerning the legislative resolution of this dilemma. Although the actions taken here surely approach the limits of executive authority under existing statutes, creative law-making could well combine needed flexibility with greater accountability. We urge the executive and legislative branches to seek a more comprehensive, long-range statutory solution to these problems.

In the short run, although we have concluded that the director possessed the needed authority to contract for the center, we have stressed that the matter is not free from doubt. If the legislature approves of the project, it may wish to consider appropriating the shortfall rather than relying upon a transfer pursuant to §8.39. Such action would virtually remove any lingering doubts concerning the director's authority. Indeed, if it wishes to remove all doubt, the legislature may consider retrospective validation of the contract. *See Butler v. Hatfield*, 152 N.W.2d 484, 493 (Minn. 1967) (legislature may ratify contract entered into by state official even though in excess of his statutory authority).

V

In summary, we hold that the director had statutory authority, as the designee of the Governor, pursuant to §§7.9 and 8.39 of the Code to contract for the new center. Funds may be transferred from departmental funds, or from the unexpended appropriation of another agency, to satisfy the difference between the amount of the federal grant and the contract price. We note but do not decide the constitutional questions which arise from resort to §7.9 in these circumstances. The legislature may remove

any lingering doubts about the director's statutory authority (and moot the constitutional questions concerning §7.9) by retrospectively validating the contract.

May 2, 1979

COUNTIES: Proration by sheriff of mileage expenses for serving legal papers. Section 337.11(10), Code of Iowa (1979). The sheriff may charge full mileage for each action in which subpoenas or original notices are served, but must prorate mileage expenses for several legal papers other than original notices or subpoenas served on the same trip. (Condon to Mossman, Benton County Attorney, 5-2-79) #79-5-1 (L)

May 3, 1979

AUTHORITY OF COUNTY BOARD OF SUPERVISORS OVER COMMUNITY MENTAL HEALTH CENTER. Article III, Section 39A, Iowa Constitution, Chapters 230A, 504 and 504A, 1979 Code of Iowa, §§230A.1, 230A.2, 230A.3, 230A.3(1), 230A.3(2), 230A.4, 230A.5, 230A.6, 230A.10, 230A.10(2), 230A.12, 230A.13, 332.3(6), 504.14, 504A.17, 504A.18. A board of supervisors does not have authority to establish a mental health department within county government in order to provide direct services to clients through employees hired and controlled by the board. A board of supervisors does not have authority to assume control of a community mental health center established pursuant to Chapter 230A, Code of Iowa. (Fortney to Wells and Horn, State Representatives, 5-3-79) #79-5-2 (L)

May 3, 1979

STATE OFFICERS AND DEPARTMENTS: Department of Agriculture; Disposing of Dead Animals. Section 167.3, Code of Iowa (1979). A person who collects parts of an animal for the purpose of obtaining the hide, skin or grease therefrom must obtain a license to dispose of the bodies of dead animals. (Schantz to Lounsberry, Secretary of Agriculture, 5-3-79) #79-5-3 (L)

May 4, 1979

STATE OFFICERS AND DEPARTMENTS: Open meetings law. Sections 28A.1, 28A.2(1), 28A.2(2), 114.17, 114.19, 114.21, 258A.1(1)(a), 258A.3 (1), 258A.4, Iowa Code (1979); Ch. 1037, §§1, 12, Acts 67th G.A. (1978); §28A.1, Iowa Code (1977). A peer review committee of the board of engineering examiners which has been delegated no policy-making or decision-making authority is not a "governmental body" within the meaning of §28A.2(1)(c). (Schantz and Haskins to Hanson, Special Counsel, Board of Engineering Examiners, 5-4-79) #79-5-4

Mr. Thomas D. Hanson, Special Counsel, Iowa State Board of Engineering Examiners: You ask the opinion of our office as to whether the proceedings of a peer review committee of the Board of Engineering Examiners [the "board"] are subject to Ch. 28A, Iowa Code (1979), pertaining to open meetings[1], and, if so, in what respect.

The board issues certificates of registration as an engineer and as a land surveyor and is granted the power to suspend or revoke a certificate. *See* §§114.17, 114.19, 114.21, Iowa Code (1979). The board is covered by

Ch. 258A, Iowa Code (1979), relating to continuing professional and occupational education. See §258A.(1)(a), Iowa Code (1979). Ch. 258A utilizes the concept of peer review committees to aid in licensing discipline and authorizes their creation by a covered board.[2] By rule, the board here has authorized the appointment of peer review committees,

See 390-4.4, I.A.C. Under rule, peer review committees consist of three or more engineers or land surveyors. *See* 390-4.4(1), I.A.C. Their function is the investigation of complaints about the acts or omissions of registrants. *See* 390-4.4, I.A.C.

Ch. 28A, pertaining to open meetings, applies only to a "governmental body." Section 28A.2(1), Iowa Code (1979), defines that term as follows:

As used in this chapter:

1. "Governmental body" means:

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[1] Ch. 28A, Iowa Code (1979), was effective January 1, 1979. *See* Ch. 1037, §12, Acts 67th G.A. (1978). The former open meetings law, Ch. 28A, Iowa Code (1977), was repealed at the same time. *See*, Ch. 1037, §1, Acts 67th G.A. (1978). It had previously been declared unconstitutional in *Knight v. Iowa District Court of Story County*, 269 N.W.2d 430 (Iowa 1978).

[2] §258A.3(1), Iowa Code (1979), states in relevant part:

1. Notwithstanding any other provision of this chapter, each licensing board shall have the powers to:

h. Register or establish peer review committees;

i. Refer to a registered peer review committee for investigation, review, and report to the board, any complaint or other evidence of an act or omission which the board reasonably believes to constitute cause for licensee discipline. However, the referral of any matter shall not relieve the board of any of its duties and shall not divest the board of any authority or jurisdiction.

§258A.4, Iowa Code (1979) states in relevant part:

1. Each licensing board shall have the following duties in addition to other duties specified by this chapter or elsewhere in the code:

c. Establish procedures by which any recommendation taken by a peer review committee shall be reported to and reviewed by the board if a peer review committee is established.

d. Establish procedures for registration with the board of peer review committees if a peer review committee is established;

e. Define by rule those recommendations of peer review committees which shall constitute disciplinary recommendations which must be reported to the board of a peer review committee is established;

* * *

2. Each licensing board, shall submit to the senate and house committees on state government in January of each year, commencing in January of 1979, a summary of the activities report respecting the following subjects:

* * *

b. The number of complaints, peer review committee disciplinary actions, and judgments and settlements reviewed or investigated by the board, the number of formal disciplinary proceedings commenced before the board or in the courts, the number and types of sanctions imposed, and the number and status of appeals to the court of board decisions, and the number and types of peer review committees registered by the board.

a. A board, council, commission or other governing body expressly created by the statutes of this state or by executive order.

b. A board, council, commission, or other governing body of a political subdivision or tax-supported district in this state.

c. A multi-membered 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.

d. Those multi-membered bodies to which the state board of regents or a president of a university has delegated the responsibility for the management and control of the intercollegiate athletic programs at the state universities.

A preliminary question is whether a peer review committee is a "governmental body" within the meaning of §28A.2(1)(a). Chapter 258A by statute authorizes the formation of such committees. The comparable provisions of the prior law defined "public agencies" to include "any board, council, commission, created or authorized by the law of this state." Section 28A.1(1), Iowa Code (1977). However, the term "authorized" has been deleted from the new law and the term "created" has been modified by "expressly." Because of prior litigation involving these terms, see *Greene v. Athletic Council of Iowa State University*, 251 N.W.2d 559 (Iowa 1977), significance must be attached to this change. Webster explains that the term "created" means "to cause to be or to produce by fiat or by mental, moral or legal action: as *a*: to invest with a new form, office or rank: constitute by an act of law or sovereignty." A statute which does not itself "constitute" the committee, but merely permits the Board, in its discretion, to form peer review committees, does not "expressly create" them as those terms are employed in §28A.2(1)(a).

The central issue is whether a peer review committee is a "governmental body" within the meaning of subsection (c). Subsection (c) provides coverage for bodies delegated authority by boards, councils and commissions covered by subsections (a) and (b). To be covered by subsection (c), a body must be: 1) multi-membered, 2) "formally" created by a board, council, commission or other governing body, 3) "directly" created by a board, council, commission or other governing body, and 4) must itself be a "governing body," in the sense of having been delegated some policy-making or decision-making authority. Further elaboration of these requirements may be helpful.

The requirement that the body be "multi-membered" is self-explanatory. When an agency head makes a decision he or she does not have a meeting subject to being open.

With respect to legal procedure, Webster defines "formal" as "requiring special or stipulated solemnities or formalities to become effective." Thus, the requirement that a subsection (c) body must be "formally" created by the delegating body would be satisfied by a vote upon a resolution or motion or equivalent means.

Webster defines "direct" as "marked by an absence of an intervening agency, instrumentality or influence: IMMEDIATE . . . effected by the votes of the people or the electorate and not by representatives (elected for 7 years by direct suffrage)." Thus, the requirement that a subsection (c) body must be "directly" created by the delegating body means it

must be fully constituted and appointed by a body covered by §28A.2(1)(a) or (b) and not by an intermediary or representative such as an executive director or secretary. That this was intended by employing the term "direct" is made clear by the existence of subsection (d), specifically providing coverage for bodies delegated responsibility for intercollegiate athletic programs at the state universities. Those bodies are appointed by the presidents of the universities, who are not covered by subsections (a) or (b). In the absence of the special provision, they would not be covered by subsection (c), because they are not "directly created" by the Board of Regents.

The requirement that a subsection (c) body must itself be a "governing body" in the sense specified is plainly implied. First, we note that the "definition" of "governmental body" does not consist of words of explanation. Indeed, subsection (a), for example, refers to a "board, council, commission or *other governing body.*" This language indicates that the essential notion of "governing" or "governmental" is well understood and the function of the definition is to limit the coverage of the chapter to certain of those who clearly do exercise governmental authority. Webster defines "govern" as "to exercise arbitrarily or by established rules continuous sovereign authority over; *esp.* to control and direct the making and administration of policy in." The General Assembly, the Governor and other executive officers plainly "govern" in this sense, but the definition of governmental body serves to exclude them from coverage. What is implicit in §28A.2(1) is made more explicit in two adjacent sections of the chapter which relate the notion of governing to "policy-making" and "decision-making."

Section 28A.2(2), defining the term "meeting," provides as follows:

> 2. "Meeting" means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter *within the scope of the governmental body's policy-making duties.* Meetings shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter. (Emphasis added).

It would make no sense to include within the definition of a "governmental body" a group which could never have a "meeting" within the statutory definition of that term.[3]

It appears from the legislative history that the terms "policy-making duties" were chosen advisedly. The Legislative Service Bureau has provided us with a copy of the proposed open meetings law as it emerged from subcommittee. In that draft, the following definition of "meeting" appeared.

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[3] It should be noted that an alternative construction of the statute would be to read the definitions of "governmental body" and "meeting" separately and to articulate a rule that certain bodies are "covered" but never have "meetings" which are subject to the requirements of the act. The practical effect would be the same under either approach. But because the basic question is one of coverage, we believe persons possibly subject to the act will more clearly understand our construction if it is framed in terms of the definition of a "governmental body."

" 'Meeting' means a gathering, formal or informal, of a majority of the members of a governmental body where the business of that body is discussed or any action on its behalf is taken."

The only apparent purpose of the addition of the "policy-making duties" language in full committee would be to remove any doubts about coverage. In employing this language, the committee adopted, fortuitously or otherwise, one of three possible functional approaches to the question of which agencies should be covered, an approach linked by the author of a law review article to existing law under the *Greene* case, *supra*. *See Note*, "The Iowa Open Meetings Act: A Lesson in Legislative Ineffectiveness." 62 Ia.L.Rev. 1108, 1119 (1977).

We note also the declaration of policy contained in §28A.1:

This chapter seeks to assure, 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. . . . (Emphasis added.)

That purpose would not be advanced by application of the statute to a body with no decision-making authority.

In this respect, we interpret the new statute consistently with prior law. Section 28A.1, Iowa Code (1977), provided, in pertinent part:

All meetings of the following public agencies shall be public meetings open to the public at all times, and meetings of any public agency which are not open to the public are prohibited, unless closed meetings are expressly permitted by law:

1. Any board, council, commission, created or authorized by the law of this state.

2. Any board, council, commission, trustees, or governing body of any county, city, township, school corporation, political subdivision or tax-supported district in this state.

3. Any committee of any such board, council, commission, trustees, or governing body.

In determining whether the Iowa State Athletic Council was a "council" within the meaning of the prior act, the Iowa Supreme Court, in *Green v. Athletic Council of Iowa State University*, 251 N.W.2d 559, 561 (Iowa 1977), stated:

Obviously the athletic council exercises governmental powers. It is a powerful *decision-making and policy-making* body which acts for the public in directing and administering intercollegiate athletics at the university. It is not a mere study or advisory group. Cf. *McLarty v. Board of Regents of the University System of Georgia*, 231 Ga. 22, 200 S.E. 2d 117 (1973). . . . [T]his clearly makes the council a governmental entity. . . . (Emphasis added).

This focus on decision-making and policy-making is clearly carried forward into the new act. Although the coverage of the new act is in some respects plainly narrower than the *Greene* logic would suggest, we see no indication that the coverage is broader than the *Greene* approach.

In determining whether a particular body satisfies the requirement that it be a governing body, in the sense of having policy-making or decision-making authority, we note that §28A.1 requires that "ambiguity in the construction or application of this chapter should be resolved in favor of openness." Thus, we do not read §28.2(1) as requiring that a

governmental body have "final authority" in the sense that its decisions could not be overridden by the body which created it. It would be sufficient if the body had authority to make a decision binding upon an affected party or group unless and until it were overridden by superior authority. However, a body whose authority does not extend beyond studying or investigating a problem and/or giving advice or making recommendations, is not a "governmental body" within the meaning of the open meetings law.

In order to avoid misunderstanding, several other general observations appear in order. Although we do not understand the language of the chapter to expand coverage beyond prior law, we should note several important features of the act designed to achieve the purpose of making governmental decisions accessible to the people. First, we note an attempt to employ more precise language to avoid the constitutional difficulties encountered by the prior act and to close a vague "escape hatch" open to covered bodies. Second, the new act has increased "teeth," both in the procedures to be followed and in the ease with which stronger sanctions can be imposed. Finally, we note the strong policy preference for openness expressed by the act. Although not subject to the procedural requirements or the sanctions of the chapter, an advisory or study group which will report to a governing body ordinarily ought to be subject to the public expectation that it will abide by the spirit of the act and conduct its business in the sunshine except when a covered body could go into closed session under §28A.5.

We turn now to the specific question of whether this peer review committee is a covered governmental body. At this point, we are guided only by the rules adopted by the Board of Engineering Examiners.

The rules plainly contemplate that a peer review committee will be "multi-membered." 390-4.4(1), I.A.C. Although it appears that the Board contemplates "ad hoc" rather than "standing" committees, Board rules rather clearly contemplate that a particular committee will be "formally" and "directly" created by the Board itself rather than by the chairman or an administrative officer of the Board. 390-4.4(1), I.A.D. However, the rules, as presently written, limit the authority of a peer review committee to investigating complaints and making recommendations concerning the appropriate disposition of the complaint. 390-4.4(2), 4.4(4) and 4.4(5). At present, the Board has clearly reserved for itself all policy-making and decision-making authority with respect to discipline of registrants. We conclude, therefore, that at present a peer review committee of the Board of Engineering Examiners is not a "governmental body" within the meaning of Chapter 28A. Of course, should broader authority be delegated to a peer review committee, our conclusion might be different.

In summary, a peer review committee of the Board of Engineering Examiners is not a "governmental body" within the meaning of §28A.2(1)(a), because it is not expressly created by statute. A body delegated authority by a covered board, council, commission or other governing body is a "governmental body" within the meaning of §28A.2(1)(c) if it is "multi-membered," "formally" and "directly" created, and is delegated governmental authority in the sense of policy-making or decision-making duties. The peer review committees authorized by the Board of Engineering Examiners is not covered by §28A.2(1)(c), because it has not been delegated such authority.

May 4, 1979

MOTOR VEHICLES: Section 321.233, Code of Iowa (1977), does not exempt maintenance personnel hauling snow on a public highway, not officially closed, from complying with local traffic signals. (Miller to Allbee, Franklin County Attorney, 5-4-79) #79-5-5 (L)

May 4, 1979

COUNTIES: permit fee. Article III (Sec. 39A) of the Iowa Constitution. The county board of supervisors may issue a permit to and collect a permit fee from quarry operations pursuant to the County Home Rule Amendment, as long as the permit fee is reasonable and related to the expense of administration. However, if the purpose or the effect of the fee is to raise revenue beyond the administrative costs of permit system itself, the fee would be a tax and be in contravention of the County Home Rule Act. (Condon to Davitt, State Representative, 5-4-79) #79-5-6

Honorable Philip A. Davitt, State Representative: This letter is in response to your request for an opinion regarding the power of the county board of supervisors to license quarry operators and to charge a fee. Specifically, your questions were as follows.

1. Does the Iowa Code authorize or limit such a permit and fee?

2. If it is not authorized by the Code, does the recent "home rule" amendment to the Iowa Constitution authorize such a permit and fee, and does the permit constitute a "tax" as prohibited by that amendment?

In response to your first question, the Iowa Code neither authorizes nor prohibits a county board of supervisors from requiring a permit and a permit fee for the operation of a quarry.

Your second question refers to the County Home Rule Amendment, Article III (Section 39A) of the Iowa Constitution. The Amendment states as follows:

Counties or joint county-municipal corporation governments 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 general assembly may provide for the creation and dissolution of joint county-municipal corporation governments. The general assembly may provide for the establishment of charters in county or joint county-municipal corporation governments.

If the power or authority of a county conflicts with the power and authority of a municipal corporation, the power and authority exercised by a municipal corporation shall prevail within its jurisdiction.

The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in express words is not a part of the law of this state.

As a result of this amendment, counties may exercise power to govern local affairs without express statutory authorization. The amendment contains four limitations, one of which must be considered in the collection of a permit fee. A county may not "levy any tax unless expressly authorized by the general assembly."

A tax is defined in Iowa law as a "charge to pay the cost of government without regard to special benefits conferred." *Newman v. City of Indianola*, 232 N.W. 2d 568, 573 (Iowa 1975); *In re Shurtz's Will*, 242 Iowa 448, 46 N.W. 2d 559, 562 (1951).

A determination as to whether the proposed fee and/or permit is in fact a tax relies primarily on amount charged. Under the County Home Rule Act set out above, the county may not levy any tax. This does not mean that counties are forbidden from procuring permits and/or fees to control the operations of quarries, as long as the fee bears a reasonable relation to the administrative costs of issuing and administering of the permits. [*See* Dillion Mun. Corp. §291; *State v. Manhattan Oil Co.*, 199 Ia. 1213, 203 NW 301, 303 (1925); *Towns v. Sioux City*, 214 Ia. 76, 241 N.W. 658, 663 (1932)].

In *State v. Osborne*, 171 Ia. 678, 154 N.W. 294 (1915), the court reviewed the imposition of a license fee and whether such a fee was indeed a tax. The court in *Osborne, supra.* 298, stated that:

The weight of authority is to the effect that a license fee enacted as a police regulation for an occupation or business which is not of itself harmful or demoralizing must have some fair relation to the cost of making and issuing the license and the expense of policy supervision and protection. *Telephone Co. v. Milwaukee*, 126 Wis. 1, 104 N.W. 1009, 1 L.R.A. (N.S.) 581, 110 Am. St. Rep. 886; *Robinson vs. Norfolk*, 294, 128 Am. St. Rep. 934; *Postal Co. v. Taylor*, 192 U.S. 64, 28 Sup. Ct. 208, 48 L. Ed. 243; Tiedeman on Police owers, §274.

When, therefore, it is clearly evident that an act sought to be justified as an exercise of the police power is not, in fact, intended as a regulation, and that its real purpose, no matter what verbiage is employed to conceal it, is to raise revenue or to accomplish some ulterior effect not within the legitimate province of legislation, the courts will hold it be unauthorized and void. *Iowa City v. Glassman*, 155 Iowa, 671, 136 N.W. 899, 40 L.R.A. (N.S.) 852. *See* cases above cited.

While no express authority to charge a fee for a permit is found in the Iowa Code, we think that whenever, as in this case, a county is not restricted or preempeted by the state in the regulation of a given subject, the county may require those who do any act, or transact any business, to obtain a license or permit therefore. A reasonable fee for the license or permit, and the labor or expense attending its issue, may be properly charged under County Home Rule to the person procuring it, although the power to do so is not expressly given in the Iowa Code. This is not a tax, nor its exaction an exercise of the taxing power. It is simply a reasonable sum, collected of the party interested for the purpose of defraying the necessary expense attending the granting of the permit. As long as such a reasonable sum is collected, the fee would be proper in scope and not in contravention of the County Home Rule Act. However, if the purpose or the effect of the fee is to raise revenue beyond the administrative costs of permit system itself, the fee would be a tax and be in contravention of the County Home Rule Act.

May 9, 1979

COUNTIES: County sheriff, County Civil Service Commission; Sections 80B.2, 80B.3(3), 80B.11, 341A.6(5), 341A.6(6), 341A.6(7), 341A.8, 341A.13, 692.1(10), 692.2, 692.3, Code of Iowa, 1979. County sheriffs may not provide criminal history data to the County Civil Service Commission. County sheriffs may not redisseminate history information received on an individual from the Department of Public Safety to a County Civil Service Commission even if it is the basis for rejection of that individual. (Boecker to Larson, 5-9-79) #79-5-7

Mr. Charles W. Larson, Commissioner, Iowa Department of Public Safety: This is in response to your request for an opinion of the Attorney General with respect to the following questions:

"1. Can the county sheriff provide criminal history record information to the County Civil Service Commission on civil service applicants for appointment to the position of deputy county sheriff?

2. If the county sheriff cannot provide this information directly to the Civil Service Commission, can the county sheriff reject applicants based upon prior criminal history without justifying to the Civil Service Commission the reason for that rejection?"

The answer to your first question is no. The county sheriff may not provide criminal history information to the County Civil Service Commission on civil service applicants. Section 692.2, Code of Iowa (1979), specifically sets forth those who may receive criminal history data. Section 692.2, Code of Iowa (1979), states in pertinent part:

"That department and bureau may provide copies or communicate information from criminal history data only to criminal justice agencies, or such other public agencies as are authorized by the confidential records council. The bureau shall maintain a list showing the individual or agency to whom the data is disseminated and the date of dissemination.

Authorized agencies and criminal justice agencies shall request and may receive criminal history data only when:

1. The data is for official purposes in connection with prescribed duties, and,

2. The request for data is based upon name, fingerprints, or other individual identifying characteristics."

Clearly the county sheriff meets this criteria. The county sheriff's office is a "criminal justice agency" as defined in Section 692.1(10), Code of Iowa, 1979:

"'Criminal Justice Agency' means any agency or department of any level of government which performs as its principal function the apprehension, prosecution, adjudication, incarceration, or rehabilitation of criminal offenders."

Section 692.3, Code of Iowa, 1979, governs the redissemination of criminal history records by those who have received the same from Department of Public Safety. Section 692.3 states:

"Redissemination. A peace officer, criminal justice agency, or state or federal regulatory agency shall not redisseminate criminal history data, within or without the agency, received from the department or bureau, unless:

1. The data is for official purposes in connection with prescribed duties of a criminal justice agency, and

2. The agency maintains a list of the persons receiving the data and the date and purpose of the dissemination, and

3. The request for data is based upon name, fingerprints, or other individual identification characteristics.

A peace officer, criminal justice agency, or state or federal regulatory agency shall not disseminate intelligence data, within or without the agency, received from the department or bureau or from any other source, except as provided in subsections 1 and 2."

The county sheriff may only disseminate this data to a criminal justice agency and a County Civil Service Commission does not qualify. 1976 O.A.G. 671.

The county sheriff has a duty to comply with the standards established by the Iowa Law Enforcement Academy and Council pursuant to Chapter 80B, Code of Iowa, 1979. The Legislature created the Law Enforcement Academy and Council for the purpose of setting the qualifications of individuals desiring to be peace officers in Iowa. Section 80B.2, Code of Iowa, 1979. A law enforcement officer who must meet these qualifications includes a deputy sheriff. Section 80B.3(3), Code of Iowa, 1979.

Pursuant to Section 80B.11, Code of Iowa, 1979, rules are promulgated by the director of the Academy governing the qualifications that must be satisfied to become a law enforcement officer. One requirement is that an individual pass a background investigation. Section 550-1.1(6)(80B) IAC[1] states:

"In no case shall any person hereafter be recruited, selected, or appointed as a law enforcement officer unless such person:

* * *

Is of good moral character as determined by a thorough background investigation including a fingerprint search conducted of local, state and national fingerprint files and has not been convicted of a felony or a crime involving moral turpitude. When the hiring authority is prohibited from receiving criminal history data as specified under Chapter 749B[2] of the Code, then the fingerprints will be taken by a police department under civil service, a sheriff's department or a state law enforcement agency and submitted to the Iowa Law Enforcement Academy director for search."

The county sheriff is the hiring authority pursuant to Section 341A.13, Code of Iowa, 1979. Section 341A.13 states:

"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."

From the above it is evident that the county sheriff is obligated to check the criminal history records before hiring an individual. Also, it is evident that he may receive this information from the Department of Public Safety. The point to be made in answering your first question is can he disseminate this information to the County Civil Service Commission? We hold that a county sheriff may not disclose criminal history data to a County Civil Service Commission.

The answer to your first question necessitates that the response to the second question presented be in the affirmative. As we stated above, the county sheriff may redisseminate this information only to a criminal justice agency as defined in Section 692.1(10).

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[1] An objection to this rule was filed by Administrative Rules Review Committee on February 23, 1976. IAC Supp. 1-26-76, 3-18-76.

[2] Chapter 749B appears as Chapter 692 in the 1979, Code of Iowa.

The county sheriff is the ultimate appointing authority. Section 341A.13, Code of Iowa, 1979. It is the county sheriff who must determine the individuals to be hired from the list of ten supplied to him from the County Civil Service Commission.

The responsibility of the County Civil Service Commission is to conduct competitive tests for the position being filled and to certify to the county sheriff a list of those passing the examination. Sections 341A.6(6) and 341A.6(7), Code of Iowa, 1979.

Appointments to the position of deputy sheriff shall be made solely on "merit, efficiency and fitness," and these qualities are to be determined by "open competitive examination and impartial investigations." Section 341A.8, Code of Iowa, 1979. The County Civil Service Commission as stated has the authority to prepare and administer the competitive examination pursuant to Section 341A.6(6), but the Code is silent as to by whom the impartial investigation is made. In light of the restrictions placed upon the access to and dissemination of criminal history data pursuant to Chapter 692, Code of Iowa, 1979, this responsibility must necessarily fall to the county sheriff. If the reason for rejection is based upon data contained in the criminal history records of an individual the county sheriff is prohibited by Section 692.3 from redissemination.

In summary, the county sheriff bears the task of conducting the background investigation of an individual certified to him by the County Civil Service Commission. The county sheriff may not state the specific reason for rejection if said rejection is based on criminal history data to the County Civil Service Commission.

The problem presented by the procedure set forth above is that the County Civil Service Commission must hear appeals and complaints from those who may be rejected by the county sheriff. Section 341A.6(5), Code of Iowa, 1979. If the rejection is based upon information obtained from the individual criminal history record, the county sheriff could not relate this information to the County Civil Service Commission.

There are two possible solutions to this problem. Once the sheriff has received damaging information to an applicant from the criminal history data obtained pursuant to Chapter 692, he could verify from another source the record received. The county sheriff if confronted with an appeal pursuant to Section 341A.6(5) could demonstrate to the County Civil Service Commission the reason for rejection based on the independent data obtained.

The second alternative would be for the County Civil Service Commission to obtain from the Confidential Records Council the authority to be a direct recipient of criminal history records when an appeal is taken. This could be accomplished under the authority of Section 692.2, Code of Iowa, 1979, which permits other "public agencies as are authorized" to receive criminal history data from the Department of Public Safety.

May 9, 1979

CRIMINAL PROCEDURE: Rules 82 and 84 of the Iowa Rules of Civil Procedure. Rule 82 of the Iowa Rules of Civil Procedure, regarding service (notification) and filing of pleadings and other documents, is

applicable to criminal proceedings. Rule 84 of the Iowa Rules of Civil Procedure, regarding copy fees taxed as costs, is not applicable to criminal proceedings, nor is it apposite to uncontested probate matters. (Dallyn to Bordwell, Washington County Attorney, 5-9-79) #79-5-8

Mr. Richard S. Bordwell, Washington County Attorney: You have requested an opinion from the Attorney General concerning the applicability of certain rules of the Iowa Rules of Civil Procedure to criminal proceedings as well as to probate matters. You pose the following questions for consideration:

1. Whether the provisions of Rule 82 of the Iowa Rules of Civil Procedure, regarding service (notification) and filing of pleadings and other documents, are applicable to criminal proceedings?

2. Whether Rule 84 of the Iowa Rules of Civil Procedure, regarding copy fees taxed as costs, is applicable to criminal proceedings?

3. Whether copy fees for notices and final reports served in uncontested probate matters are recoverable as costs taxed pursuant to Rule 84 of the Iowa Rules of Civil Procedure?

As a premise to your initial questions, the Iowa Rules of Civil Procedure were promulgated by the supreme court in 1943 pursuant to the power of the court granted in its enabling statute to "prescribe all rules of pleading, practice, and procedure . . . for all proceedings of a civil nature in all courts of this state . . . ." See Section 684.18, Code of Iowa (1979) (which reiterates this same language). Notwithstanding the rather broad language of Iowa R. Civ. P. 1 ("these rules shall govern the practice and procedure in all courts . . .") the Rules of Civil Procedure have no application to criminal cases unless a specific statute makes a particular rule applicable. *State v. Addison,* 250 Iowa 712, 95 N.W.2d 744, 747 (1959). Thus, of its own force, neither Rule 82 nor Rule 84 would apply to criminal proceedings.

However, Rule 28(2) of the Iowa Rules of Criminal Procedure [Chapter 813, Code of Iowa (1979)] expressly provides that "service and filing of written motions, notices and other similar papers shall be in the manner provided in civil actions." This statute expressly makes Iowa R. Civ. P. 82 (which governs notice, service and filing in civil cases) applicable to all criminal proceedings. Therefore, in criminal proceedings, all papers required by rule or statute to be filed with the court shall be served upon the other party or his attorney, and all papers required to be served upon the other party shall be filed with the court. Iowa R. Civ. P. 82.

With respect to your second question, court costs incurred during criminal proceedings were not recoverable by the prevailing party at common law; they are now taxable only to the extent that a specific statute permits a specific type of cost to be recovered. *City of Cedar Rapids v. Linn County,* 267 N.W.2d 673, 674-675 (Iowa 1978); *Woodbury County v. Anderson,* 164 N.W.2d 129, 133 (Iowa 1969). Section 625.1, Code of Iowa (1979) does not permit the recovery of copy fees in criminal proceedings as this provision has been held applicable to civil proceedings only. *City of Cedar Rapids v. Linn County,* 267 N.W.2d 673, 674 (Iowa 1978) [construing §625.1, Code of Iowa (1977), the language of which **is identical to that in the 1979 Code ("Costs shall be recovered by the successful party against the losing party")]. Prior opinions issued by this office [1976 O.A.G. 697, 881] stating that §625.1 of the 1975 Code**

is applicable to criminal proceedings are thus overruled to the extent inconsistent with *City of Cedar Rapids v. Linn County.*

Nor is chapter 606, Code of Iowa (1979) authority for incorporating the provision of Iowa R. Civ. P. 84 (allowing copy fees to be taxed as costs) into criminal proceedings. Section 606.15 provides that "the clerk of the district court shall charge and collect the following fees" for an enumerated list of services rendered by the clerk for either party in a civil suit. Section 606.15(27) then provides that the clerk shall charge and collect, "in criminal cases, the same fees for [the] same services as in suits between private parties. When judgment is rendered against the defendant, the fees shall be collected from such defendant." These "same fees" are those fees accrued by the clerk of court in performing the services enumerated in §606.15 for either the State or the defendant during a criminal proceeding and are thus by definition "court costs," which are charged to a convicted defendant pursuant to §606.15(27). See *City of Cedar Rapids v. Linn County*, 276 N.W.2d 673 (Iowa 1978).

The fees listed in §606.15 do not cover those costs, such as copy expenses, incurred independently by a party to the proceeding. This type of cost (if allowed by law to be taxed with court costs) is *recoverable* by the successful party against the losing party pursuant to the express authority of §625.1, Code of Iowa (1979). However, since §625.1 is not itself applicable to criminal proceedings, it cannot be used to apply Iowa R. Civ. P. 84 to criminal proceedings. *City of Cedar Rapids v. Linn County*, 276 N.W.2d 673, 674 (Iowa 1978).

There are apparently no other statutes expressly permitting copy fees to be taxed as costs in criminal proceedings, nor are there any other statutes incorporating Iowa R. Civ. P. 84 into criminal procedure. Therefore, the conclusion must be that Iowa R. Civ. P. 84 is inapplicable and that copy fees are not taxable as court costs in criminal proceedings.

With respect to your third question, it appears that Iowa R. Civ. P. 84 is inapposite to uncontested probate matters. Section 625.1 allows those copy fees taxable with costs pursuant to Iowa R. Civ. P. 84 to be recovered by the *successful party* against the *losing party. However*, in uncontested probate matters, there are no successful or losing parties; therefore, copy fees would not be assessed between opposing parties as "court costs" pursuant to a final judgment. See *Matter of Estate of Adams*, 234 N.W.2d 125, 130 (Iowa 1975). A personal representative incurring such copy-fee costs in an uncontested probate matter would have to submit them as a line item in his final report submitted to the district court sitting in probate. The court's approval of the final report would then tacitly allow these expenses as costs of administration and thus render them taxable to the gross assets of the estate.

May 11, 1979

COUNTY AND COUNTY OFFICERS: SHERIFF: USE OF COUNTY-OWNED AUTOMOBILES. Section 721.2, Code of Iowa (1979). The use of county-owned automobiles by sheriff's officers on "24-hour call" to travel between home and work does not violate section 721.2, Code of Iowa (1979). (Dallyn to Schnekloth, State Representative, 5-11-79) #79-5-9

The Honorable Hugo Schnekloth, State Representative: You have requested an opinion of the Attorney General concerning the use of county-

owned automobiles by members of a county sheriff's office. You pose the following question for consideration:

Whether the use of a county-owned automobile by sheriff's officers on "24-hour call" to travel between home and work constitutes use of public property for private purpose or personal gain in violation of §721.2(5) Code of Iowa (1979)?

You have expressed your factual concerns over this matter as follows: Many officers of the sheriff's department have county-owned vehicles assigned to them on a "24-hour" basis, which means these are assigned to officers who are subject to call and are expected to respond and report to duty 24 hours a day, seven days a week. Because they do have this kind of responsibility and have the vehicle assigned to them, they also drive the vehicle to and from work on a regular basis.

These matters raise the question of whether this use of the vehicles violates section 721.2(5) Code of Iowa (1979). This section provides that any public officer or employee, who knowingly does any of the following, commits a serious misdemeanor:

Uses or permits any other person to use the property owned by the state or any subdivision or agency of the state for any private purpose and for personal gain, to the detriment of the state or any subdivision thereof.

It is assumed that the vehicles you refer to are those county-owned automobiles provided by the board of supervisors for the use of the sheriff and deputies pursuant to section 332.35, Code of Iowa (1979). As county-owned vehicles, they are clearly "the property owned by . . . any subdivision or agency of the state" within the meaning of Code section 721.2. Similarly, the sheriff and deputies would be "any public officer or employee" within the meaning of the statute. Thus, the issue is what uses constitute "for any private purpose and for personal gain, to the detriment of the state or any subdivision thereof."

Plainly what was sought to be prohibited by the legislature in enacting this statute was the unauthorized use of state property for purposes unrelated to the furtherance of state or county interests. As an initial matter, it seems clear that the phrase "to the detriment of the state or any subdivision" should not be construed as words of limitation in the case where the *sole* use of an automobile is for a private purpose and thus for personal gain. In such a situation, there would be by definition no benefit derived by the State (or county) in the use of its property, and detriment would be presumed through the natural depreciation in value of the property as a consequence of its unauthorized use.

It is in the area of mixed uses, i.e., where the employee's use of the automobile is arguably serving a public as well as a private purpose, that the question of whether a private use, when balanced against the **State interest served, results in either a benefit or a detriment to the State (or county). In a former opinion issued by this office, the issue was raised as to whether Department of Revenue employees working in field offices could drive state motor vehicles to and from work even though they occasionally spent several successive days in their offices. 1976 O.A.G. 339. In holding that such employees could so use state motor vehicles under section 740.20, Code of Iowa (1975) [the provisions of which were repealed by 68 G.A., ch. 1245(4) section 525 and were sub-**

stantially re-enacted into section 721.2(5) Code of Iowa (1979)], the opinion applied the following test:

The test should be whether the employee, in using his vehicle to go to or from a hotel or motel, or even to or from his home, is serving a public as well as a private purpose. If, for example, a state employee is regularly on call at home or other places, frequently required to do state work at home or to depart from his home on state business at odd hours, there is no reason why the vehicle cannot be taken home. Of necessity, and within these guidelines, the factual determination of whether a motor vehicle is being used or operated for private purpose, or properly for a dual purpose, public as well as private, must ordinarily be left to the head of the employee's department. 1976 A. G. O. at 341.

This test appears entirely appropriate to the question you present. A reasonable person could determine that requiring law enforcement officers to be on "24-hour call" was rationally related to promoting the State's or county's interest in protecting the public health, safety and welfare. A reasonable person could similarly conclude that providing such officers with permanently-assigned State or county vehicles was necessary to assure prompt and efficient response to public emergencies occurring at odd hours of the day or night. Instant access to these vehicles would be a necessary component of this determination; thus, permitting these officers to drive these vehicles to and from work and home would necessarily be implied therein.

Under section 721.2(5) Code of Iowa (1979), the State or county would be deriving a benefit any time it could be factually demonstrated that an officer was using a county-owned automobile for a purpose that assures his instant availability and mobility in an employment-related "call," notwithstanding any spin-off benefits to him personally as a result of his access to the automobile. This would include driving the automobile to and from work and home, and arguably between work or home and another destination if the officer's presence at this destination is consistent with his official duties and he is required to be on instant call while present at this other destination. This, of course, avoids the absurd and inefficient result of forcing an officer to take a call at home, drive his personal automobile down to the sheriff's office, pick up a county automobile, and then proceed to the scene of the emergency — perhaps too late to be of assistance.

As suggested in the prior opinion noted above, the head of the department should promulgate written rules establishing guidelines for such mixed uses of county-owned automobiles. These rules should contain the names or official titles of those persons authorized to drive county-owned automobiles to and from work. There are apparently no Iowa Supreme Court decisions construing the code provision "for any private purpose and for personal gain." However, in a close question of whether the public use involved is merely incidental to the primary private use, it would be advisable for the departmental rules to follow a fairly restrictive interpretation of the public interest involved in an incidental use of the vehicle by an off-duty deputy, who is nevertheless "on call." By incidental use, it is meant that use which is other than the driving of the automobile to and from work over the most direct or accessible route.

The foregoing analysis is not meant to be a blanket authorization for *any* private use of State or county property on a mere pretext of State

interests. An example of a permissible use of the automobile might be where the officer transports himself, and perhaps another witness, to a court hearing during his off-duty hours (where his presence is required due to his involvement in the case incurred pursuant to his official duties). An example of an impermissible use would be transporting himself or his family to the grocery store or to a social event in a county-owned automobile.

This promulgation of rules would (1) deter such unauthorized use of the automobiles, (2) provide guidelines for making the factual determination of whether an automobile is properly being used for a mixed purpose, and (3) provide due process notice to employees as to when their unauthorized use of an automobile may be a criminal violation of section 721.2, Code of Iowa (1979). Moreover, it is again important for these departmental rules to restrict, rather than to enlarge, those questionable instances in which county-owned automobiles are used for both public and private purposes. As noted in a prior opinion of this office, an authorization by an agency or department to use public property for other than purely public purposes, if later shown to be erroneous, may subject both the department head and the employee to criminal sanctions. See O.A.G. No. 77-7-10 (July 14, 1977).

May 14, 1979

COUNTIES: Licensing of food service establishments. Sections 170.2, 170A.2(5), 170A.2(8), 170A.4, and 332.23. The Secretary of Agriculture has exclusive control of the regulation, inspection, and licensing of food service establishments, precluding counties from licensing the establishments as county businesses pursuant to Section 332.23. However, a county may license a business other than a food service establishment even though a food service establishment is also on the premises. (Condon to Burk, Blackhawk Assistant County Attorney, 5-14-79) #79-5-10 (L)

May 14, 1979

COUNTIES: Licensing of food service establishments. Sections 170.2, 170A.2(5), 170A.2(8), 170A.4, and 332.23, Code of Iowa (1979). The Secretary of Agriculture has exclusive jurisdiction of the licensing of food service establishments and the county may not license the establishment as a county business pursuant to Section 332.23. However, a county may license a business other than a food service establishment even though a food service establishment is also on the premises. (Condon to Bordwell, Washington County Attorney, 5-14-79) #79-5-11 (L)

May 14, 1979

USURY: Chapter 535, 1979 Code of Iowa. An out-of-state creditor doing business with unincorporated Iowa businesses is subject to the Iowa Usury Statute. Remedies and sanctions for violations are found at §§535.4 and 535.6. The Attorney General of the State of Iowa may seek injunctive relief when the statute is openly, repeatedly, continuously, persistently, and intentionally violated. (Ormiston to Chiodo, State Representative, 5-14-79) #79-5-12 (L)

May 14, 1979

COUNTIES AND COUNTY OFFICERS: Signature of surveyor on plat. Section 335.2, Iowa Code (1979). The signature of a land surveyor on a plat filed with a county recorder, must be an actual signature, and not a photocopied one. (Haskins to Hanson, Special Counsel, Board of Engineering Examiners, 5-14-79) #79-5-13 (L)

May 16, 1979

OPEN MEETINGS—"MEETING": §§28A.2(1) and 28A.2(2), Iowa Code (1979). To constitute a "meeting" as defined in §28A.2(2) the following elements must be present: (1) a majority of the members of a governmental body must be involved in the particular gathering or assemblage ,and (2) the acts or duties of the members involve policy-making or decision-making responsibilities. The second element encompasses the discussion and evaluative processes in arriving at a decision or policy. Ministerial acts of the members, i.e., acts which do not involve an exercise of judgment as to the propriety of an act of the body, are exempted from coverage by the open meetings law. If policy-making and decision-making duties are performed by a majority of the members, it constitutes a "meeting" under §28A.2(2) regardless of the informal setting of the gathering. (Cook to Pellett and Crabb, State Representatives, 5-16-79) #79-5-14

The Honorable Wendell Pellett; The Honorable Frank Crabb, State Representatives: You have requested our opinion on the definition of "meeting" found in §28A.2(2) of Iowa's "open meeting" laws, Chapter 28A, Iowa Code (1979).[1] Your question focuses upon those occasions when members of a governmental body may meet "socially for a cup of coffee or riding together in a car to board meetings or basketball games." The issue you present for our consideration is whether such informal, social gatherings constitute a "meeting" within the definition of §28A.2(2).

In an opinion to Thomas D. Hanson, issued May 4, 1979, (OAG number 79-5-4), we discuss the parameters of coverage of the open meeting law in terms of the definition of "governmental body" in §28A.2(1). Any analysis of the coverage of the law must necessarily begin with the inquiry as to whether a particular agency or body is a "governmental body" within the law. If so, then the members must determine secondly whether a particular gathering or assemblage of the members constitute a "meeting" as defined in §28A.2(2). If a particular gathering is not covered, then it need not be conducted in the "sunshine." If it is covered, then the provisions are triggered and must be followed. It is this second inquiry that is the focus of your opinion request. We assume, for purposes of this opinion, that we are dealing with a "governmental body" as defined.

It is necessary to set out §28A.2(2) in its entirety:

" 'Meeting' means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties. Meetings shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter."[2]

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[1] Chapter 28A of the 1979 Iowa Code, effective January 1, 1979, is a complete revision of the open meeting laws. Former Chapter 28A, Iowa Code (1977), was repealed *in toto. See,* Chapter 1037, §1, Acts 67th G.A. (1978).

[2] **The prerevised law, §28A.1(3), Iowa Code (1979), contained an extremely broad definition of "meeting", sweeping within its meaning "all meetings of every kind, regardless of where the meeting is held, and whether formal or informal."**

From the statutory definition, we can readily identify four aspects of an assemblage which must be examined to determine whether a gathering is a "meeting" within the law. First, there clearly must be a "majority of the members of a governmental body" involved in any particular assemblage or gathering to constitute a "meeting".[3] Of course, the "majority" requirement simply requires that a number, greater than half of the total members, be present or involved in a gathering. *See, Black's Law Dictionary*, 1107 (4th ed. 1968). In the absence of a majority of the members, the provisions do not apply and discussions or business conducted by individual members need not be open to the public.

Second, the statute makes it clear that the determination whether a gathering of members of a governmental body is a "meeting" does not depend upon the formalities of the occasion. The section specifically provides that an "informal", as well as a formal gathering of the members may constitute a "meeting" for purposes of the law. It would be a strange law indeed which was intended to assure the public a right to observe their government's business being conducted, but which permitted governmental body members to avoid the requirements of the law by simply conducting important public affairs during informal settings. The intent of the Legislature in including the term "informal" is clearly to prevent this. Thus, in terms of your question, the mere fact that the members are "together socially for a cup of coffee" or "riding together in a car to board meetings or basketball games" is not determinative of the question. Such "informal" gatherings of the members constitute a "meeting" under the law if the members engage in discussion or conduct public business involving "deliberation or action upon any matter within the scope of the governmental body's policy-making duties," as discussed below.

Third, the definition specifically excludes from coverage any "gathering of members . . . for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter." Some elaboration on this coverage exemption is necessary.

We are first guided by the definition of "ministerial act" found in *Arrow Express Forwarding Co. v. Iowa State Commerce Comm.*, 256 Iowa 1088, 130 N.W.2d 451 (1964):

"A ministerial act has been defined as 'one which a person or board performs upon a given state or 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'."

And see, Gibson v. Winterset Community School Dist., 258 Iowa 440, 138 N.W.2d 112 (1966); 27 Words and Phrases, Ministerial Act, p. 374

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[3] We assume from your question for purposes of this opinion that the members are together, in person, during a single gathering. We do, however, want to express our doubts that the provisions could be avoided through any bifurcation mechanism employed by a majority of the members to conduct the public's business.

We also note here that the statute expressly includes a "gathering . . . by electronic means" and presumably would cover telephonic discussions conducted by a majority of the members if the remaining elements of a meeting, discussed infra, are present.

(1961). It is apparent that the linchpin of the definition is whether the individual must "exercise . . . judgment upon the propriety of the act being done." Thus, as applied in the §28A.2(2) exemption, only those acts performed by a governmental body which do not involve an exercise of discretion or judgment are specifically excluded from coverage of the open meeting laws.

The second prong of the exemptive language refers to "social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter." This exemption makes clear that any gathering of the members of a purely, nonbusiness nature is excluded from open meeting coverage. However, the "social" exemption is limited to only those gatherings where the members do not engage in discussions or conduct amounting to policy-making or deliberations of the body.

This leads us to the fourth and central element of the "meeting" definition. The statute requires that "deliberation or action upon any matter within the scope of the governmental body's policy-making duties" be open to the public, unless within an exception in §28A.5. The term "deliberation" is defined by Webster as "a discussion and consideration by a group of persons of the reasons for and against a measure." In *Accardi v. Mayor & Council of City of No. Wildwood,* 386 A.2d 416 (N.J. 1976), the New Jersey Court, when called upon to determine the meaning of the term "deliberations" in that state's sunshine law, explained that it "includes the discussion and evaluation" of the facts giving rise to a body's decision. We also note here, that §28A.1 announces an assurance to the public that the "basis and rationale of government decisions" will be subject to public examination. The term "policy" is defined by Webster as follows:

"2a: a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions, b: a high-level overall plan embracing the general goals and acceptable procedures esp. of a governmental body."

In our opinion to Thomas Hanson, cited earlier, we observed that the focus of §28A.2(1) is upon those types of bodies which exercise decision-making and policy-making duties. In the context of the definition of "meeting" in §28A.2(2), the terms "deliberation" and "policy-making duties," as defined above, embrace those situations when such bodies exercise these duties. Moreover, the term "deliberation" includes the discussion and evaluative processes of such bodies in arriving at an eventual decision or policy. In contrast to the exempted "ministerial" duties of a body, the types of duties thus covered by these terms are those involving an exercise of discretion or judgment as to the propriety of an act performed by the body.

We recognize that questions will undoubtedly arise as to whether a partciular act of body members involves their decision-making and policy-making powers as opposed to ministerial acts. We note in this regard that §28A.1 provides that such ambiguity in the application of the law should be resolved in favor of the underlying policy in favor of open public meetings.

Accordingly, we now turn to your specific question. As noted earlier, it will not serve to exempt a gathering of members from the provisions by merely characterizing the gathering as a "social cup of coffee" or a

"ride to a board meeting or basketball game." The Section contemplates coverage of such assemblages if (1) a majority of the members are present, and (2) the members, in substance, engage in "deliberation or action upon . . . the governmental body's policy-making duties," as defined above. Under such circumstances, the open meeting provisions, (§28A.3, keeping of minutes and requirement that meetings be held open to the public), (§28A.4, public notice), (§28A.5, closed sessions), (§28A.6, enforcement) and (§28A.7, rules of conduct at meetings), apply and must be followed by the body.

May 16, 1979

OPEN MEETINGS LAW. Sections 28A.2(1) and 504A.17, Iowa Code (1979). A board of directors for a non-profit corporation formed under Chapter 504A is not covered by Chapter 28A because the board itself is not expressly created by statute. (Bremer to Riedman, Director, Iowa Department of Substance Abuse, 5-16-79) #79-5-15(L)

May 16, 1979

OPEN MEETINGS LAW. Section 28A.2(1), Iowa Code (1979). A non-profit agency which otherwise is not governed by Chapter 28A is not brought under the provisions of Chapter 28A solely by receipt of State funds. (Bremer to Representative Anderson, 5-16-79) #79-5-16 (L)

May 16, 1979

STATE OFFICERS AND DEPARTMENTS: Open Meetings: State Educational Radio and Television Facility Board. §§18.144, 28A.2(1), Iowa Code (1979). Ch. 1037, §12, Acts 67th G.A. (1978). To the extent that the advisory committees of the State Educational Radio and Television Facility Board are not delegated policy-making or decision-making authority, they are not "governmental bodies" under Ch. 28A, the new open meetings law. (Haskins to Thole, Executive Director, State Education Radio and Television Facility Board, 5-16-79) #79-5-17 (L)

May 16, 1979

OPEN MEETINGS LAW: §28A.2(1), Code of Iowa (1979). Hearing panels of the Faculty Judicial Commission at the University of Iowa are not "governmental bodies" subject to the Open Meetings Law both because they are not directly created by the Board of Regents and because they exercise no policy-making or decision-making authority. (Miller to Richey, Executive Secretary, State Board of Regents, 5-16-79) #79-5-18 (L)

May 16, 1979

SCHOOLS: Open Meetings Law. Sections 20.16, 20.17(3), 28A.1, 28A.2(1)(a), 28A.2(1)(c), 28A.2(2), 28A.5(1)(a)-(j), 68A.2, 68A.7(1)-(12), 68A.7(6). Neither a negotiating session between a school board and a non-certified employee organization nor a strategy session for collective bargaining with non-certified employee organizations is permitted by Chapter 20 or 28A to be closed to the public. (Powers to Wagner, President, Board of Directors, Sioux City Community School District, 5-16-79) #79-5-19

Richard G. Wagner, President, Board of Directors, Sioux City Community School District: You have requested an opinion regarding the question of whether a noncertified employee organization and a public employer may hold a closed negotiating session and whether a public employer may hold a closed strategy session pursuant to 20.17 or 28A, The Code (1979).

Chapter 20, The Code (1979), entitled the Public Employment Relations Act (hereinafter referred to as PERA) permits public employees

to organize for the purpose of exercising the right to bargain collectively. This right is granted to employee organizations that are certified as the exclusive bargaining representative pursuant to the procedures outlined in the PERA.

The duty to bargain which arises under Section 16 of the PERA upon certification, initiates a collective bargaining process consisting of negotiations, mediation, fact-finding and arbitration. Employee organizations which are not certified as the exclusive bargaining representative are not entitled to exercise the statutory right and duty to bargain. Since they have no statutory right to engage in collective bargaining, it is clear that the regulations of the PERA regarding the collective bargaining process do not apply to noncertified employee organizations.

One regulation regarding the collective bargaining process is §20.17(3), The Code (1979), which permits negotiations and strategy sessions to be exempted from the requirements of the Open Meetings Law, Chapter 28A The Code (1979). Because PERA requires certification as a condition precedent to collective bargaining, this exemption would only apply to negotiating sessions between the school board and certified employee organizations.

Your second question is whether a negotiating session or strategy meeting may be closed under any provision of the Open Meetings Act. The school board comes within the definition of governmental body of §28A.2(1), The Code (1979), because it is a "board . . . created by the statutes of this state . . . ." *See* 274.7. The negotiating session or strategy meeting comes within the definition of meeting, §28A.2(2), The Code (1979), because "there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties." §28A.2(2), The Code (1979). Negotiating with employees in a collective bargaining context is a policy-making duty and not "a gathering of members of a governmental body for purely ministerial . . . purposes when there is no discussion of policy . . . ." §28A.2(2), The Code (1979). *See* OAG 5-4-79, Schantz and Haskins to Hanson, for an extensive discussion of the meaning of policy-making duties. A ministerial duty has been defined as one which a person or board performs 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 properity of the act being done. *Arrow Express Forwarding Co. v. Iowa State Commerce Comm.*, Iowa, 256 Iowa 1088 130 N.W.2d 451 (1964).

A negotiating session where a majority of the board members are present or where a majority of two or more people formally and directly designated by the Board to conduct negotiations are present would be a "meeting", §28A.2(1)(a), (c) and (2), The Code (1979), required by the Chapter 28A to be open. None of the reasons listed in §28A.5(1)(a)-(j), The Code (1979) would permit the sessions to be closed. We note, however, that should the Board delegate authority to a single individual to conduct negotiations, the single negotiator would not be covered because the negotiator is not a "governing body" under §28A.2(1)(c).

Strategy sessions similarly do not fall within any of the reasons in §28A.5(1)(a)-(j), The Code (1979) which would allow a meeting to be closed. While meetings to prepare, review or discuss records which are

confidential records under one of the exemptions of the Public Records Act are meetings which may be closed under the Open Meetings Act. §28A.5(1)(a), The Code (1979); 1968 OAG 281; none of the exemptions under Chapter 68A would permit a session to discuss strategy for collective bargaining with noncertified employee organizations to be closed under Chapter 28A. It might be argued that such a session could be held to discuss "reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose" §68A.7(6), The Code (1979), and thus be subject to closing under §28A.5(1)(a), The Code (1979). We do not believe that §68A.7(6) was intended to extend exemption to strategy sessions for noncertified collective bargaining. The Open Meetings Act in §28A.1 declares that ambiguity in the construction or application of the act should be resolved in favor of openness. The Pubilc Records Act in §68A.2 permits all citizens and the media to copy and publish all public records "unless some other provision of the Code *expressly* limits such right or *requires* such records to be kept secret or confidential." (Emphasis added). Section 68A.7(6), The Code (1979) does not speak to collective bargaining in any manner. There are no "competitors" in the traditional use of that term who would gain any advantage. Websters Dictionary defines a competitor as one that seeks what another claims. Cf 1974 OAG 381 (where strategy sessions to develop negotiating positions for an unstated purpose by the Board of Regents were held exempt from 28A).

If such a strategy session for noncertified collective bargaining could be closed using this rationale, the same rationale could have been used to close strategy sessions for certified collective bargaining. The language of §20.17(3), The Code (1979) which expressly exempts strategy sessions for certified collective bargaining would have been unnecessary. The inclusion of strategy sessions in §20.17(3) is an indication that they were not exempt under any other rationale.

In answer to your questions, negotiating sessions with noncertified employee organizations where a quorum of the school board or two or more persons formally and directly designated by the board to negotiate would be required to be open. Strategy sessions to discuss collective bargaining strategy for negotiations with noncertified employee organizations would similarly be required to remain open under Chapter 28A.

May 17, 1979

WEAPONS — MANNER OF CONVEYANCE. §§702.7, 724.4, Code of Iowa, 1979. An antique handgun may be transported to a target range without a concealed weapons permit as long as it is transported in conformance with the requirements of a §724.4 of the Iowa Criminal Code. (Williams to State Representative Keith H. Dunton, 5-17-79) #79-5-20 (L)

May 18, 1979

ELECTIONS: Residency Requirements, §48.2, 47.4(4), Chapter 53, Code of Iowa, 1979. Domicile, as outlined in *Edmundson v. Miley Trailer Co.*, 211 NW 2d 269 (Iowa 1969), is sufficient to establish residency under Iowa election law. Indicia of residence include intent and actual conduct, with resolution of issue determined on case-by-case basis. Neither §48.2 or Chapter 53 of Code requires present physical presence in order to reside in jurisdiction and be qualified to vote. Declaration of voter is entitled to special consideration under Iowa law. Burden of proof

rests with party challenging legality of votes cast in past election. (Appel to Representative Horace Daggett, 5-18-79) #79-5-21

Honorable Horace Daggett, Iowa Representative: We are in receipt of your opinion request of March 15 asking for clarification of voter qualifications in school district elections. Specifically, you ask:

1) Would the holding in *Edmundson v. Miley Trailer Co.*, 211 NW 2d 269 (Iowa 1969) be applied to determine if teachers formerly employed in a school district are still domiciled in the school district?

2) What indicia of residency or domicile must be shown in order to legally vote in a school bond election?

3) Does Section 48.2 of the Iowa Code require that a person vote where he actually resides, rather than where he is domiciled?

4) Does Chapter 53 of the Code affect the validity of votes cast by an absentee voter who has been residing in another city for several years but is still domiciled within the boundaries of a school district?

The relevant statutes to be construed in answering these questions are §48.2 and §48.4, Code of Iowa, 1979. Section 48.2 provides:

Any person who is an eligible elector in all respects except age may, at any time during the six months preceding his or her eighteenth birthday, register to vote in the county of his or her residence.

Residence for voting purposes is defined in §47.4(4), which states:

A person's residence for voting purposes only, is the place where he declares is his home with the intent to remain there permanently or for a definite or indefinite or undeterminable length of time.

In *Edmundson v. Miley Trailer*, 211 N.W. 2d 269 (1973), the Iowa Supreme Court considered whether an itinerant horse trader was still a "resident" under Iowa's jurisdictional long arm statute, §617.3, Code of Iowa, 1979. This statute establishes a basis through which an Iowa resident may bring an action in Iowa courts against foreign corporations or nonresidents who breach contracts or commit torts within Iowa. In that case, the court observed that consideration of a person's domicile is useful in determining whether the person resided in Iowa for purposes of the long arm statute. The court noted that domicile, once established, continues until supplanted by acquisition of a new one. Mere physical absence did not terminate domicile if the person never abandons the intention of returning to the old dwelling place. Applying these principles to the facts presented in the case, the court concluded that the traveling merchant did not establish a new domicile, and therefore should be considered a resident of his last, unabandoned domicile for purposes of §617.3.

Since *Edmundson* dealt with jurisdictional questions under a long arm statute and not with residency requirements in elections, it has no direct application to the questions you pose. The Iowa Supreme Court, however, **has often looked toward domicile in determining residency in the election law context, *Vanderpoel v. O'Hanlon*, 53 Iowa 246, 5 N.W. 119 (1880), *State ex rel Keary v. Mohr*, 198 Iowa 89, 199 N.W. 278, (1924), *Dodd v. Lorenz*, 210 Iowa 513, 231 N.W. 422. (1930)**

While the above Iowa cases seemed to require domicile with intent to remain permanently in order to qualify to vote, this approach became constitutionally suspect in the early 1970's, *see Whatley v. Clark*, 482 F.

2d 1230 (5th Cir. 1073), *cert. den. sub. nom. White v. Whatley*, 415 U.S. 934 (1974), *Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972). These cases held election laws that required intent to permanently remain at a given place violative of equal protection because they unduly impinged on the fundamental right to travel and the right to vote. Against this background, the Iowa General Assembly passed legislation in 1972 and 1973 which defined "residence" in a manner which eliminated the possibility of this constitutional infirmity. The 1973 version, now §47.4(4) of the Code, states that a person's residence, for voting purposes, "is the place which he declares is his home with intent to remain there permanently, or for a definite or indefinite or undeterminable length of time." This definition avoids the possibility of a *Whatley-Newburger* style constitutional attack.

Nothing in the language of the statute or the history of its purpose suggests that the established principles useful in determining domicile are now irrelevant for election law purposes, but only that a showing of domicile would no longer be a prerequisite for voting. While any person domiciled in a given jurisdiction remains qualified to vote, a lesser showing under Iowa's election law may also now be sufficient, i.e. something less than an intention to remain. The law now thus allows college students to vote in their college communities even if they cannot prove an intent to remain there permanently.

The use of the word "home" in §47.4(4) does not make residence requirements more stringent than under previous law. In *State v. Savre*, 129 Iowa 122, 105 N.W. 387 (1905), the Iowa Supreme Court held that the word "residence" in election laws was synonymous with "home." This appears to represent the majority view in other jurisdictions, *Stein v. County Bd. of School Trustees of Du Page County*, 85 Ill. App. 251, 229 N.E. 2d 165 (1969), *Sharp v. McIntire*, 23 Colo. 99, 46 P. 115 (1935), *State ex rel Goldsworth v. Aldrich*, 14 R.I. 171, 175 (1883).

You ask what indicia of residence of domicile must be shown in a school bond election to qualify as a voter. A threshold question is whether school bond elections should be treated differently from other elections since nontaxpayers domiciled in the district could place a heavy load of bonds on taxpaying residents without being financially responsible themselves. While an argument for such differentiation is not implausible, the legislature has chosen to make no such distinction. Section 277.3 of the Code expressly states that the general election requirements of Chapter 39 to 53 of the Code apply to school elections. The courts in Iowa have declined to alter this expression of legislative policy, *Paulson v. Forest City Community School District*, 238 N.W. 2d at 350. We also note that a more restrictive approach to residency in school bond issues could be subject to constitutional attack similar to that raised in *Whatley* and *Newburger supra.*

We must therefore turn to the meaning of "residence" or "home" in Iowa's generally applicable election law, §47.4(4). Residency in election law cases is usually determined on a case-by-case basis. Two important features in resolving the validity of voting residence are intent of the voter and conduct of the voter, which must be reasonably consistent with the asserted intent. *Pike County School District No. 1 v. Pike County Board of Education*, 244 Ark. 9, 444 S.W. 2d 72, 74 (1969). Factors that

are often considered include frequency of presence, property ownership, situs of personal belongings, social and family ties with a community. *See Gray v. Main*, 309 F. Supp. 207, 218 (M.D. Alabama 1968), *Hardy v. Lomenzo*, 349 F. Supp. 617, 622 (S.D. N.Y. 1972)

In considering the question of voting residence, the prevailing view is that physical residence, while relevant, is not an absolute prerequisite and that extended absence will not necessarily cause forfeiture of voting residence. For instance, voters who graduated from high school, left the county to attend college, and then took jobs with government agencies that required them to live outside the county, were held residents of their home county for voting purposes where they all had families, in the county, had cars registered there, and only rented places where they presently lived, *Rodrigquez v. Thompson*, 542 S.W. 2d 480, 483 (Tex. 1976). Similarly, in *Atkinson v. Thomas*, 407 S.W. 2d 234 (Tex. 1966), a single woman school teacher who returned to the home of her parents during vacations and holidays was found to have voting residence in the county where her parents resided, 407 S.W. 2d at 242. And, in *Everman v. Thomas*, 303 Ky 156, 197 S.W. 2d 58 (1946), the court upheld residency where evidence showed that while voter had been teaching for eight years in another school district and rooming for 2½ years with stepmother, he was unmarried and spent part of his time on family's farm in home district.

In short, lengthy presence in another jurisdiction will not cause a voter to lose residence *if* the evidence shows that he or she intends to return at some future time and never intended to permanently abandon the place as his or her residence, *Stein v. County Board of School Trustees*, 85 Ill. App. 251, 229 N.E. 2d 165, 168 (1967), *see also Kyser v. Board of Elections of Cuyahoga County*, 33 Ohio App. 2d 52, 291 N.E. 2d 775, 778 (Ohio, 1972) (person living in self-propelled motor unit entitled to vote in precinct from which he removed himself in which he had last permanent residence until he either forfeited right to vote or located a permanent voting residence elsewhere).

We do not believe §48.2 or Chapter 53 of the Code alters any of the established law concerning residency. Chapter 53 governs procedures for absentee ballots and manifests no intent to narrow the franchise for persons voting by this method. Any such effort would raise serious constitutional questions of equal protection. Section 48.2 of the Code establishes the right of anyone 18 years of age to register, but does not evince any intent to limit the meaning of the term residence for purposes of permanent registration. We think Iowa courts would require more explicit legislative direction before they overturn the traditional judicial approach to residency requirements in election laws.

Two concluding observations are in order. First, in Iowa, a person's declaration of residence has special importance. Originally, §47.4(4) provided that a person's residence for voting purposes was "the place which he *maintains* as his home with intent to remain there permanently or for a definite or an indefinite or undeterminable length of time." Acts, 64th G.A., Ch. 1025.84(4). In 1973, the statute was amended to read that person's residence is "the place which he *declares* as his home with intent to remain there permanently or for a definite or indefinite period of time." Acts, 65th G.A., Ch. 136, §95. Thus, in cases where an individual arguably has two residences, the declaration is likely to be held conclu-

sive, *Paulson v. Forest City Community School District*, 238 N.W. 2d 344 (1977) (college student's declaration of voting residence in college community rather than in hometown upheld).

Second, the Iowa Supreme Court has held that a presumption exists in favor of the legality of votes cast, *Paulson v. Forest City Community School District*, 238 N.W. 2d 344 at 348 (1976), 26 Am. Jur. 2d, Elections, §343 at 162. Thus, the burden of proof will be with the party contesting the allegedly illegal votes. *See also Greaves v. Driggers*, 252 S.W. 2d 782 (Tex. 1952).

May 18, 1979

TAXATION: Property Tax — Assessing Tracts of Real Property — §428.7, Code of Iowa, 1979. Assessors can value tracts of real property, for assessment purposes, as a unit without limitations on the size of the unit being assessed. (Kuehn to Allbee, Asst. Fayette County Attorney) #79-5-22 (L)

May 21, 1979

CONSTITUTIONAL LAW; STATUTES; COMMON LAW; GENERAL ASSEMBLY; IMMUNITIES; U.S. CONST. Art. I, §6, IOWA CONST. Art. III, §11, §§2.17, 2.18, 2.19, Code of Iowa (1979). State legislators possess a constitutional privilege from civil arrest under Article III, §11 of the Iowa Constitution and are also immune from libel and slander actions arising out of any speech or debate or sessions of a standing committee. Also, the common law of Iowa seemingly provides members of the General Assembly with an immunity for all legitimate legislative activities. (McNulty to Junkins, State Senator, 5-21-79) #79-5-23

Honorable Lowell L. Junkins, State Senator: You have requested the opinion of this office regarding the extent of a state legislator's immunity for statements made and actions done by virtue or under color of legislative authority. The immunities Iowa legislators possess may be summarized as follows: a constitutional privilege from civil arrest while the General Assembly is in session; a statutory immunity from libel and slander suits arising out of speeches and debates in either house or arising out of sessions of a standing committee; and a common law immunity appears to exist for all "legitimate legislative activities." An exhaustive analysis of situations in which these aforementioned legislative immunities can properly be claimed is beyond the scope of this opinion. What follows, rather, is a brief summary of their respective fields of operation.

The Constitution of the State of Iowa only furnishes state legislators with a privilege from civil arrest during the time the General Assembly is in session. Article III, section 11 of the Iowa Constitution provides:

Senators and Representatives, in all cases, except treason, felony, or breach of the peace, shall be privileged from arrest during the session of the General Assembly, and in going to and returning from the same.

This office has stated in the past, *see* 1976 OAG 186, and confirms today that section 11 does not afford a state legislator a privilege against arrest for criminal offenses committed during a session of the General Assembly. This conclusion is necessitated because the words of exception

in section 11 are broad enough to include all crimes. Therefore, section 11 does not immunize a state legislator from criminal arrest for statements made or acts performed under color of legislative authority.[1]

A question remains, however, as to the scope of the constitutional civil arrest privilege, especially in view of the fact that civil arrests are no longer common. The Supreme Court of Iowa has not been called upon to interpret section 11. Cases decided by the United States Supreme Court under virtually identical language of the United States Constitution[2] may, however, offer some guidance in this area.[3]

In *Long v. Ansell*, 293 U.S. 76, 55 S.Ct. 21, 79 L.Ed.2d 208 (1934), the Court held that a member of Congress is not immune from service of process as a defendant in a civil matter. *Id.* at 82-83, 55 S.Ct. at 22, 79 L.Ed. at 210. Also, the Court has indicated in dicta that a member of Congress cannot assert the privilege from civil arrest to avoid testifying in a criminal case. *Gravel v. United States*, 408 U.S. 606, 614-615, 92 S.Ct. 2614, 2622, 33 L.Ed.2d 583, 596 (1972). *See also United States v. Cooper*, 4 Dall 341, 1 L.Ed. 859 (1800) (Chase, J., sitting on Circuit). To the extent the Supreme Court of Iowa would be willing to interpret section 11 of Article III of the Iowa Constitution in a like manner, the privilege of Iowa state legislators from civil arrest may very well be a narrow one.

Noticeably absent from the Iowa constitutional scheme is a provision ensuring that legislators will not be held accountable in any other tribunal or place for their speeches and debates.[4] Such a provision is found in the United States Constitution and as many as 41 state constitutions.[5] Iowa does, however, have a statutory provision which implements the "speech and debate" immunity, at least in part. Section 2.17, Code of Iowa (1979), provides:

> A member of the general assembly shall not be held for slander or libel in any court for words used in any speech or debate in either house or at any session of a standing committee.

The measure of protection afforded a state legislator by this provision is self-evident. Its exactness is to be contrasted with the all-inclusive

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[1] It should be noted that only each house of the General Assembly has the authority to arrest and punish members for acts of contempt committed in either house. §§2.18 and 2.19, Code of Iowa 1979).

[2] U.S. CONST. Art. I, §6, reads in part:

> "[The Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same. . . ."

[3] The provisions of Article I, section 6 of the United States Constitution do not, of course, apply to state legislators. Thus, cases decided thereunder can only be utilized as persuasive authority in interpreting section 11.

[4] Although Iowa state legislators have the constitutional liberty to dissent from, or protest against, acts or resolutions they consider injurious to the public, IOWA CONST. Art. III, §10, the Iowa Constitution is silent as to their accountability for such dissents or protests.

[5] For a listing of those states, see *Tenney v. Brandhove*, 341 U.S. 367, 375, n.5, 71 S.Ct. 783, 788, 95 L.Ed. 1019, 1026 (1951).

protection afforded the speech and debate of members of Congress by Article I, section 6 of the United States Constitution. Article I, section 6 provides in pertinent part: "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place. . . ." Thus, save for the ballot box, members of Congress cannot be held accountable — civilly, criminally, or otherwise — for their speeches and debates.

In addition, the United States Supreme Court has construed "speech and debate" broadly to give added protection to members of Congress to pursue their legislative duties independently and without fear of harassment. *See e.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 507, 95 S.Ct. 1813, 1823, 44 L.Ed.2d 324, 339 (1974) (issuance of subpoenas pursuant to a legitimate committee investigation); *Gravel v. United States*, 408 U.S. 606, 615-616, 92 S.Ct. 2614, 2622, 33 L.Ed.2d 583, 597 (1972) (participation in committee proceedings); *Kilbourn v. Thompson*, 103 U.S. 168, 204, 26 L.Ed. 377, 391 (1881) (voting on a resolution of contempt). In short, it can fairly be said that, in addition to speech and debate on the floor of Congress, the activities of members of Congress cannot be questioned in any other place if they are

> an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Gravel v. United States, 408 U.S. 606, 625, 92 S.Ct. 2614, 2627, 33 L.Ed. 2d 583, 602 (1972).[1]

Section 2.17 of the Code does not, on its face, provide as broad an immunity as the speech and debate clause of the United States Constitution does as judicially interpreted. Yet, the policies of the two embodiments of law seem to be identical, i.e., to provide legislators adequate "breathing space" so that they may perform their duties efficiently and without fear of executive or judicial reprisals. In light of this policy, a difficult question arises as to how broadly the Supreme Court of Iowa would interpret Code section 2.17 given its precise and limiting language. Resolution of this question is not offered.

The need for interpretation of Code section 2.17 is obviated by the protection the common law of Iowa seemingly provides for legislative acts and statements. The source of Iowa common law is, to a large extent, the corpus of English law which Iowa inherited, insofar as its principles were suitable to the conditions and business of the people of Iowa and in harmony with the genius and object of our institutions. *Pierson v. Lane*, 60 Iowa 60, 14 N.W. 90, 92 (1882). And the common law remains in force

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[1] A Congressman's immunity should not be read, however, as synonymous with all that he or she does. The Court in *Gravel* also held that Senator Gravel's arrangement with a private publisher to publish the Pentagon Papers was not an immune legislative act within the meaning of the federal speech and debate clause. 408 U.S. at 626, 92 S.Ct. at 2627, 33 L.Ed.2d at 608.

notwithstanding the absence of its express declaration in the Iowa Constitution or Code. *See Iowa Civil Liberties Union v. Critelli,* 244 N.W.2d 564, 568 (Iowa 1976).

As a threshold matter, it cannot be doubted that the English common law afforded legislators a broad privilege. *See United States v. Johnson,* 383 U.S. 169, 180, 86 S.Ct. 749, 755, 15 L.Ed.2d 681, 688 (1966); *Tenney v. Brandhove,* 341 U.S. 367, 372, 71 S.Ct. 783, 786, 95 L.Ed. 1019, 1025 (1951) Evidence of the breadth of the English common law privilege can be found in Strode's Act, a parliamentary enactment, noted by the Court in *Johnson*:

That suits, accusements, condemnations, executions, fines, amerciaments, punishments, corrections, grievances, charges, and impositions, put or had or hereafter to be put or had, unto or upon the said Richard [Strode] and to every other of the person or persons afore specified that now be present Parliament, or that of any Parliament hereafter shall be, for any bill, speaking, reasoning, or declaring of any matter or matters concerning the parliament to be communed and treated of, be utterly void and of none effect.

See United States v. Johnson, 383 U.S. 169, 182-83, n.13, 86 S.Ct. 749, 756, 15 L.Ed.2d 681, 689 (1966). This Act was passed to void the criminal conviction of Richard Strode, a member of the House of Commons. Strode had been convicted of obstructing the tin mining industry by his introduction of a bill regulating tin miners which appeared to have been motivated by a personal interest. An English court subsequently held that Strode's Act only applied to Strode so in response thereto, Parliament passed a resolution declaring Strode's Act to be general law. *Id.* at 183, n.13, 86 S.Ct. at 756-57, 15 L.Ed.2d at 689. Shortly thereafter, the parliamentary struggle for legislative independence was finally achieved by the adoption of the Bill of Rights, which declared in pertinent part:

That the Freedom of Speech and Debates or Proceedings in Parliament, ought not be impeached or questioned in any court or place out of Parliament.

1 Wm. & Mary Sess 2, cap 2.

Tenney **is the only case in which the Supreme Court has had occasion to directly apply the common law privilege. The plaintiff in *Tenney* had claimed his civil rights were violated by the actions of California state legislators in a legislative investigation. The Court indicated that the applcation of legislative immunity would turn on the question whether the defendants were within the sphere of legitimate legislative activity by their participation in a committee investigation. *Tenney v. Brandhove,* 341 U.S. 367, 376, 71 S.Ct. 783 788, 95 L.Ed. 1019, 1027, (1951). The Court held that investigations, whether by standing or special committees, are an established part of representative government so that the immunity would apply, notwithstanding plaintiff's claim that the defendants acted with a unworthy purpose. *Id.* at 377, 71 S.Ct. at 788 95 L.Ed. at 1027. *Tenney* is only persuasive authority for determining whether legislative immunity is a part of the common law of Iowa. Yet, it seems unlikely that the Supreme Court of Iowa would reject such a common law legislative immunity because a broad application of it is certainly in harmony with the genius and object of efficient and fearless legislating by the General Assembly.**

A question remains, however, as to whether the language of Code section 2.17 which limits the immunity of legislative speech and debate to libel and slander actions, should be construed as a repeal of the broad common law privilege. We believe it should not. It is an established principle of law that a statute will not be deemed to have repealed the common law relating to the same subject unless the statute covers the whole subject matter of the area regulated. *Drady v. District Court of Polk County*, 126 Iowa 345, 349, 102 N.W. 115, 117 (1902). As referred to above, legislative immunity at common law extended beyond libel and slander actions. Indeed, the Court in *Johnson* characterized Strode's Case as "persuasive evidence that the parliamentary privilege meant more than merely preventing libel and treason prosecutions." *Johnson v. United States*, 383 U.S. 169, 183, n.13, 86 S.Ct. 740, 757, 15 L.Ed.2d 681, 690 (1966). It seems evident, therefore, that the legislature, in enacting section 2.17, did not attempt to regulate the whole subject matter of legislative privilege. Thus, Code section 2.17 should not be construed as an abrogation of the common law.

It should be emphasized, however, that this matter is not totally free from doubt. It could be argued that the legislature intended to deal with legislative immunity comprehensively and exclusively when it enacted what is now section 2.17 in 1851, thereby repealing the common law immunity. And if section 2.17 were to be limited to its express terms, such an argument would effectively limit the fields of operation of legislative immunity. This argument does not seem to be the better view for it is dependent on a demonstration of a clear and obvious legislative intent to abrogate common law legislative immunity, *see Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564, 568 (Iowa 1976), and also is dependent on a narrow interpretation of a statute, the policy of which would best be served by a broad construction. In short, it is the opinion of this office, as referred to above, that Code section 2.17 not be construed as a repeal of the common law but as a partial affirmance of the same. *See Peterson v. Gittings*, 107 Iowa 306, 311-12, 77 N.W. 1056, 1058 (1899).

In summary, Iowa legislators, in all likelihood, possess a common law immunity for all legitimate legislative activities. No reason appears to exist why this common law immunity should not be interpreted in a like manner as Article I, section 6 of the United States Constitution. Indeed, this federal constitutional provision is a product of the English common law. *See Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502, 95 S.Ct. 1813, 1821, 44 L.Ed.2d 324, 336 (1975); *Tenney v. Brandhove*, 341 U.S. 367, 372-73, 71 S.Ct. 783, 786, 95 L.Ed. 1019, 1025 (1951). Also, Iowa legislators have the immunity from suit for libel and slander actions provided by section 2.17 of the Code and also possess a constitutional privilege from civil arrest.

May 22, 1979

CRIMINAL LAW: COUNTIES: MENTAL HEALTH: COST OF PSYCHIATRIC EVALUATION OF CRIMINAL DEFENDANTS: Ch. 230, Code of Iowa (1979). The county of an indigent criminal defendant's "legal settlement" is liable for the costs of a court-ordered psychiatric evaluation at a state hospital. (Hansen to Wickey, 5-22-79) #79-5-24

Mr. Gene A. Wickey, Assistant Woodbury County Attorney: You have requested an opinion of the Attorney General concerning liability for the

costs of psychiatric evaluation of adults charged with criminal offenses. You pose the following question for our consideration:

"When an indigent adult is charged with a criminal offense and the trial court orders at public expense a evaluation at one of the state mental health institutes or at the Iowa security medical facility, and the defendant is not a legal resident of the county in which the offense was allegedly committed, which county, if any, is liable for the costs of the evaluation?"

The answer is that the county of "legal settlement," if any, is liable for these costs. The controlling statutory provisions appears in Chapters 230 and 252, Code of Iowa (1979).

Section 230.1, Code of Iowa (1979) provides, in pertinent part:

"*Liability of county and state.* 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 the person has a legal settlement, or

"2. By the state when such person has no legal settlement in this state, or when such settlement is unknown . . . ."

More particularly as to psychiatric examinations, §230.2, Code of Iowa (1979) provides:

"*Finding of legal settlement.* The district court shall, when a person is ordered placed in a hospital for psychiatric examination and appropriate treatment, or as soon thereafter as it obtains the proper information, determine and enter of record whether the legal settlement of said person is:

"1. In the county from which the person was placed in the hospital;

"2. In some other county of the state;

"3. In some foreign state or country; or

"4. Unknown.

The import of §§230.1 and 230.2, read together, is that the county of "legal settlement," if any, is liable for the costs involved in a court-ordered psychiatric evaluation at a state hospital. That a person's county of "legal settlement" may not be the same as his or her county of present residence (whether temporary or permanent) is made clear in §§252.16 and 252.17, Code of Iowa (1979). Section 252.16 provides:

"*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."

Section 252.17 provides:

"*Settlement continues.* A legal settlement once acquired shall so remain until such person has removed from this state for more than one year or has acquired a legal settlement in some other county or state."

In *State ex rel. Gibson v. Story County*, 207 Iowa 1117, 224 N.W. 232 (1929), the Iowa Supreme Court considered an issue analogous to that posed by your question. The question was whether Jasper County or Story County was liable for the costs of the hospitalization, care, and support of a person named Robinson who was committed to a state hospital after being declared insane. He had been charged with a crime in Story County, but he was *residing* in Jasper County at the time.

Before February 14, 1925, Robinson's "legal settlement" was in Story County. On February 14, 1925, he moved to Jasper County. In May of 1925, Robinson was arrested and charged with a crime in Story County. He was jailed until June 30, 1925, when he was found to be insane by the Story County Commission on Insanity and was committed to a state hospital. That commission also determined that Robinson's "legal settlement" was in Jasper County, and certified its finding in that respect to the superintendent of the state hospital and to the Jasper County Auditor. Upon Jasper County's disputing of the claim, the matter went to the district court, which held that Story County was liable for Robinson's hospital care from June 30, 1925 to February 14, 1926. Affirming, the Supreme Court found that Robinson's "legal settlement" was in Story County at the time that he was committed and that Story County thus was liable for the costs of Robinson's commitment and care until such time as Robinson acquired "legal settlement" in Jasper County (i.e., February 14, 1926—one year after he had changed his place of residence to Jasper County). Jasper County was held liable for Robinson's hospital care after February 14, 1926. The same result would obtain under the current statute with one exception: under Section 230.1, Code of Iowa (1979), the "legal settlement" of a mentally ill person who is a patient of any state institution remains the "legal settlement" existing at the time of admission to the institution.

Section 3581, The Code (1979), upon which the Court relied in *Gibson*, provided for the same scheme of liability for costs as that in its successor provision of §230.1 Code of Iowa (1979), other than for the one change as to the "legal settlement" not changing during the time of commitment. Moreover, the rationale of *State ex rel. Gibson v. Story County*, supra, clearly is applicable also to persons admitted to a state hospital for psychiatric examination rather than being limited strictly to persons committed after being declared insane. See §§230.1 and 230.2, Code of Iowa (1979), as set out above.

Under the statutory scheme of Chapter 230, Code of Iowa (1979) for determining liability, the district court ordering the psychiatric evaluation must determine the defendant's "legal settlement," and enter its determination as provided in Code §230.2, as set out above. The district court is required to certify its finding as to "legal settlement" to the superintendent of the hospital, as provided in §230.3. The district court must also certify this finding to the county of "legal settlement" as provided in §230.4, when it finds that the defendant's "legal settlement" is in another county in Iowa. If the district court finds that the defendant's "legal settlement" is either unknown or is in a foreign state or a foreign country, it must certify its finding as required by §230.3, and notify the director of the division of mental health of the department of social services of its finding, as provided in §§230.5 and 230.34. The county of admission (i.e., the county in which the district court judge has entered his order for the psychiatric evaluation) is liable, in the first

instance, for all legal expenses incurred with such psychiatric evaluation. Section 230.10, Code of Iowa (1979). However, these expenses are subject to reimbursement with interest by the county of "legal settlement," Code §230.10, or by the State if the mentally ill person has no county of "legal settlement" in Iowa, Code §230.11.

This opinion overrules a previous Attorney General's Opinion (1966 O.A.G. 138) which dealt with a question similar to the one which you raise. That opinion held that when a district court commits a criminal defendant for psychiatric evaluation purposes during a criminal proceeding the costs therefor must be paid by the county in which the proceeding is held (i.e. the county of commitment). The opinion stated that the costs of psychiatric evaluation were within the general class of expenses necessary for investigation in the interests of justice as authorized by §775.5, Code of Iowa (1966) and were to be paid as court costs.

Section 775.5, Code of Iowa (1966) is now §815.7, Code of Iowa (1979). Section 815.7, Code of Iowa (1979) retains the language of §775.5, Code of Iowa (1966) which authorizes the payment of "such sum or sums as the court may determine are necessary for investigation in the interests of justice." Section 815.7, Code of Iowa (1979), however, is a general provision which authorizes the payment of funds for investigation. Chapter 230, Code of Iowa (1979), by contrast, is a specific statute which sets out a detailed scheme for determining liability for the costs of services received in state hospitals and at the Iowa security medical facility.

Section 4.7, Code of Iowa (1979) provides that general provisions of statutes and specific provisions of statutes should be construed, when possible, so that both provisions are given effect. It is our opinion that when Chapter 230 and §815.7, Code of Iowa (1979) are construed together, §815.7 authorizes payment for psychiatric evaluations, see *State v. Haines*, 259 N.W.2d 806 (Iowa 1977), and that Chapter 230 determines which governmental unit is liable for payment of any costs incurred at public expense at a state institution to which Chapter 230 applies.

Chapter 230, as noted above, applies to treatment or evaluation of mentally ill persons at "a state hospital." This clearly includes the four state mental health institutes under Chapter 226, and the security medical facility under Chapter 223. Until 1977, however, a different statutory scheme of liability existed for expenses incurred at the security medical facility.

Section 223.8, as originally enacted in 1968, provided in pertinent part:

"Referees by the court for psychological diagnosis and recommendations as part of the pretrial or presentence procedure or determination of competency to stand trial shall be charged to the court referring such person."

This language was stricken by the General Assembly in 1977, when the present form of §223.8 was adopted, to wit:

"*Costs and charges.* Chapter 230 . . . shall govern the determination of costs and charges for the care and treatment of mentally ill patients admitted to the Iowa security medical facility, except that charges for the care and treatment of any person transferred to the security medical facility from an adult correctional institution or from a state training

school shall be paid entirely from state funds. Charges for all other patients at the security medical facility shall be billed to the respective counties at the same ratio as for patients at state hospitals for the mentally ill, under section 230.22."

The current statutory language thus clearly places the liability for costs incurred at the Iowa security medical facility under the general scheme of Chapter 230. The costs for court-ordered psychiatric evaluations at public expense clearly come within this section, with the county of "legal settlement" liable in all cases except in the very limited situation in which the person was transferred to the security medical facility from a correctional institution (in which case the State is liable). Section 223.8, Code of Iowa (1979). In revising §223.8 to its present form in the Code of Iowa (1979), the legislature thus has specifically rejected the payment from the court fund (in the county from which defendant was committed) of the costs of psychiatric evaluations at the security medical facility.

May 23, 1979

COUNTIES: A county board of supervisors may determine pursuant to the County Home Rule Amendment, Article III (§39A) of the Iowa Constitution, if a county employee has a conflict of interests. (Condon to Junkins, State Senator, 5-23-79) #79-5-25

Honorable Lowell L. Junkins, Senate Minority Leader: This letter is in response to your request for an opinion regarding the sale of products by a county employee to the county. In your request, you described the following fact situation:

"The particular factual situation with which we are currently involved concerns the cutting and selling of fence posts by an employee of the Conservation Board to the County. The bill was submitted to the County, but the Supervisors refused to approve the same since they allege that there is a conflict of interest on the employees part."

The conflict of interest which may arise when a public employee sells a product to his public employer is governed by long-standing common law principles and several statutes. Section 68B.4, Code of Iowa, (1979), pertains to state employees and requires sales in excess of $500 by a state employee to a state agency, commission, board or department to be by public bidding. Section 362.5 enumerates situations in which a city employee may sell to the city employer. For city employees, a sale of the type you describe would be permitted in certain circumstances upon competitive bid in writing, publicly invited and opened. *See* §§362.5(4) and (10), Code of Iowa (1979). There is no similar comprehensive regulatory scheme relating to counties, although several isolated provisions are applicable to county employees. *See e.g.*, §§252.29, 347.15. In the absence of a general statutory regulatory scheme for county employees, we must resolve this issue by reference to common law principles regarding conflicts of interest. This office, of course, has no authority to modify these requirements by substituting the safeguard of public bidding. Only the General Assembly could take such action.

The leading case in this area is *Wilson v. Iowa City*, 165 N.W.2d 813 (Iowa 1969). Although the Iowa Supreme Court's ruling is based upon a statutory conflict of interest provision, it contains a thorough analysis of the common law. In that case, an employee of the University of Iowa and a member of the Iowa City City Council, violated the conflict pro-

vision of the Urban Renewal Law, Section 403.16, Code of Iowa (1966), when he voted on a proposed urban renewal project which involved land owned by the university. In its decision, the Court said:

"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 result. It is the *potential* for conflict of interest which the law desires to avoid. [Emphasis retained]." 165 N.W.2d at 822.

A contract for the sale of goods to a town was voided because the seller was a member of the town council in *Bay v. Davidson*, 133 Iowa 690, 111 N.W. 25 (1907). The Supreme Court applied the common law regarding conflicts of interest and determined that the seller could not sell to the town even though he did not participate in the decision to purchase the goods from him. The Court cited the district court decision as follows:

"It matters not if he did in fact make his private interests subservient to his public duties. It is the relation which the law condemns, not the results. It might be that in this individual case public duty triumphed in the struggle with private interests, but such might not be the case again or with another officer, and the law will not increase the temptation nor multiply opportunities for malfeasance. Neither will it take the trouble to determine whether in any case the results show a wrong or crime but it absolutely and unequivocally refuses its sanction to any contract of any kind whatever where such relation exists." 111 N.W. at 26.

These two cases involve public officers, while the fact situation you have presented involves a public employee. Officers are distinguished from employees for some purposes, including imposition of salary restrictions, duration of employment, qualification for office, criminal liability for nonfeasance or misfeasance in office, and importance, dignity and independence commensurate with an officer. 3 McQuillan, Municipal Corporations §12.30 (3d Ed.Rev. 1973).

The Iowa Supreme Court recognized the distinction between a public officer and a public employee in *Friedman v. Forest City*, 239 Iowa 112, 30 N.W.2d 752, 757 (1948). The Court ruled that only an officer, not an employee, can create an obligation or a liability for a municipal corporation.

The state of the applicable law in Iowa can thus be summarized as follows. No general statutes relating to conflict of interest at the county level have been enacted. If applicable, the common law of conflicts of interest would preclude the transaction you describe. However, the common law doctrine has previously been applied only to public officers. The Iowa Supreme Court has clearly recognized the basic distinction between public officers and public employees. The question presented, therefore, is whether the Iowa Supreme Court could be expected to extend the common law doctrine of conflicts of interest to public employees. Although the matter is not entirely free from doubt, we conclude that, in view of the County Home Rule Amendment, Art. III §39, Iowa Constitution, the Iowa Supreme Court would not extend the common law doctrine of conflicts of interest to county employees. Although conflicts of interest

involving county officers may best be resolved at the state level because of a need for uniformity and disinterested decision-makers, conflicts of interest involving public employees, absent a legislative decision to the contrary, can appropriately be handled as local matters. The County Boards of Supervisors should establish their own policies with respect to conflicts of interest for county employees.

May 23, 1979

STATE OFFICERS AND DEPARTMENTS: Open meetings law. Sections 28A.2(1), 179.2, 184A.1(7), 184A.18, 185.3, 185C.3, Iowa Code (1979). The Iowa Crop Improvement Association, Iowa Dairy Association, Iowa Beef Producers Association, Iowa Swine Producers Association, Iowa Poultry Associations, Iowa Soybean Association, Iowa Corn Growers Association and State Horticultural Society are not "expressly created" by statute and thus are not subject to the open meetings law. The Soybean Promotion Board, Corn Growers Promotion Board, Iowa Turkey Marketing Council and the Dairy Industry Commission are subject to the Chapter 28A provisions. (Cook to Lounsberry, Secretary of Agriculture, 5-23-79) #79-5-26 (L)

May 24, 1979

USURY: SMALL LOANS: Interest: Chapters 535 and 536, 1979 Code of Iowa. Section 535.2, 1979 Code of Iowa, establishes the permissible rate of interest on money due on precomputed small loans that have matured. Under §535.2(1) the rate of interest is five per cent per annum in the absence of a written agreement. Section 535.2(3) permits the parties to agree in writing to a rate not to exceed two percentage points above the monthly average ten-year constant maturity interest rate of United States government notes and bonds. (Ormiston to Kingery, Department of Banking, 5-24-79) #79-5-27

Honorable Ned F. Chiodo, State Representative: You have requested a written opinion of the Attorney General on the following questions:

1. Can an out-of-state corporate manufacturer doing business in the State of Iowa charge interest on open credit accounts to unincorporated Iowa businesses in excess of the usury rates?

2. If the interest rate is in violation of the Iowa usury law, what remedies or sanctions does the law provide?

3. If the interest rate is illegal under Iowa law, can the company charging that rate be enjoined from doing business in the State of Iowa until it agrees to conform to a legal rate of interest?

The rate of interest that may legally be charged an unincorporated Iowa business is governed by Chapter 535, 1979 Code of Iowa, better known as the Iowa Usury Statute. When there is no written agreement between the parties, the allowable rate of interest on open end accounts is "five cents on the hundred by the year" after six months from the date of the last item. (§535.2[1][f]) A written agreement establishing the rate of interest would be controlled by §535.2(3)(a):

"3. a. The maximum lawful rate of interest which may be provided for in any written agreement for the payment of interest entered into during any calendar quarter commencing on or after July 1, 1978, shall "be two percentage points above the monthly average ten-year constant maturity interest rate of United States government notes and bonds as published by the board of governors of the federal reserve system for the calendar month second preceding the first month of the calendar quarter during which the maximum rate based thereon will be effective, rounded to the nearest one-fourth of one percent per year."

As of March 1, 1979, the interest rate allowed under this section has been set at eleven percent per year.

In the State of Iowa, usury has been defined as consisting of four essential elements:

"(1) A loan or forbearance, either express or implied, of money or of something circulating as such; (2) an understanding between the parties that the principal shall be payable absolutely; (3) the exaction of a greater profit than is allowed by law; and (4), an intention to violate the law."

State ex rel Turner, Attorney General v. Younker Brothers, Inc., (1973), 210 N.W.2d 550 at p. 555.

The Iowa Supreme Court in *Younkers* has held that "the only intent necessary under the law is to exact payments . . . in excess of the amount of interest allowed by law." (Supra, p. 555)

Any rate of interest that violates the statute is prohibited and deemed usury. At §535.4, the statute states:

"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."

The statute has historically been construed to apply to corporate creditors. An out-of-state corporation that is registered to do business in the State of Iowa is subject, under §496A.104 of the 1979 Code of Iowa, to the same duties, restrictions, penalties and liabilities imposed on an Iowa corporation.

In answer to your second question, the penalties for usury under the usury statute is set forth at §535.5:

"If it shall be ascertained in any action brought on any contract that a rate of interest has been contracted for, directly or indirectly, in money or in property, greater than is authorized by this chapter, the same shall work a forfeiture of eight cents on the hundred by the year upon the amount of the principal remaining unpaid upon such contract at the time judgment is rendered thereon, and the court shall enter final judgment in favor of the plaintiff and against the defendant for the principal sum so remaining unpaid without costs, and also against the defendant and in favor of the state, for the use of the school fund of the county in which the action is brought, for the amount of the forfeiture; and in no case where unlawful interest is contracted for shall the plaintiff have judgment for more than the principal sum, whether the unlawful interest be incorporated with the principal or not."

This is the remedy available to individual borrowers when the interest rate exceeds the amount permitted by the statute. If interest in excess of two percent per month is levied by the creditor, he can be found guilty of a serious misdemeanor under the statute. (§535.6)

To answer your third question, an action seeking an injunction may lie in some circumstances. In *State ex rel Turner v. Younker Brothers, Inc., supra*, at 565, the Iowa Supreme Court held that when a statute is "openly, publicly, repeatedly, continuously, persistently and intentionally violated," a public nuisance is created as defined in Chapter 657.1 of the Code of Iowa. In its opinion, the Supreme Court ruled that the Attorney General of Iowa had the authority to institute an action praying for

injunctive relief for alleged violations of the Iowa Usury Statute. On a case-by-case basis, therefore, an action to enjoin a creditor from violating the usury statute may be appropriate. Since this action would protect Iowa consumers from violations of the Iowa Usury Statute by either in-state or out-of-state creditors, the Attorney General, in normal circumstances, would not seek to enjoin a creditor from doing business in the State of Iowa until it agrees to conform to a legal rate of interest.

May 24, 1979

RESIDENCY REQUIREMENTS: Public employees. U.S. Constitution, 5th Amendment, 14th Amendment. Continuous residency requirement for public school teachers are not violative of the U.S. or Iowa Constitutions or the Code of Iowa. (Powers to Tyrrell, House of Representatives, 5-24-79) #79-5-28

Representative Phillip E. Tyrrell, House of Representatives: You have requested an opinion regarding the question of whether it is a violation of the Constitution for a school board to require teachers to live within the school district.

At the outset, two terms must be defined. A continuous residency requirement, which your question concerns, requires a teacher to maintain residency in the district in order to obtain or retain employment. A durational residency requirement would mandate a period of residency before a teacher becomes eligible for employment.

The constitutionality of governmental action under the 5th and 14th amendments is determined by two separate tests. If the state action penalizes the exercise of a "fundamental right" or involves a "suspect classification", the action will be subject to strict scrutiny by the Court and must satisfy a compelling state interest in order to be sustained as constitutional. If no fundamental right or suspect classification is involved, the state action must only be justified by a rational basis. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Under the rational basis test, the classification must bear a reasonable relationship to the object of the legislation. *Shapiro, supra.* A classification having some rational basis doesn't offend the Constitution because it is not made with mathematical nicety or scientific exactness. *Dandridge v. Williams*, 397 U.S. 471 (1970).

The exercise of statutory authority by an administrative body carries a presumption of constitutional validity. *Atkins v. School Board of City of Newport News*, 148 F.Supp. 430 (1957) aff'd. 246 F.2d 325 (4th Cir. 1957), cert. den. 355 U.S. 855 (1957). Courts favor constitutionality of statutes and should be reluctant to strike down a statute as unconstitutional. *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1936).

The question of whether a continuous residency requirement penalizes the exercise of a fundamental right to travel interstate has been addressed by the U. S. Supreme Court in several cases. The Court upheld an ordinance which required city employees to be residents of the city in *McCarthy v. Philadelphia Civil Service Commission*, 96 S.Ct. 1154 (1976). The Court found that such an ordinance did not violate due process or equal protection. In an earlier case, *Detroit Police Officers Association v. City of Detroit*, 92 S.Ct. 1173 (1972), the Supreme Court

had refused to review a Michigan Supreme Court decision upholding a continuous residency requirement for Detroit's police. The Supreme Court concluded that no federal question was presented. Other federal and state courts have reached the same conclusion. *See Andre v. Board of Trustees of Village of Maywood*, 561 F.2d 48 (7th Cir. 1977); *Wardwell v. Board of Education of City of Concinnati*, 529 F.2d 627 (6th Cir. 1976); *Wright v. City of Jackson*, 506 F.2d 900 (5th Cir. 1975); *Ector v. City of Torrance*, 514 P.2d 433 (Cal. 1973) cert. den. 415 U.S. 935 (1974); *Hattiesburg Fire Fighters Local 184 v. City of Hattiesburg*, 263 S.2d 767 (Miss. 1978); *Abrahams v. Civil Service Commission*, 319 A.2d 483 (N.J. 1974).

Courts have upheld a variety of justifications as providing a rational basis for such a requirement. In *Wardwell v. Board of Education of Cincinnati*, 529 F.2d 625 (6th Cir. 1976), the Court of Appeals approved the following reasons:

(1) such a requirement aids in hiring teachers who are highly motivated and deeply committed to an urban educational system.

(2) teachers who live in the district are more likely to vote for district taxes, less likely to engage in illegal strikes, and more likely to help obtain passage of school tax levies.

(3) teachers living in the district are more likely to be involved in school and community activities bringing them in contact with parents and community leaders and are more likely to be committed to the future of the district and its schools.

(4) teachers who live in the district are more likely to gain sympathy and understanding for the racial, social, economic, and urban problems of the children they teach and are thus less likely to be considered isolated from the communities in which they teach.

(5) the requirement is in keeping with the goal of encouraging integration in society and in the schools.

Whether or not these justifications are persuasive as a matter of policy is not a question which a court (or this office) will address under the rational basis test.

Durational residency requirements, on the other hand, have frequently failed to survive strict constitutional scrutiny. The Supreme Court has found these requirements for the receipt of welfare benefits, voter registration and hospital care to infringe on the right to interstate travel and thus are violative of the 5th and 14th amendments, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 331 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

In summary, neither the federal nor state Constitutions, nor the Iowa Code prohibits the establishment of a continuous residency requirement as long as the policy has a rational basis. It is highly probable that a requirement that teachers live within the district for a specific period prior to their employment would not be constitutional based on the *Shapiro* rationale.

May 25, 1979

WEAPONS. National Guard Members. Sections 724.4(3) and 29A.1(7), Iowa Code (1979). National Guard members who carry weapons while in connection with their duties are exempt from State Weapons permits requirements. (Bremer to Senator Calhoon, 5-25-79) #79-5-29 (L)

May 25, 1979

COUNTIES: Section 340.8 salary limitation. Section 340.8, Code of Iowa (1979). The salary limitation of Section 340.8 does not include compensation for voluntary overtime services received by deputy sheriffs pursuant to a contract between sheriff's departments and the Corps of Engineers. (Condon to Jay, 5-25-79) #79-5-30(L)

May 30, 1979

STATE OFFICERS AND DEPARTMENTS — SUBSTANCE ABUSE — Licensure of hospitals. Sections 125.13 and 125.21, Iowa Code (1979). Pursuant to §125.13 and §125.21, a hospital must obtain a license from the Commission on Substance Abuse to conduct or maintain a substance abuse substitute or antagonist program. (Cook to Riedmann, Director, Iowa Department of Substance Abuse, 5-30-79) #79-5-31 (L)

May 30, 1979

COUNTIES: Brucellosis Fund Claims. Sections 164.21, 164.23, 164.27, The Code, 1979, Sections 343.10, 343.11, The Code, 1979, Section 74.1, The Code, 1979. A claimant is entitled to only that portion of his claim against the Brucellosis Fund which can be paid by moneys on hand, and a Board of Supervisors may not bind the Brucellosis Fund through successive fiscal years to make payments to one claimant. (Benton to Tullar, Sac County Attorney, 5-30-79) #79-5-32 (L)

May 30, 1979

MUNICIPALITIES: Special Assessments §§384.58, 384.59, 384.60, 384.62 and 384.65, the Code, 1979. Where there is a deferred special assessment pursuant to §384.62 interest accrues on the date of the change in use of the property, withdrawal or discontinuance of the deferment. (Blumberg to Neighbor, Jasper County Attorney, 5-30-79) #79-5-33 (L)

June 4, 1979

MOTOR VEHICLES: Schools; Criminal Law; §§321.285, 321.372(1), The Code, 1979. Section 321.372(1) prohibits stopping a school bus to load or unload students with less than 300 feet of clear visibility in situations where visibility is obstructed by inclement weather. In certain circumstances, the legal excuse of sudden emergency may be available to the bus driver. The 1935 amendment to §321.285 permitting a driver to assume that other drivers will obey the law may provide a legal excuse for driving at a speed which will not permit stopping within an assured clear distance. The amendment does not provide an excuse for travelling in excess of a reasonable and proper speed. (Mull to Lytle, 6-4-79) #79-6-1

Mr. Richard H. Lytle, Assistant County Attorney: This is in reply to your request for an Attorney General's Opinion regarding interpretation of particular traffic regulations. Your specific questions are as follows:

1. Is it unlawful for a school bus to stop to load or unload pupils if visibility is reduced to less than 300 feet due to inclement weather conditions such as dense fog?

2. If a vehicle strikes the rear of a school bus illegally stopped upon a highway under poor visibility conditions, can the operator of said vehicle escape criminal prosecution under the provisions of Section 321.285 which state, "such driver having the right to assume, however, that all persons using said highway will observe the law."[?]

The questions arise from a collision which occurred outside of a business or residence district. Your letter notes the circumstances as follows:

On March 1, 1979, within Van Buren County, Iowa, at approximately 7:30 a.m., a school bus stopped on a traveled portion of State Highway

#2 to pick up its first students. The bus reportedly was displaying all of the proper signals and lights. At this time, however, the visibility in that area was no more than 100 feet due to an extremely dense fog. At that particular time, the school bus was struck from behind by a semi tractor-trailer causing extensive damage to both vehicles and minor personal injury. The investigation by the Highway Patrol revealed that the semi tractor-trailer was being operated at no less than 40 m.p.h.[1]

I

Your initial question concerning the legality of stopping a school bus to load or unload students in inclement weather is in reference to §321.372 (1), The Code, 1979. This is a "law-of-the-road" provision regulating the stopping of school busses. Section 321.372(1) provides in relevant part that: "No school bus shall stop to load or unload pupils unless there is at least three hundred feet of clear vision in each direction."

Violation of this provision constitutes a penal offense punishable as a misdemeanor under §321.482, The Code, 1979. Because traffic regulations defining a criminal offense are to be strictly construed, *State v. Nelson*, 178 N.W.2d 434 (Iowa 1970), an argument could be made that the phrase "clear vision" contemplates only permanent obstructions such as a curve in the road or the crest of a hill rather than atmospheric conditions. *See Schwalen v. Fuller and Co.*, 107 Wash. 476, 182 P. 592 (1919) (rain, fog, or snow held not to be obstructions within meaning of ordinance prohibiting the operation of vehicles so enclosed, constructed or loaded as to prevent the driver from having a clear and unobstructed view).

The majority view, however, is found in *Laflamme v. Lewis*, 89 N.H. 69, 192 A. 851 (1937). In *Lewis*, the court held that weather conditions were within the scope of a statute that prohibited parking or standing of cars "unless a clear view of such vehicle may be obtained from a distance of two hundred feet in each direction upon such highway." 192 A. at 584. The court quoted with approval the rationale of an earlier case, *Woodman v. Powers*, 242 Mass. 219, 136 N.E. 352, 353 (1922):

> Manifestly the statute was designed to protect the public from injury from motor vehicles. The evident intention of the Legislature was to require such vehicles to proceed slowly where the view of the operator is obstructed. The obstruction to view ordinarily would be the same whether it is caused by trees, buildings, billboards or other permanent objects, or is due to darkness, a blinding snowstorm or thick fog. It would be too narrow a construction of the statute to hold that it applies to obstructions of the statute to hold that it applies to obstructions of a permanent character only.

Based on this reasoning the court held that: "If a 'traveler's view is obstructed' by fog within the meaning of the speed regulations . . . the conclusion is inevitable that the same circumstances must preclude 'a clear view' of a vehicle parked upon the highway." 192 A. at 855. *Accord, Legere v. Tatro*, 315 Mass. 141, 52 N.E.2d 11 (1943); *Silva v. Waldie*, 42 N.M. 514, 82 P.2d 282 (1938); *Larson v. Lowden*, 204 Minn. 80, 282

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[1] You quite properly included the facts of a particular situation to provide a concrete context for your legal questions. This opinion, of course, will address only general matters of statutory interpretation and should not be understood as a resolution of or comment upon the liability of parties in a particular situation that may be the subject of litigation.

N.W. 669 (1938); *Fawcett v. Manny*, 172 Wash. 212, 19 P.2d 934 (1933); *Sullivan v. Lutz*, 181 Wis. 61, 194 N.W. 25 (1923).

We find the rationale of *Lewis* persuasive. Since weather conditions cause a threat equally as great as permanent obstructions, there would seem to be no rational policy reason for assuming that the legislature intended the statute to have a narrow scope. This is particularly so given the weighty purpose of the statute — the protection of school children from injury as they alight and leave transportation vehicles. Thus, in our opinion, stopping a school bus to load or unload students with less than 300 feet of clear visibility in each direction due to adverse weather conditions constitutes a violation of §321.372(1).

This interpretation is strengthened by decisions of the Iowa Supreme Court interpreting similar provisions of the Code. For example, §321.285 requires a motorist to adjust his speed to permit a stop "within the assured clear distance ahead." The Court has held that weather conditions such as fog, rain or snow may effect the assured clear distance ahead in the same manner as permanent features such as the crest of a hill or a curve in the road. *See e.g., Ruan Transport Corp. v. Jacobs*, 216 N.W.2d 182 (Iowa 1974) (snow); *Campbell v. Martin*, 257 Iowa 1247, 136 N.W. 2d 508 (1965) (fog); *Minks v. Sternberg*, 217 Iowa 119, 250 N.W. 883 (1933) (mist); Annot., 42 A.L.R.2d 13 (1955).

We would also note that the requirement of 300 feet of clear vision in each direction is but one of numerous safety precautions required to reduce the risks of stopping a school bus on a highway to load or unload pupils. Other safety measures required by §321.372(1) include turning on flashing warning lights from 300 to 500 feet from the point of discharge and turning on red flashing warning lamps upon stopping. Moreover, permitting a school bus to stop on the travelled portion of a road is a narrow exception to the general rule for vehicles. Outside of a business or residential district, the general rule prohibits stopping a motor vehicle on the travelled way when it is practical to stop it off the travelled way. Section 321.354, The Code (1979).

We do not believe that this construction renders the statutory prescription unduly vague or creates an ambiguity requiring a narrow construction. *See State v. Powers*, N.W.2d (Iowa April 25, 1979). The statute expressly prohibits stopping school busses to load or unload children when there is not 300 feet of clear vision both in front of and behind the vehicle. We think this rather explicit statutory direction puts a driver on fair notice that it is a violation of law to allow children on or off the bus when fog so obstructs visibility that the driver cannot see 300 feet in each direction.

We recognize that an interpretation of the stopping regulation of §321.372(1) which requires taking account of atmospheric conditions may to some degree burden the transportation of students by bus in adverse weather conditions. Nonetheless, the promotion of the safety of school children seems well worth any inconvenience that results. However, we also note that strict compliance with the statute may not always be required in sudden emergency situations.

The case of *City of Des Moines v. Davis*, 214 N.W.2d 199 (Iowa 1974), suggests that the legal excuses for violation of the laws of the road

recognized in civil actions in *Kisling v. Thierman*, 214 Iowa 911, 243 N.W. 552 (1932) are available in criminal prosecutions. In *Davis*, the defendant requested an instruction as to legal justification based on his claim that he was placed in a sudden emergency situation requiring him either to exceed the speed limit or be involved in a collision. The court noted that:

Legal excuse has been defined by this court as:

(1) Anything that would make it impossible to comply with the statute or ordinance.

(2) Any thing over which the driver had no control which places his car in a position contrary to the provisions of the statute or ordinance.

(3) Where the driver of the car is confronted by an emergency not of his own making and by reason thereof he fails to obey the statute; and

(4) Where a statute specifically provides an excuse or exception.

Young v. Hendricks, 226 Iowa 211, 213, 283 N.W. 895, 896-897. *See also Kisling v. Thierman*, 214 Iowa 911, 243 N.W. 552.

In *Davis*, the court rejected the sudden emergency claim on the facts and held that the trial court was not required to instruct as to legal justification or excuse because speeding could have been avoided by the defendant taking advance precautions and slowing down. The opinion strongly suggests, however, that under appropriate circumstances a sudden emergency defense would be available. Indeed, we can discern no sound reason why a sudden fog should be treated differently in a criminal action from a sudden dust cloud in a civil action. *See Dickman v. Truck Transport, Inc.*, 224 N.W.2d 459 (Iowa 1974) (sudden dust cloud may provide legal excuse of emergency in civil action grounded in stopping of truck on highway in violation of §321.354).

Even assuming that the excuse of sudden emergency may be available in certain situations to school bus drivers otherwise in violation of §321.372(1), we should stress that recognition of the excuse will generally present a fact question to be resolved in the circumstances of each case and we express no view on its applicability to the particular situation you present. However, in the interest of providing guidance to school authorities we add some additional observations.

If fog is prevalent before the bus is loaded, the emergency would probably not be characterizable as "sudden" and the excuse would likely be unavailable. Even when fog appears after the bus has been loaded and begun its route, the excuse may not be available if visibility is not so poor as to prevent continued travel at a reduced speed, either back to school or to some other place safer than the travelled portion of a highway. And, even if it is unsafe to continue to travel, the excuse will not be available if it is feasible to remove the bus to the shoulder or some other place safer than the travelled portion of a highway. In short, the excuse of emergency will justify stopping a school bus on the highway in violation of the statute only if that is a safer course of action for the school pupils than any other reasonably available alternative.

II

Your second question raises the issue of whether the statutory language permitting the assumption that other drivers will obey the law

provides an exception or excuse for striking an illegally stopped vehicle in a criminal prosecution for speeding under §321.285, The Code, 1979. Section 321.285 is a "law-of-the-road" statute regulating the speed of motor vehicles by defining speeding as a penal offense punishable as a misdemeanor under §321.482, The Code, 1979.

The offense of speeding is defined in terms of both fixed and flexible speed limits. The first paragraph of §321.285 sets forth the flexible standards as follows:

> Any person driving a motor vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead, such driver having the right to assume, however, that all persons using said highway will observe the law.

In recognition that proper speed is relative and requires a motorist to adapt his rate of speed to particular conditions, the first paragraph of the statute articulates the following two flexible standards for determining excessive speed:

(1) a "reasonable and proper" speed; and

(2) the ability to stop "within the assured clear distance ahead."

An amendment in 1935 added the final phrase that "such driver having the right to assume, however, that all persons using said highway will observe the law." Ch. 49, Acts of the 46th G.A. (1935). The amendment appears to be a codification of the common-law rule that a driver is permitted to assume that all others using the highways are acting lawfully. *See Jelsman v. English*, 210 Iowa 1065, 321 N.W. 304 (1930); *Hartman v. Red Ball Co.*, 211 Iowa 64 233 N.W. 23 (1930). Such language appears to provide a statutory exception or excuse.

Because the statute states that a vehicle must travel at a "reasonable and proper" speed *and* be able to stop in the "assured clear distance," it is plain that the statute describes two independent standards. If either standard is violated, an offense under the statute is committed. The 1935 amendment applies only to alleged violations under the second standard, namely, the assured clear distance test ("such driver" of the amendment refers only to the last antecedent, which is "person" of the assured clear distance rule). *See State v. Williams*, 238 Iowa 838, 28 N.W.2d 514 (1947) (in manslaughter prosecution for violation of "reasonable and proper" speed limit arising out of a car fatally striking a pedestrian, court held it was not necessary to instruct as to the substance of the 1935 amendment). Therefore, regardless of the effect of the amendment on the assured clear distance rule, a driver cannot avoid prosecution based on the "reasonable and proper" speed regulation on the grounds that the amendment provides an exception or excuse for striking an unlawfully stopped vehicle.

The assured clear distance standard of the statute is violated when a motorist operates his vehicle at such a speed that he strikes a reasonably discernible object which is stationary or moving in the same direction or which appears in his lane in time for the motorist to avoid a collision. *Nolte v. Case*, 221 N.W.2d 741, 744 (Iowa 1974). The rule stresses the

adjustment of speed to enable avoidance of collisions. As a speed regulation, the violation of the statute is technically not the collision itself but rather the operation of the vehicle at an excessive speed that results in a collision. *See State v. Cheatwood*, 84 App. 125, 132, 82 N.E.2d 770, 774 (1948); *Schroff v. Fuley Construction Company*, 87 Ohio App. 277 286, 94 N.W.2d 641, 646 (1950); Note, "Discernible Objects and Sudden Foreshortening: Judicial Gloss on the Ohio Assured-Clear-Distance-Ahead Statute," 36 *Univ. of Cinn. L. Rev.* 449, 452 (1967).

It could be argued that the 1935 amendment establishes an additional element that must be present in order to violate the "assured clear distance" rule of the speeding statute. *See* Note, "Statutory Violations — Negligence Per Se?" 8 *Drake L. Rev.* 110, 124 (1959); *Central States Electric Company v. McVay*, 232 Iowa 469, 472, 5 N.W.2d 817, 820 (1942) ("This amendment to the statute unmistakably shows the legislative intent that the right to assume compliance with the law on the part of others is to be considered in determining whether the statute has been violated.") The Iowa Supreme Court, however, has not interpreted the 1935 amendment as adding another element to the offense. See 8 *Drake L. Rev.* at 126. The amendment has been construed as allowing a finding of legal excuse for violation of the assured clear distance rule.

The question remains whether the 1935 amendment provides a legal excuse for an alleged second-prong violation. Some Iowa Supreme Court authority suggests that it does. In *Knaus Truck Lines v. Commercial Freight Lines*, 238 Iowa 1356, 29 N.W.2d 204 (1947), the plaintiff's truck crested a rise only to discover defendants' temporarily immobilized vehicles obstructing traffic at the base of the hill. Due to slippery conditions, the driver could not bring his vehicle to a halt and a collision occurred. The defendants won a directed verdict on the ground that the plaintiff was contributorily negligent as a matter of law for failing to stop in the assured clear distance in violation of §321.285. The Supreme Court reversed. It held that since the obstructing vehicles were illegally parked on the roadway, the driver might be able to show legal excuse under the 1935 amendment. The court observed that the driver "had a right to assume, until he know or should have known otherwise, there would be no illegal obstructions on the highway," 238 Iowa 1356, 1361, 29 N.W.2d 204, 209. See also *Central States Electric Co. v. McVay*, 232 Iowa 469, 5 N.W.2d 817 (1942) (trial court ruling of contributory negligence as a matter of law for failure to stop in the assured clear distance reversed where plaintiff collided with illegally unlighted farm wagon on highway surface).

We have reservations concerning the present viability of the *Knaus* decision. The apparent purpose of the 1935 amendment is to provide protection for a driver who reasonably believes the road ahead of him which he visibly observes as unobstructed will remain so because drivers are expected to obey the law. For example, if a driver on a through highway sees another vehicle approaching from an access road, the driver need not consider the presence of the other auto as a limitation on the assured clear distance ahead, for he may assume that the other driver will not enter the highway into his path. In other words, the amendment seems designed to absolve a motorist from liability when the apparently assured clear distance unexpectedly becomes obstructed because a motorist fails to observe traffic laws. *See* Note, "Enforcement

of the Reasonable and Proper Speed Limit," 41 *Iowa L. Rev.* 442, 447 (1956).

A strong case could be made, however, that before the excuse of the 1935 amendment is triggered, there must first be a visually apparent assured clear distance that is cut off by the unlawful activity of another motorist. Such an approach would protect a motorist from events which could not reasonably be anticipated, while insuring that liability for violation of the statute turns on behavior of the accused, and not upon the serendipitous character of a road obstruction.

For example, suppose A and B are both traveling at the same unduly high rate of speed along similar highways in equally dense fog. Both vehicles are traveling too fast to stop in the distance that the driver can visually identify as free from obstruction. Suddenly, A sees an illegally parked school bus in his path, is unable to stop, and a collision occurs. B comes upon a large boulder on the road, is unable to stop, and caroms off the rock into the path of an oncoming vehicle. The conduct of A and B is equally culpable, but if the illegal character of the parked school bus provided an excuse, only B's conduct would be subject to criminal prosecution. Such a result is arguably incongruous because the gravamen of the offense is traveling too fast given the weather and geographic features, not doing harm to certain kinds of vehicles or objects.

Because of our doubts about the strength of the *Knaus* rationale, we think it is at least possible that the Iowa Supreme Court would not follow the case or would seek to distinguish situations like the present one on their facts. Regardless of the court's affinity to its precedents on that issue, however, the 1935 amendment does not provide an excuse for violating the "reasonable and proper" standard of §321.285. Whether a driver violates this standard of the speeding statute by traveling unreasonably fast given poor visibility imposed by the weather would ordinarily be a question for the jury.

III

In summary, the prohibition contained in §321.372(1) against stopping a school bus with less than 300 feet of clear vision may be violated by stopping a bus in dense fog. Weather conditions such as fog, rain and snow may constitute an obstruction to clear vision within the meaning of the statute. In certain circumstances, however, a driver may be able to establish the legal excuse of sudden emergency.

Section 321.285 includes two standards for determining excessive speed: 1) reasonable and proper and 2) assured clear distance. The 1935 amendment providing that a driver has the right to assume other persons using the highway will observe the law provides a legal excuse under certain circumstances for persons charged with violation of the assured clear distance standard, but will not provide an excuse for persons charged with violation of the reasonable and proper standard.

June 4, 1979

GOVERNOR/ENERGY POLICY COUNCIL/GENERAL ASSEMBLY/ LEGISLATIVE COUNCIL: Energy Emergency Powers; Delegation of Powers; Legislative Veto of Governor's Emergency Proclamation. Iowa Const., Art. III, §1, Legislative Department, §1, 8, 15, 16, 17; Amendments 26 and 37; Chapter 17A; §§93.7(10), 93.8, Code of Iowa, 1979. Section 93.8, Iowa Code, 1979, granting energy emergency powers to the Governor and the Energy Policy Council, is constitutional except insofar as it allows revocation of an emergency proclamation by concurrent resolution of the General Assembly or by vote of the Legislative Council. (Osenbaugh to Gallagher, 6-4-79) #79-6-2

James V. Gallagher, State Senator: Your opinion request of March 20, 1979, asks two questions regarding the constitutionality of section 93.8, Iowa Code (1979), which provides emergency powers to the Governor in case of acute energy shortage. We are first asked to determine whether section 93.8 is constitutional as presently written. You also ask whether there would be any constitutional limitations on implementation of section 93.8.

It is our opinion that section 93.8 is a constitutional grant of authority to the Energy Policy Council and the Governor, if the statute is properly construed and adequate procedural safeguards are provided. However, section 93.8 is unconstitutional to the extent that it grants veto power over a proclamation of emergency to the legislative branch by means other than enactment by statute. Additionally, various constitutional provisions will limit the authority granted by section 93.8. Thus our discussion of the constitutionality of the statute is an examination of the statute as written and not as it might be applied in a specific case.

Section 93.8 delegates to the Governor broad authority to regulate energy use and supply; these emergency powers are conditioned on a finding by both the Governor and the Energy Policy Council that "the health, safety, or welfare of the people of this state is threatened by an actual or impending acute shortage of usable energy . . . " This delegation of rule-making authority has potentially significant impact on the public and may be delegated to the executive branch only if there are adequate guidelines for its exercise and it otherwise comports with constitutional requirements.

The Iowa Constitution, Article III, section 1, states:

> 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 constitutional limitation on distribution of powers does not prevent the delegation of legislative functions if adequate limitations are imposed on its exercise. The adequacy of the checks on exercise of the authority delegated hinges on the sufficiency of standards and procedural safeguards and the necessity for delegation. *Warren County v. Judges of Fifth Judicial District*, 243 N.W.2d 894, 900 (Iowa 1976).

Section 93.8 contains two sets of general standards — one setting forth the facts required to issue a proclamation of emergency and the other listing the types of powers the Governor may exercise pursuant

to the proclamation of emergency. The generality of statutory standards does not *per se* render the delegation unconstitutional but does make it susceptible to challenge. *Warren County v. Judges of Fifth Judicial District*, 243 N.W.2d 894, 900 (Iowa 1976).

Section 93.8, Iowa Code (1979), authorizes the Energy Policy Council to recommend that the Governor declare an emergency if the Council "determines the health, safety, or welfare of the people of this state is threatened by an actual or impending acute shortage of usable energy . . ." The Governor may then issue "a proclamation of emergency." "The proclamation shall state the facts relied upon and the reasons for the proclamation." Section 93.8 provides adequate standards for this delegation of authority to declare an emergency if construed in light of its purpose, which is to determine when an emergency requires that the Governor be authorized to take extraordinary measures to curtail energy use and to regulate its supply. The first clause requires the Council to determine that (1) there is "an actual or impending *acute* shortage of usable energy" and (2) this shortage *threatens* the public health, safety, or welfare. Furthermore, the statute is entitled "Emergency powers" and requires the Governor to issue a "proclamation of emergency" before the Governor may exercise the powers delegated.

In seeking a meaning of a law the entire act should be considered and each section construed together. The subject matter, reason, consequence and spirit of an enactment must be considered, as well as the words used.

Matter of Estate of Blevin, 236 N.W.2d 366, 369 (Iowa 1975). Construing these terms in their ordinary meaning, as defined in Webster's New Twentieth Century Dictionary (Unabridged Section Ed., 1971), "emergency" is "a sudden or unexpected occurrence or combination of occurrences demanding prompt action; urgent necessity . . . ", "acute" means "critical; crucial", and "threaten" means "to be a menacing indication of (something dangerous, evil, etc.)" or "to be a source of danger, harm, etc., to." *See also, Young v. Hendricks*, 226 Iowa 211, 215, 283 N.W.2d 895, 898 (1939); *Golden v. Springer*, 238 N.W.2d 314, 321 (Iowa 1976) (sudden emergency defense).

Construing the statute as a whole and in such a way as to avoid constitutional objection, the Energy Policy Council and the Governor must find that the energy shortage critically threatens the public welfare to such a degree as to create an urgent necessity for measures to be taken by the Governor. So construed, the statute provides adequate standards for the issuance of the proclamation of emergency in light of judicial recognition of propriety of greater discretion where, as here, there is a need for expertise in a matter of great public welfare in an area of very complex governmental and economic conditions and detailed legislation could not provide needed flexibility. *Warren County v. Judges*, 243 N.W.2d at 900; *Grant v. Fritz*, 201 N.W.2d 188, 192 (Iowa 1972). As stated in *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-69 (1976), upholding Presidential imposition of license fees on petroleum imports under statute authorizing the President to act to the extent "he deems necessary to adjust the imports of such article . . . so that such imports will not threaten to impair the national security", "[n]ecessity . . . fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules . . . "[1]

[1] This case is not fully apposite here since the United States Constitution contains no specific limitation on distribution of powers as found in

Subsections (1) to (5) of Section 93.8 list the emergency powers of the Governor. These powers are authorized only if there is a finding of emergency as described above. The great public need as found by the emergency proclamation and the impossibility of advance legislative action which would be appropriately tailored to the needs in an actual energy emergency are compelling arguments for the necessity of this delegation. Since the delegation is based on necessity, the Governor's regulations pursuant thereto must be reasonably necessary to avert the acute threat to the public health, safety, or welfare of the public. Other standards appear in the statute; for example, the Governor may regulate the operating laws of energy consuming instrumentalities but only to the extent the regulation is not itself hazardous or detrimental to the public welfare. Section 93.8(1). By listing certain actions the Governor may take, the legislature impliedly excluded authority to take other actions since " . . . the express mention of one thing implies the exclusion of others." *Lynch v. Bogenrief*, 237 N.W.2d 793, 796 (Iowa 1976); *Lenertz v. Municipal Court of City of Davenport*, 219 N.W.2d 513, 516 (Iowa 1974). The Governor's authority to enact rules pursuant to the emergency proclamation is derived from, and limited by, section 93.8.

The legislative act is the charter of the administrative action beyond the authority conferred by the statute is ultra vires. Although an administrative regulation must be consistent with the constitution, this alone is not enough. It must also be authorized by the statute creating the agency.

Iowa Department of Revenue v. Iowa Merit Employment Commission, 243 N.W.2d 610, 615 (Iowa 1976), quoting IA Sutherland, Statutory Construction, §31.02, at 354-355 (Sands 4th ed. 1972).

Given the lack of detailed standards in section 93.8 and the significance of the potential impact on members of the public, the validity of the delegation will depend on "whether the procedure established for the exercise of power furnishes adequate safeguards for those affected by the administrative action." *Iron Workers Local No. 67 v. Hart*, 191 N.W.2d 758, 772 (Iowa 1971); *See, Elk Run Telephone Co. v. General Telephone Co.*, 160 N.W.2d 311, 317 (Iowa 1968); Note, *Safeguards, Standards, and Necessity: Permissible Parameters for legislative Delegations in Iowa*, 58 Iowa L.Rev. 974 (1973).

The statute does not expressly provide procedural safeguards. Indeed, section 93.7(10) specifies that "Rules promulgated by the Governor pursuant to a proclamation issued under the provisions of section 93.8 shall not be subject to review or a public hearing as required by this subsection [which refers to Chapter 17A]." *See also*, 17A.2(1).

While Chapter 17A's rulemaking procedures and judicial review provisions do not apply to rules issued by the Governor, we find adequate procedural safeguards in the applicability of Chapter 17A to the Energy Policy Council's actions under section 93.8, the requirement that the Governor state the facts and reasons relied on in issuing the proclamation

(Footnote Cont'd)

Article III, section 1, of the Iowa Constitution, and the statute further listed specific factors for the President to consider.

of emergency, and the availability of judicial review of the Governor's actions by common law writ.

A finding of emergency by the Energy Policy Council is a prerequisite to the use of the emergency powers; the Council is also authorized to recommend actions to the Governor. The Energy Policy Council is an "agency" to which Chapter 17A applies. Section 17A.2(1). The statute provides for Council action by "resolution." Section 93.8. Even if the provision for action by resolution exempts the Council's emergency finding and recommended actions from Chapter 17A's rulemaking requirements (Cf. section 17A.1(2)), the Administrative Procedure Act does impose significant procedural safeguards. The rulemaking procedures would apply to any rules promulgated by the Council pursuant to the Governor's delegation under section 93.8(4) or to any general policies, or plans, or proposed rules developed by the Council in advance for implementation in emergencies generally. Additionally, all Council actions are "agency action" subject to judicial review under section 17A.19. See 17A.2(9). As preliminary or intermediate action, the Council's resolution would presumably be immediately reviewable to test whether it was in excess of statutory authority, unconstitutional, or unreasonable. Section 17A.19 (1), (8). While Section 93.8 does not specifically provide that the Council give findings or reasons for its actions, such requirement could be implied in order to insure adequate judicial review under *Erb v. Iowa State Board of Public Instruction*, 216 N.W.2d 339, 342 (Iowa 1974). Chapter 28A would require that the Council's actions be taken in open meeting upon reasonable notice to the public. Additionally, Chapter 17A would provide procedural safeguards in adjudicative proceedings resulting from application of the gubernatorial rules if the Governor delegated such authority to the Council.

The requirements of a Council finding of emergency and of findings and reasons by the Governor provide checks on the Governor's power to declare an emergency. Although the Governor is not subject to APA requirements, his actions would be subject to judicial review under the extraordinary writs. *Sterling v. Constantin*, 287 U.S. 378 (1932). Thus some procedural safeguards exist to limit the powers delegated. However, given the breadth of power granted, it should be noted that the Council and the Governor can provide greater procedural safeguards than those minimal safeguards required by law. Such self-imposed procedural protections would apparently be considered in determining whether there is an undue delegation of power. *Cf., Iron Workers Local No. 67 v. Hart*, 191 N.W.2d 758, 772-72 (Iowa 1971). If the Governor and the Council follow appropriate procedures, provide appropriate findings and reasons to support the proclamation of emergency, and promulgate rules within the authority as granted, we believe the delegation of authority to the Council and the Governor is valid.

Section 93.8 allows a concurrent resolution of the General Assembly or majority vote of the Legislative Council to revoke the proclamation of emergency. Upon such revocation, "any functions being performed pursuant to the Governor's proclamation shall cease immediately." Section 93.8. The effect of the revocation is thus to repeal any rules promulgated by the Governor or the Energy Policy Council and to terminate any other emergency powers provided by the statute. Thus the revocation of the emergency proclamation operates to repeal rules which have the force of law.

A previous opinion from this Office concluded that a proposed statute providing for repeal of administrative rules by concurrent or joint resolution, rather than by law, would violate Article III, §§1, 16, and 17 of the Constitution of the State of Iowa. 1967-68 O.A.G. 78 (Turner to Bailey). It was there concluded that such repeal of administrative rules would effectively repeal or amend a statute other than by enactment of a law subject to the Governor's veto in violation of Article III, §§1, 16, and 17. Since the administration of laws is an executive function and review of administrative rules is a judicial function, the opinion concluded that legislative repeal by resolution would violate the distribution of powers clause, Art. III, §1.

As stated in *Knorr v. Beardsley*, 240 Iowa 828, 848, 38 N.W.2d 236 (1940) (dicta), ". . . a legislature can act only by bills which it adopts as statutory laws." Otherwise the legislature could circumvent such constitutional limitations on its power as the quorum requirement, Art. III, §8, requirements for passage of bills, Art. III, §§15, 17, or the executive veto power, Art. III, §16. A statute which provides for future resolutions to suspend the operation of the statute violates these state constitutional provisions. *Opinion of the Justices to the Senate*, 376 N.E.2d 1217, 1223-1224 (Mass. 1978).

The revocation power operates as a condition subsequent to terminate the Governor's rulemaking power and the rules promulgated thereunder. It therefore significantly differs from devices often called "legislative vetoes" which delay or prevent the effectivenss of administrative rules upon legislative resolution. *See*, e.g., section 17A.8(9). Such devices operate as conditions precedent to the effectiveness of administrative rules and do not have the effect of invalidating regulations which have already assumed the force of law. While one closely divided federal court has held such "Congressional vetoes" constitutional, the court emphasized that the President's recommendations had never had the force of law and that private rights were not affected since the status quo was retained as a result of the veto. *Atkins v. United States*, 556 F.2d 1028, 1057-1071 (Ct.Cl. 1977) (Congressional veto of President's judicial salary adjustment recommendations).[2]

Since the legislative resolution here repeals a condition for the exercise of authority, it is not direct review of the actual rules themselves. Also the initial power to declare an emergency would be an appropriate legislative function. These factors would weigh toward the validity of the revocation procedure. However, examining section 93.8 in the abstract, it is our opinion that the joint resolution procedure is constitutionally defective.

The provision for revocation of the veto by the Legislative Council when the General Assembly is not in session is further invalid as an unlawful delegation of power. The Legislative Council does not itself

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[2] The legislative article of the Iowa Constitution differs from that in the United States Constitution. Commentators are divided on the constitutionality of the Congressional veto and the courts have generally avoided the issue. *See, Buckley v. Valeo*, 424 U.S. 1, 257, 282-286 (1976) (decided on another ground) (concurring opinion of White, J.); *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir. 1977) (issue not ripe), cert. den., sub nom *Clark v. Kimmick*, ... U.S. ..., 92 S.Ct. 2667; *McCorkle v. United States*, 559 F.2d 1258 (4 Cir. 1977).

have legislative authority since that is vested in the General Assembly. Iowa Constitution, Art. III, Legislative Department, §1. Conduct of legislative business by the Council would violate the quorum and passage of bills clauses, Art. III, §§1, 15, and 17. Allowing twenty legislators, ten from each house, to exercise the power of the legislature would violate the one-person-one-vote principle embodied in Amendment 26 to the Iowa Constitution (amending Art. III, §34) *See*, Bunn and Gallagher, Legislative Committee Review of Administrative Rules in Wisconsin, 1977 Wis. L. Rev. 935, 973.

Delegation of the revocation power to the Legislative Council is also invalid because no standards or safeguards are provided. *See, Warren County v. Judges of Fifth Judicial District*, 243 N.W.2d 894, 895 (Iowa 1976), holding that the same principles for testing delegation to the executive branch apply to delegations to the judicial branch. The complete absence of standards for revoking the emergency proclamation would allow the Legislative Council to in effect repeal the statute.

Even if the legislature could constitutionally vest authority to revoke an emergency proclamation in an administrative agency, legislative officers can not exercise an executive function. *In re Opinion of Justices to the Governor*, 341 N.E.2d 254, 257 (1976); *Anderson v. Lamm*, 579 P.2d 620, 626-629 (Colo 1978) (requirement of legislative committee approval of expenditure of funds unconstitutional).

Whether the invalidity of the revocation procedure renders the entire statute unconstitutional is a close question. The test of separability is legislative intent.

It is a recognized principle that the objectionable part of a statute may alone be voided when the remaining portion is complete and enforceable by itself and when it appears the legislature intended the remainder to stand even if a part was invalid.

State v. Books, 225 N.W.2d 322, 425 (Iowa 1975). As stated in *State v. Monroe*, 236 N.W.2d 24, 35 (Iowa 1975), quoting approvingly from 82 C.J.S. Statutes §93, pages 154-155:

A statute may be unconstitutional in part and yet be sustained with the offending part omitted, if the paramount intent or chief purpose will not be destroyed thereby, or the legislative purpose not substantially affected or impaired, if the statute is still capable of fulfilling the apparent legislative intent, or if the remaining portions are sufficient to accomplish the legislative purpose deducible from the entire act, construed in the light of contemporary events.

Neither Chapter 93 as published in the Code nor Chapter 1113, Acts of the Sixty-fifth General Assembly, contains a separability clause. "When there is no such clause, the presumption is that the statute was meant to stand or fall in its entirety." *Motor Club of Iowa v. Department of Transportation*, 251 N.W.2d 510, 519 (Iowa 1977); *State v. Books*, 225 N.W.2d 322, 325 (Iowa 1975). In *Motor Club*, the administrative rules in question were found to be interdependent since the invalid provisions were conditions precedent to the remaining provisions and there was legislative history that the commission had previously refused to pass the resolution without the invalid conditions. However, "The presumption against separability in absence of a separability clause is a weak one." 2 Sutherland, Statutory Construction §44.09, p. 353. "In all cases, the determining factor is legislative intent." *State v. Books*, 225 N.W.2d at

325, finding such presumption overcome where the amendment to a long-standing enactment was invalid and the effect of total invalidation would be to have no regulation covering gifts to public officials.

The critical question is whether the legislature would have enacted section 93.8 without the procedure for revocation by concurrent resolution of the General Assembly or by majority vote of the Legislative Council. Since section 93.8 has the single objective of providing emergency powers to the Governor, the invalid part cannot be separated if the provisions in section 93.8 are "connected and dependent upon each other so that if you reject the unconstitutional part you destroy the legislative intent . . . " *Smith v. Thompson*, 219 Iowa 888, 258 N.W. 190, 196 (1934). The revocation provision limits the authority delegated to the Governor by providing a means for terminating this authority under an emergency proclamation. The effect of invalidating the revocation procedure would not terminate the power of the legislature to revoke an emergency proclamation, but such revocation would require enactment of a statute subject to executive veto. Art. III, §16. The same session of the General Assembly which enacted section 93.8 also proposed Amendment 37 to the Iowa Constitution to provide a method by which the General Assembly can convene itself into special session by a call of two-thirds of its members. Amendment 37 provides a constitutional procedure by which the legislature may limit the Governor's authority whether or not it is in regular session.

One federal court has found "Congressional veto" provisions inseparable from the remainder of the statute. *McCorkle v. United States*, 559 F.2d 1258, 1261-62 (4 Cir. 1977), denied plaintiff federal employee's challenge to the one-house veto of the President's salary recommendations because the veto clause was not separable. The Court stated:

"When the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent. See *Davis v. Wallace*, 257 U.S. 478, 484, 42 S.Ct. 164, 66 L.Ed. 325 (1922). 2 C.D. Sands, Statutes and Statutory Construction, §44.13, (4th ed. 1973).

In reaching its decision that the statute was not severable so that voiding the one-house veto would also void the Presidential power, however, the Court emphasized legislative history which established that Congress would not have delegated the authority to the President in the absence of the one-house veto provision. On the other hand, the United States Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), and the D.C. Circuit Court of Appeals in *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir. 1977), declined to reach the constitutional question even though this left the agencies in question free to exercise the delegated authority — implying that the constitutionality of the Congressional veto was not necessary to the validity of the delegation. *See also*, dissent of Shelton, J., in *Atkins v. United States*, 556 F.2d at 1075, 1082-1089, finding veto clause severable. Again *McCorkle* involved a Congressional veto of Presidential recommendations before they went into effect. The veto in section 93.8 is a check on power already granted rather than a precondition to that power. In *McCorkle*, the veto would cause prior salaries to remain in effect; here a legislative veto would repeal existing rules. If the legislative veto paragraph of section 93.8 is not separable, the legislative purpose of prevention of public injury due to an energy emergency would be totally frustrated.

While severing the revocation procedure would remove a procedure by which the Governor's power is limited, we do not believe that the increased power delegated to the Governor by severing this paragraph is sufficiently great to hold that the legislature would not have enacted the statute without the invalid provisions. *Cf., State v. Monroe*, 236 N.W.2d 24, 36 (Iowa 1975). Absent the last paragraph of section 93.8, the legislature could repeal a proclamation of emergency by enactment of a statute subject to executive veto. The legislature could do so either in regular session or by calling a special session by request of two-thirds of the members of each House. Amendment 37, Iowa Constitution. We would conclude that the revocation procedure is not so interdependent with the other provisions of the statute as to render the entire statute unconstitutional. We therefore conclude that the Governor and the Energy Policy Council may constitutionally exercise the authority granted by section 93.8.

Section 93.8 does not on its face constitute a taking of property without just compensation. Iowa Const., Art. I, §18. Since a precondition to the power to curtail energy use is a finding by both the Energy Policy Council and the Governor of an acute energy shortage threatening the public welfare, the regulations authorized are within the State's police power. It is clear that property rights or the right to pursue a business are not absolute but are instead subject to reasonable regulation and prohibition within the lawful exercise of the police power. *Woodbury County Soil Conservation Dist. v. Ortner*, N.W.2d (Iowa 1979); *Iowa Department of Transportation v. Nebraska-Iowa Supply*, 272 N.W.2d 6, 13 (Iowa 1978); *Benschoeter v. Hakes*, 232 Iowa 1354, 1361-62, 8 N.W.2d 481, 485-86 (1943); *City of Des Moines v. Manhattan Oil Co.*, 193 Iowa 1096, 184 N.W. 823, 826-829 (1921). In order for the statute in its application to constitute a "taking" or be an invalid exercise of the police power, the individual would bear the burden of proving that the regulation in question bore no substantial relationship to public safety or public welfare and that its application to the individual was unreasonable and arbitrary. *Iowa Department of Transportation v. Nebraska-Iowa Supply*, 272 N.W.2d 6, 13 (Iowa 1978).

The U.S. Constitution Amendment XIV, §1, provides that no state shall deny to any person the equal protection of the laws. See also ART. I, §6, Iowa Constitution. The equal protection clause restricts those classifications which a state may create in the course of its regulatory functions. If the classification is not based upon sex, race, alienage, or national origin and does not impair fundamental rights, it is valid if rationally related to a legitimate state interest and not patently arbitrary. *Kreft v. Fisher Aviation, Inc.*, 264 N.W.2d 297, 301 (Iowa 1978); *Lunday v. Vogelmann*, 213 N.W.2d 904, 907 (Iowa 1973). The validity of rules promulgated under section 93.8 under the equal protection clause would be measured by this test.

The Fourteenth Amendment and Iowa Const., ART. I, §9, prohibit a state from depriving any person of life, liberty or property without due process of law. Due process is flexible, calling for those procedural protections which the situation demands. *Patten v. Patrick*, 276 N.W.2d 390, 396 (Iowa 1979). Generally, the procedural safeguards required by due process are determined by the private interest that will be affected. The risk of erroneous deprivation of that interest, the probable value of any additional or substitute procedural safeguards, and the state's interest

in more summary action. *Patten v. Patrick*, 276 N.W.2d at 394. This test demands a case-by-case analysis to determine whether section 93.8 as applied affords adequate procedural due process.

Although due process like equal protection reaches legislative classifications, in those situations where commercial activity is regulated and neither suspect criteria nor fundamental right is involved, due process is violated only when the classification is arbitrary and without foundation in public policy, its means are unrelated to its objectives, or the distinction drawn is invidious and lacks a rational basis incapable of justification under any conceivable set of facts. *Hames Mobile Homes, Inc., v. Sellers*, 343 F.Supp. 12, 13 (N.D. Iowa 1972).

The due process clause also prohibits statutory language which is so vague that its terms do not convey sufficiently definite warning as to that conduct prescribed by the statute, measured by common understanding or practice. *Pottawattamie County v. Iowa Department etc.*, 272 N.W.2d 448, 452 (Iowa 1978); *Milsap v. Cedar Rapids Civil Service Commission*, 249 N.W.2d 679, 684 (Iowa 1977). Under the *Pottawattamie* and *Milsap* test, we cannot conclude that section 93.8 is so vague as to offend due process.

For the reasons stated above, it is our conclusion that section 93.8, with the exception of the last paragraph, is constitutional. We have also attempted to describe certain constitutional limitations on the exercise of the powers granted, as requested by your letter.

June 7, 1979

MUNICIPALITIES: Civil Service — Section 400.11, the Code, 1979. Preference shall be given to those on eligibility lists for temporary service. (Blumberg to Walter, State Representative, 6-7-79) #79-6-3(L)

June 8, 1979

APPLICATION OF SECTION 334.13 TO LOSS OF COUNTY TREASURER'S FUND: Sections 64.2, 64.10, 334.13-26, Code of Iowa, 1979. Losses from robbery in a county treasurer's office in excess of the amount of the treasurer's bond of $25,000 are covered by 334.13. Losses less than $25,000 not covered by insurance are to be recovered from the treasurer's surety or borne by the county. (Hagen to Johnson, State Auditor, 6-8-79) #79-6-4 (L)

June 8, 1979

COUNTIES: Incompatibility of Offices — Chapter 173, Sections 332.3 (23), 336.2(7), 347.13, 347.14(13) and 347.27, the Code, 1979. A member of a board of supervisors may not simultaneously be a member of a county hospital board or a county fair board. A member of a board of supervisors may be a member of the State Fair Board. The doctrine of incompatibility of offices is not an obstacle to an assistant county attorney representing a local school district, but such representation may raise several ethical problems under the Code of Professional Responsibility. (Appel and Blumberg to Arends, Assistant Humboldt County Attorney, 6-8-79) #79-6-5 (L)

June 8, 1979

MENTAL HEALTH: Role of county attorney under Chapter 229, Code of Iowa. §§229.6-8, 229.12, 229.21, 229.50-53, 333.2. Chapter 229, Code of Iowa, does not permit the county attorney to screen applications for orders of involuntary hospitalization prior to the time of filing

with the clerk of court. The Code of Iowa does not charge the county attorney with the duty of presenting evidence in support of the involuntary commitment of a substance abuser. (Fortney to Wickey, Assistant Woodbury County Attorney, 6-8-79) #79-6-6(L)

June 11, 1979

MUNICIPALITIES: Platting — §§409.1, 409.8, 409.9, 409.1, 409.31, and 409.45, the Code, 1979. An owner of land or parcels of land of forty acres or less, and an owner of land of any size within a city or within two miles of a city pursuant to §409.14, who subdivides the land into three or more parts shall have a plat made and filed before the subdivided land can be sold. (Blumberg to Howell, State Representative, 6-11-79) #79-6-7

The Honorable Rollin K. Howell, State Representative: We have your opinion request of May 9, 1979, regarding subdivisions. You ask at what point land that is subdivided must be surveyed, platted, and that plat filed with the county.

Section 409.1, the Code, 1979, provides:

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. [Emphasis added].

Pursuant to this section an owner of land of forty acres or less or of land that has been divided into parcels of forty acres or less and an owner of land in a city who subdivides the land or parcels into three or more parts shall have a plat made of the subdivision.

Section 409.8 requires each plat to be accompanied by a correct description of the subdivided land. An abstract of title and a title opinion is required by §409.9. Section 409.12 provides that the signed and acknowledged plat and the title opinion, together with the certificates of the county clerk, recorder and treasurer, and the affidavit and bond, if any, along with the certificate of approval of the local governing body shall be entered of record in the office of the county recorder and the county auditor and assessor. The plat is not valid until it is so filed. The technical requirements of the plat are found in §409.31. Finally, §409.45 provides that any person who sells, offers for sale, or leases any lots in any city or addition to any city before the plat has been acknowledged and recorded shall forfeit and pay fifty dollars for each lot or part of each lot so disposed of.

In summary then, when an owner of land or parcels of land of forty acres or less or an owner of land of any size within a city or within two miles of a city pursuant to §409.14, subdivides the land into three or more parts, a plat must be made and filed before that land can be sold. If the land is within a city pursuant to §409.14, the plats may have to conform to that city's requirements.

June 11, 1979

MENTAL RETARDATION: Sterilization of mentally retarded minor with parental consent. Fourteenth Amendment to the Constitution of the United States; Social Security Act; Chapter 145, Code of Iowa; Chapter 77, Acts of the 67th General Assembly. Given the fundamental nature of the right to procreate and the intrusive and irreversible nature of sterilization, a parent does not have the authority to consent to the sterilization of a mentally retarded child. A district court lacks the requisite jurisdiction to approve an application for sterilization. (Fortney to Yenger, 6-11-79) #79-6-8

The Honorable Sue Yenger, State Senator: You inquired as to whether it is legal to perform a sterilization upon a 15-year-old girl who is mentally retarded if the parents of the girl give their consent to the procedure. It is our opinion that performing such a procedure would be improper.

The last pronouncement from the United States Supreme Court on the issue of sterilization occurred in 1942. *Skinner v. Oklahoma*, 316 U. S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655, invalidated a state statute which authorized the compulsory sterilization of "habitual criminals" who had been convicted of crimes such as larceny, but not those convicted of embezzlement. In holding that the statute violated the Equal Protection Clause of the Fourteenth Amendment, the Court stated:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. 316 U. S. 535, 541.

If it was not established before, *Roe v. Wade*, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) clearly demonstrated that procreation is a fundamental right which is not to be infringed in the absence of a compelling state interest unobtainable by less intrusive means. Even when the Court held that it is not a violation of the Social Security Act to deny public monies for abortions, it reiterated the concept that the decision to procure an abortion is a private one. *Beal v. Doe*, 432 U. S. 438, 97 S. Ct. 2366, 53 L. Ed. 2d 464 (1977).

The courts have not treated minors in a manner different from adults when the fundamental right of procreation was involved. In 1977, the Supreme Court held that minors have a constitutional right to purchase non-prescription contraceptives. *Carey v. Population Services International*, 431 U. S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977). In the area of a minor's right to seek an abortion, the Supreme Court has barred the states from requiring parental consent or from giving parents a right to veto their child's decision. *Planned Parenthood v. Danforth*, 428 U. S. 106, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976).

Turning to the area of sterilization of a minor, we must bear in mind that we are dealing with a fundamental constitutional right which extends to both minors and adults. *Ruby v. Massey*, 452 F. Supp. 361 (D. C. Conn. 1978) dealt with a situation in which the parents of three minors sought to have their respective children sterilized. The doctor and hospital had refused, even though they conceded the girls were

severely mentally retarded and that the procedures were "medically indicated." All three girls had limited communication skills, could not reasonably be expected to cope with pregnancy or childbirth, could not reasonably be expected to successfully use contraceptives, had an inability to care for their hygenic needs and would likely require custodial care. The hospital and medical staff had refused to participate based on the belief that the parents could not validly consent to the procedure. The court held that the parents were not capable of consenting to the sterilization procedure. In reaching this decision, the court relied on the abortion and contraceptive cases cited above. In accord with *Ruby* is the decision in *L. v. H.*, 325 N. E. 2d 501 (Ind. App. 1975), cert. denied 425 U. S. 936, 96 S. Ct. 1669, 48 L. Ed. 2d 178 (1976).

In *Wyatt v. Aderholt*, 368 F. Supp. 1382 (M.D. Ala. 1974), the court struck down as violative of due process a state statute which permitted mentally retarded inmates of a state facility to be sterilized upon the decision of the superintendent or his assistant. The court stated that "the sterilization *vel non* of mentally retarded inmates cannot be left to the unfettered discretion of any two officials or individuals. Furthermore, the statute contains no provision for notice, hearing or any other procedural safeguards." *Wyatt*, at p. 1383. The situation raised in your question poses the same problems. The decision of the minor's parents is made with no protection accorded to the fundamental rights of the minor. She is given no notice of the procedure. She is afforded no hearing. She is permitted no input in the decision-making.

Based on the decisions of the United States Supreme Court regarding abortion and contraception, and with due consideration given to the lower court decisions which are directly on point, it is our opinion that a parent cannot consent to the sterilization of a mentally retarded minor child.

While you did not raise the question in your letter, we believe it would be useful to discuss the issue of whether the parent in question can seek authorization from a state district court. The district court in Iowa is a court of original, general jurisdiction. See §602.1, Code of Iowa. However, there is no provision of the Code which specifically confers upon the district court any role in a sterilization decision. Iowa at one time had a statute creating a sterilization procedure, formerly Chapter 145 of the Code, but this statute was repealed as of July 1, 1977. Chapter 77, Acts of the 67th G.A. (1977). It is the viewpoint in the majority of states that a district court does not have the jurisdiction to entertain an application for an order authorizing sterilization in the absence of a specific statute. The majority's view can best be summarized as follows:

An order for the compulsory sterilization of a mental defective, whatever may be the merits of the particular case, irreversibly denies to that human being the fundamental right to bear or beget children and thus is too awesome a power to be inferred from general statutory provisions, but rather should only be conferred by specific statutory authority which provides guidelines and adequate legal safeguards determined by the people's elected representatives to be necessary after full consideration of the constitutional rights of the individual and the general welfare of the people. 74 A. L. R. 3d 1213.

This view has been enunciated and adopted by most courts dealing with the issue. *Guardianship of Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); *In Interest of R.*, 515 S. W. 2d 467 (Mo. 1974); *Wade v. Bethesda Hospital*, 337 F. Supp. 671, 61 Ohio Ops. 2d 147 (D. C. Ohio 1971),

motion for rehearing denied 356 F. Supp. 380, 70 Ohio Ops. 2d 218 (D. C. Ohio 1971); *Frazier v. Levi*, 440 S. W. 2d 393 (Tex. Civ. App., 1969). The majority of courts faced with a request for an order authorizing sterilization without personal consent declined to reach the merits on the grounds of lack of subject matter jurisdiction. These courts ruled that they lacked jurisdiction under their general equity powers. In order to rule on this issue the courts required specific statutory authority.

Given the fundamental nature of the rights involved, coupled with the fact that the Iowa Legislature's most recent action in this area was to repeal the state's eugenic statute, it is our opinion that the district court lacks the requisite jurisdiction to approve an application for sterilization.

It should be emphasized that this opinion deals solely with the issue of sterilization. The discussion revolves around a procedure which is both intrusive to an extreme degree and irreversible. Such extreme interference with the mentally retarded minor's fundamental right to procreate cannot be condoned. However, there are other methods of contraception, such as an intrauterine device or birth control pills, which are not irreversible and are not so intrusive to the minor's person. This opinion should not be construed to encompass a prohibition on the use of such methods.

June 11, 1979

CONSTITUTIONAL LAW: Special legislation. Art. I, §6, Art. III, §30, Iowa Constitution. S.F. 478, which purports to legalize and validate certain agreements of North Iowa Muncipal Electric Cooperative Association, is not violative of Art. III, §30 or Art. I, §6. (Haskins to Jesse, State Representative, 6-11-79) #79-6-9

The Honorable Norman G. Jesse, State Representative: You have asked our opinion as to the constitutionality of S.F. 478, 68th G.A. (1979), which purports to legalize and validate certain agreements of North Iowa Municipal Electric Cooperative Association (NIMECA).[1] The agreements essentially provide that NIMECA, a cooperative association of municipal utilities, becomes a member of another cooperative association, Allied Power Cooperative of Iowa ("Allied"). With financing from NIMECA, Allied will construct a power plant whose increased output will aid the member utilities of NIMECA in meeting their power needs.

The first issue is whether S.F. 478 is unconstitutional by reason of being "special legislation" in that it only pertains to a certain group of utilities and, indeed, only to a certain group of utilities and, indeed, only to a certain agreement of those utilities. Pertinent here is Art. III, §30, Iowa Constitution, which states:

The General Assembly shall not pass local or special laws in the following cases:

For the assessment and collection of taxes for State, County, or road purposes;

For laying out, opening, and working roads or highways;

For changing the names of persons;

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[1] S.F. 478, with its preamble, is lengthy and setting it forth here would not be useful.

For the incorporation of cities and towns;

For vacating roads, town plats, streets, alleys, or public squares;

For locating or changing county seats.

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; and no law changing the boundary lines of any county shall have effect until upon being submitted to the people of the counties affected by the change, at a general election, it shall be approved by a majority of the votes in each county, case for and against it. [Emphasis added]

The above section has been interpreted to mean, in accordance with the implication of the emphasized language, that laws are not required to be general except where a general law can be made applicable. *See McSurely v. McGrew*, 140 Iowa 163, 173, 118 N.W. 415 (1908). Thus, special legislation is not necessarily unconstitutional. The question of when "a general law can be made applicable" is one of which has received differing answers by the Iowa court over time. The early cases usually struck down particularized legislation. In *Darris and Bro. v. Woolnough*, 9 Iowa 104 (1859), "an act to repeal an act revising and consolidating the laws incorporating the City of Dubuque and to establish a City court therein" was held to be void as being special legislation. The same fate was met by "an act to establish a court at McGregor." *See Town of McGregor v. Baylies*, 19 Iowa 43 (1865). However, in 1884, in *Merchants' Union Barb-Wire Co. v. Brown*, 64 Iowa 275, 20 N.W. 434 (1884), a different result was reached. There, an act appropriating a certain sum in aid of the Farmers' Protective Association of Iowa, a corporation organized to provide farmers with barb wire at the actual cost of manufacture and to defend suits for patent infringement, was held not violative of Art. III, §30, as being special legislation. Following this case, the court in *Cooper v. Mills County*, 69 Iowa 350, 28 N.W. 633 (1886), held that an act providing for holding of the circuit court of Pottawattamie County at Avoca was not in conflict with the above constitutional provision. A contention that the legislature could not legalize irregular proceedings of a board of supervisors establishing a highway on the ground that such an action would be local legislation was also rejected. *See Fair v. Buss*, 117 Iowa 164, 90 N.W. 527 (1902).

The reasoning of the court in this line of cases appears to be that the fact that a curative act is special in nature is evidence of the legislative belief that a general law cannot, or should not, be made applicable. *See Richman v. Board of Supervisors of Muscatine County*, 77 Iowa 513, 42 N.W. 422 (1889). In the later cases, as opposed to some of the earlier ones, the Court was not inclined to say that the legislative judgment was mistaken. Ironically, one of the earlier cases, *City of Clinton v. Cedar Rapids*, 24 Iowa 455 (1868), seemed to presage the more recent view. There, an act authorizing the building of a railroad from Lyons to Clinton was held not to be a case where the law was required to be general.

The present view is set forth in *State Board of Regents v. Lindquist*, 188 N.W.2d 320 (Iowa 1971), upholding a statute authorizing issuance of revenue bonds to build and equip additions to the University of Iowa hospitals. The Court there stated at 323-324:

III. *Special Act?* Defendant's next ground is that the statute is a special act, contrary to §30 of Article III of the Iowa Constitution. That section forbids special laws absolutely in six enumerated cases and then states that "in all other cases where a general law can be made applicable, all laws shall be general * * *." The statute before us deals with health care facilities generally but at The University of Iowa specifically.

If the statute dealt with health care facilities at state establishments generally or even at all state schools of higher learning, it would be sufficiently broad in application as to be a general rather than a special law and immune from attack as a special law under the recent decisions in Green v. City of Mt. Pleasant, 256 Iowa 1184, 131 N.W.2d 5, and Frost v. State, 172 N.W.2d 575 (Iowa). But the statute refers to health care facilities at only one place: The University of Iowa. Moreover, the evidence discloses that only one institution is in contemplation — the various facilities of University Hospitals. That institution is a complex one with many branches, but it is one, overall institution. We are inclined to think this statute is a special act.

But that is not necessarily fatal. The statute is not within any of the six classes forbidden absolutely. The question is whether this is a situation to which "a general law can be made applicable."

In determining whether a general law can be made applicable, courts consider the nature and purpose of the legislation and the conditions and circumstances under which it was enacted. State ex rel. Anderson v. Hodgson, 183 Kan. 272, 326 P.2d 752; Higgins v. Board of Comm'rs of Johnson County, 153 Kan. 280, 560, 112 P.2d 128. If a general law clearly can be made applicable, a special law is impermissible. Heckler v. Conter, 206 Ind. 376, 187 N.E. 878; cf. Owens v. Smith, 216 S.C. 382, 58 S.E.2d 332. On the other hand, the usual presumption in favor of constitutionality attends a legislative act of this kind. State for Use and Benefit of Lawrence County v. Hobbs, 194 Tenn. 323, 250 S.W.2d 549. This court itself has held the requirement that a special act shall not be used where a general one "can be made applicable" is not to be so tightly applied as to tie the hands of the legislature unduly. McSurely v. McGrew, 140 Iowa 163, 118 N.W. 415.

The evidence discloses that the schools of higher learning possess but a single major institution like this hospital and that this hospital, which needs enlargement, has peculiar revenue-producing capabilities making revenue bonds feasible. The state has the problem of this particular institution. Mindful of the presumption of validity which attends legislative acts, we believe the legislature was within its province in enacting a statute to deal with this special problem. We conclude this ground of challenge to the statute is not meritorious.

Applying the principles gleaned from the above cases to the present instance, it can be said that the legislature apparently feels the need to validate only the particular agreements of the particular utility cooperatives involved here. This legislative judgment does not appear unreasonable in light of the deference given by the Iowa Court to the legislative judgment where challenge is made under Art. III, §30. We, therefore, conclude that S.F. 478 is not unconstitutional under that provision.

Another issue is presented, though. Assuming that S.F. 478 is a permissible special law, is it invalid under another constitutional provision, Art. I, §6, Iowa Constitution, as being legislation granting a privilege to a citizen, or classes of citizens? *Richards v. City of Muscatine*, 237 N.W.2d 48 (Iowa 1975) held that even though a statute may create a benefit for a particular class of persons, the statute is not violative of Art. I, §6, if there is a reasonable ground and public purpose for the special benefit. In sustaining the constitutionality of a statute granting urban renewal developers special prerogatives, the Court stated at 59-60:

A Uniform Operation of the Law; Special Privileges. Section 6 of article I of the Iowa Constitution 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."

(1) 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 it 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 I 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).

We think a reasonable ground and a public purpose exist for any special benefits §403.19 incidentally creates. The legislature must have thought — and we cannot say without reason — that urban renewal benefits certain individuals or classes more than others." 240 Iowa at 416, 35 N.W.2d at 80.

The ultimate purpose of S.F. 478 is to legalize agreements whose goal is to permit certain municipal utilities, through an association in which they are members, to provide adequate electricity at a reasonable cost to their citizens. This type of goal is a public purpose. *See Sampson v. City of Cedar Falls*, 231 N.W.2d 609, 613 (Iowa 1975). Whether the agreements sought to be legalized will, in fact, achieve the goal is not for us to decide. It is enough that the legislature feels that they will and that the legislature judgment is not utterly unfounded, which it does not appear to be. Accordingly, we do not find S.F. 478 to be unconstitutional under Art. I, §6.

June 12, 1979

ENVIRONMENTAL PROTECTION: Federally Mandated Pretreatment Program — Federal Clean Water Act, 33 U.S.C. §§1317, 1342; Chapter 455B, Iowa Code, 1979, and Title 400, Iowa Administrative Code: Iowa law provides authority to apply and enforce pretreatment standards upon industrial users discharging into publicly owned treatment works. Opinion #78-10-1 (Davis to Crane, 10-6-78) is withdrawn where inconsistent herewith. (Osenbaugh to Crane, Executive Director, Iowa Department of Environmental Quality, 6-12-79) #79-6-10

Larry E. Crane, Executive Director, Iowa Department of Environmental Quality: On May 9, 1979, you requested our opinion regarding the legal authority of the State of Iowa to carry out a wastewater pretreatment program pursuant to 40 CFR 403.10 and the Federal Clean Water Act, sections 307(b) and 402(b)(8) and (9), 33 U.S.C. §§1317 (b), 1342(b).

Your opinion request seeks clarification of three points in this office's previous opinion of October 6, 1978 Davis to Crane, in light of the comments of the Regional Administrator of the United States Environmental Protection Agency, Region VII.

Item 5 of the previous opinion concluded that the State probably did not have the necessary authority to make determinations on categorization of industrial users and requests for variances. Item 9 noted that the State did not have authority to enforce permit requirements on industrial users discharging into publicly-owned treatment works. These conclusions were based on section 455B.45, Iowa Code, 1979, which provides in relevant part:

It shall be unlawful to carry on any of the following activities without first securing a written permit . . .

* * *

3. The operation of any waste disposal system or water supply distribution system or any part of or extension or addition to such system. This provision shall not apply to any pretreatment system the effluent of which is to be discharged directly to another disposal system for final treatment and disposal.

Since the pretreatment program in question regulates industrial users who discharge into publicly-owned treatment works, section 455B.45(3) renders such industrial users exempt from any permit requirement. However, section 455B.45(3) is consistent with the federal pretreatment program which imposes pretreatment standards, but not permit requirements, on industrial users. Clean Water Act, sections 402(b)(8), 307 (b)(1), 33 U.S.C. 1342(b)(8); 1317(b)(1). Under both state and federal law, permits are issued to the publicly owned treatment works (hereafter POTW) which must require any industrial user to comply with pretreatment standards. Clean Water Act, section 402(b)(8), (9), 33 U.S.C. 1342(b)(8), (9); Rule 400—19.3(5), IAC. The State is therefore not required to issue permits to such industrial users in order to have adequate authority to administer the pretreatment program. 40 CFR 403.10 (f). Nor can section 455B.45(3) be construed to restrict the Department's authority to enforce pretreatment standards since such power is expressly granted by sections 455B.32(2), (3), (9), and 455B.49(2).

Item 5 of the previous opinion concerned whether 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]

In our opinion Iowa law provides authority to determine whether an industrial user falls within a particular industrial subcategory to which national pretreatment standards apply. 40 CFR 403.6. Section 455B.32(2) authorizes the Commission to establish pretreatment standards, which have been adopted as Rule 400—17.4 (455B), IAC. Given the express authority to establish pretreatment standards, the Commission must also have authority to determine whether a particular user fits within the category of users subject to the standard. Violations of pretreatment standards are punishable by $10,000 per day fines and may be enjoined. Section 455B.49(2), (4), Iowa Code, 1979. The Director is authorized by section 455B.33(3) to:

Take any action or actions allowed by law which, in the executive director's judgment, are necessary to enforce or secure compliance with the provisions of [Part 1, Division III, Chapter 455B] or of any rule or standard established or permit issued pursuant thereto.

Surely then the Director can determine which pretreatment standard will apply to a user; otherwise, users would be subject to serious sanctions without opportunity for notice of applicable requirements. Additionally, section 17A.9, Iowa Code, 1979, authorizes declaratory rulings as to the applicability of any rule of the agency. We therefore conclude that the Director has the necessary authority questioned in Item 5(a).

The authority to deny and/or recommend approval of a variance of a pretreatment standard if the user can establish that the factors relating to it are fundamentally different from those used to create the categorical pretreatment standard is provided by Rule 400—17.7 (455B), IAC. The statutory basis for this rule is again section 455B.32(2), authorizing the establishment of pretreatment standards. While the Code does not directly authorize the Director to recommend variances from pretreatment standards, section 455B.32(3) prohibits the Commission from adopting a more stringent pretreatment standard than that required by EPA. Since the federal variance provision allows less stringent standards to be applied to a particular user, the legislative intent of section 455B.32(3) would mandate that such variances also be available in the Commission's pretreatment rules. Such determination is also consistent with the legislative statement of policy to authorize the State to implement the provisions of the federal Water Pollution Control Act. We therefore conclude that the Commission has the authority to provide by rule for such variances.

Item 9 concerned state authority to enforce against violations of pretreatment standards and requirements. The previous opinion stated:

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.[1] His inspection authority under §§455B.3(8) and 455B.33(2) also bears upon the enforcement ability of the department.

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[1] The correct citation is §455B.34.

As your letter notes, this opinion is correct. However, the Regional Administrator of EPA has construed this response to indicate that the Attorney General concluded that the State did not have the requisite authority to enforce pretreatment requirements. We will therefore clarify our position on this issue.

Federal regulations require that requests for State Pretreatment Program Approval include legal authority to seek penalties and injunctive relief for "noncompliance by the POTW with pretreatment conditions imposed into the POTW permit and for noncompliance with Pretreatment Standards by Industrial Users as set forth in §403.8(f)(1)(vi)." 40 CFR 403.10(f)(1)(iv). Authority to enforce such permit requirements on POTW's is found in sections 455B.33(4), 455B.34, 455B.45, and 455B.49. Authority to enforce pretreatment standards on industrial users is found in sections 455B.32(2) and (9), 455B.33(3), 455B.34, and 455B.49(2) and (4). Additionally the previous opinion noted that the POTW can require complinace with the various conditions of 40 CFR 403.8(f)(1) by contract with the industrial users. Rule 400—19.3(5), IAC. The fact that the state may not require permits from such industrial users does not preclude enforcement of pretreatment standards. Therefore the State has the requisite legal authority to enforce both the POTW permit conditions and the industrial user pretreatment standards.

Item 6(a), regarding state authority to apply recording, reporting and monitoring requirements, involves somewhat related issues. You had asked whether the State has authority to:

a. Require any industrial user or 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 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);

Mr. Davis' opinion of October 6, 1978, concluded:

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's 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.

We now conclude, in agreement with the Regional Administrator of EPA, that the State has the authority to require submission of proposed compliance schedules and reports accounting for progress toward, and compliance with, the progress schedule agreed upon.

Section 455B.32(9) grants the Commission authority to:

Establish, modify or repeal rules relating to inspection, monitoring, record keeping and reporting requirements for the owner or operator of any public water supply or any disposal system or of any source which is an industrial user of a publicly or privately owned disposal system.

Additionally section 455B.33(3) authorizes the Director to:

Take any action or actions allowed by law which, in the executive director's judgment, are necessary to enforce or secure compliance with the provisions of this part of this division or of any rule or standard established or permit issued pursuant thereto.

The Director has express authority to order any person to take corrective action to cease violations of any rule issued pursuant to Part I, Division III, Chapter 455B, under section 455B.34, and rules establishing pretreatment standards have been promulgated pursuant to that part, section 455B.32(2). Compliance schedules are authorized by federal regulation, 40 CFR 403.12, and Rule 400—19.3(a), IAC, and are not precluded by statute. It therefore appears that the Director has the authority to require the reports described in Item 6(a)(1)(c), (2), and (3).

In our view the previous opinion misconstrued the effect of section 455B.45), prohibiting permits for users discharging into another system. Based on other provisions of Chapter 455B as set out above, we now conclude that the State has the requisite authority as to the items questioned. We therefore withdraw the previous opinion to the extent it is inconsistent with this opinion.

June 12, 1979

DRAINAGE DISTRICTS. Affirming or Acquiring Right-of-Ways. Iowa Constitution Art. I, Sec. 18; Iowa Constitution Amendment 13, Art. I, Sec. 18; Iowa Constitution Amendment 13, Art. I, Sec. 18; 455.135(8); 455.135(6); Chap. 68, Sec. 4, 30 G.A. Original right-of-way at time drainage district was established can be determined from county records. If records unavailable it can be determined by a new survey. Drainage district acquired a prescriptive easement as to right-of-way if district was established in substantial compliance with statutes in effect in 1906. Additional right-of-way must be acquired by procedures provided in Section 455.135(6). (Adams to Willis, Calhoun County Attorney, 6-12-79) #79-6-11

Kent B. Willis, Calhoun County Attorney: We are in receipt of your opinion request concerning the problem of an undetermined right-of-way of a drainage ditch which is in need of repair. In that letter you state:

"I am hereby requesting an Attorney General's opinion regarding Chapter 455.135(8) of the 1979 Code of Iowa. The Calhoun County Board of Supervisors have the responsibility of a drainage district in Calhoun County for which the records do not show what land was taken for open ditch and what, if any, easements were acquired for purposes

of future repair. The cited statute does not indicate whether or not the drainage right-of-way would have to be condemned or in some manner purchased, or whether or not some right by prescription has been acquired through the years."

Iowa Constitution Article I, Section 18 (1857), provides:

"Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."

and Iowa Constitution Amendment 13, amending Article I, Section 18 (1908), provides:

"The general assembly, however may pass laws permitting the owners of lands to construct drains, ditches, and levees for agricultural, sanitary or mining purposes across the lands of others, and provide for the organization of drainage districts, vest the proper authorities with power to construct and maintain levees, drains, ditches, and levees heretofore constructed under the laws of the state by special assessments upon the property benefited thereby. The general assembly may provide by law for condemnation of such real estate as shall be necessary for the construction and maintenance of such drains, ditches and levees and prescribe the method of making such condemnation.

It is clear that, in sofar as a drainage district right-of-way is concerned, the owners of land taken for this purpose must be justly compensated.

The statute which governed the establishment of drainage districts at the time Joint Drainage District Calhoun-Pocahontas 1-54 was established was enacted two years prior to the second constitutional amendment referred to above. This statute, cited as Chapter 68, Acts of the Thirtieth General Assembly (1906), prescribed a method by which land owners would be compensated for damages sustained as a result of appropriating lands for drainage district improvements.

In general terms, this statute set forth five steps to be taken in creating a drainage district. The steps were:

1. Filing a petition with the County Auditor by one or more land owners whose lands will be affected, setting forth the body or district to be affected by the proposed drainage district.

2. Appointment by the County Board of Supervisors of an engineer to survey the lands described in the petition and to locate improvements petitioned for and to return his findings to the County Auditor.

3. Service of notice in writing on all land owners, occupants and lienholders in the affected area including those whose lands abut the improvement of the pendency of prayer of petition and providing a date and time for hearing on claims filed for damage with the Auditor.

4. Allowing for the filing of claims for damages as compensation for or on account of the construction of improvements.

5. Appointment of appraisers and the actual assessing of damage of those claiming them as a result of the construction of improvements.

It would appear that a comprehensive search of the records of the Auditor's Office, more particularly the engineer's survey and report, should reveal those lands which were appropriated for improvements or actual right-of-way in the construction and establishment of the drainage district.

In the event there are no records or the records fail to show which lands were taken for the improvements, Section 455.135(8) sets forth proceedings to be followed:

Section 455.135(8) reads as follows:

"If the drainage records on file in the Auditors Office for a particular district do not define specifically the land taken for right of way for drainage purposes, the board may at any time upon its own motion employ a land surveyor to make a survey and report of said district and to actually define the right of way taken for drainage purposes. After the land surveyor has filed his survey and report with the board, the board shall fix a date for hearing on said report and shall serve notice of said hearing upon all landowners and lienholders of record and occupants of the lands traversed by said right of way in the manner and for the time required for service of original notices in the district court."

Once the engineer's survey has defined specifically the lands taken for right-of-way for drainage purposes, and it has been determined that some or all of the lands so taken were not legally acquired, the governing body of the district is granted the authority to acquire said lands.

Section 455.135(6), Code of Iowa, 1979, states:

"The governing body of the district may, by contract or conveyance, acquire within or without the district the necessary lands or easements for making repairs or improvements under this section including easements for borrow and easements for meander, and in addition thereto, the same may be obtained in the manner provided in the original establishment of the district, or by the exercise of the power of eminent domain as provided for in Chapter 472. If additional right of way is required for any repair or improvement under this section, the same may be acquired in the same manner as provided for acquisition of right-of-way in the original establishment of a district, except that where notice and hearing are not otherwise required under this section notice as provided in this chapter to owners, lienholder or record and occupants of the land from which right of way is to be acquired shall suffice."

The final part of your question asks whether some right by prescription has been acquired through the years. This can be answered affirmatively if it can be determined that the original use was with the consent of the owner.

The Supreme Court of Iowa in *Simonsen v. Todd*, 261 Iowa 485; 154 N.W.2d 730 (1967), addressed itself to prescriptive easements. The Court at page 489 states:

Prescription is one of the three or four methods by which an easement may be created. *Loughman v. Couchman*, supra cit. 888 of 242 of Iowa, 153, 154 of 47 N.W.2d; *Phillips v. Griffin*, 250 Iowa 1350, 98 N.W.2d 822, 824; *Webb v. Arterburn*, 246 Iowa 363, 67 N.W.2d 504, 512. None of the other methods are involved here.

An easement by prescription is created "by adverse possession, under claim of right or color of title, openly, notoriously, continuously, and hostilely asserted against defendants for ten years or more." *Webb v. Arterburn*, supra loc. cit. 379; *Phillips v. Griffin*, supra loc. cit. 1354. We have also said under some circumstances "There may be an easement by prescription where the original use was with consent of the servient owner and use as of right has continued for more than ten years." (Acting Cases) *Loughman v. Couchman*, supra loc. cit. 889.

We have examined the line of cases upon which the statement in *Loughman* is based to ascertain the circumstances to which it has been applied and the type of use which constituted "use as of right." We

conclude that it has been applied only in those situations in which the party claiming the easement has expended substantial amounts of labor or money in reliance upon the servient owner's consent or his oral agreement to the use. Almost all are drainage cases and are determined either on the theory of a valid executed oral agreement or on the principle of estoppel."

Chapter 68, Section 4, Acts of the Thirtieth General Assembly, provided:

"Any person claiming damages as compensation for or on account of the construction of such improvement shall file such claim in the Office of the County Auditor at least five days prior to the day on which the petition has been set for hearing, and on failure to file such claim at the time specified, shall be held to have waived his rights thereto."

This very section was construed by the Iowa Supreme Court in *Taylor v. Drainage District No. 56*, 167 Iowa 42 (1914), as constitutionally precluding recovery of compensation by a landowner who failed to file a claim in the time provided by the statute. The Court there stated:

". . . It is purely a statute of limitation, the validity of which, if notice provided for in the statute previously quoted is adequate, cannot be doubted. Technically, a waiver is the voluntary or intentional relinquishment of a known right. [cited case]

But this is not saying that the Legislature may not declare that certain acts or a failure to act, under specified conditions, shall have the force or effect of a waiver and be held to be such, and this is the purport of this statute. Declaring that the omission to file claims for damages by the time fixed shall be deemed or held to be a waiver thereof is precisely the same as though it were said that it must be filed on or before a specified day and not later.

The statute proceeds as do all those of limitation upon the theory that the claimant has forfeited his right thereto by lapse of time or omission to assert his claim [cite cases]. Moreover, the Legislature, in authorizing the condemnation of a right-of-way for a drainage ditch, has provided a definite and complete method for the adjustment and adjudication of damages occasioned by the taking and the compensation to the owners of the land through which extended and, the plaintiffs being duly notified and having failed to avail themselves of the remedies afforded thereby, no other is open to them, and there can be no resort to a common-law remedy . . .

The wisdom of fixing a day on or before which all claims must be filed is not open to inquiry. It is essential to the orderly consideration and dispatch of business that there be a time after which claims for damages may not be presented or heard. Otherwise, such an enterprise could never be completed, and claims of different kinds might be urged on ad infinitum. The Court did not err in construing the statute as one of limitation."

The Court reaffirmed its holding in the above case in *Goeppinger vs. Board of Supervisors*, 172 Iowa 30, 152 N.W. 58 (1915).

These cases make it clear that if an owner of land, across which drainage district improvements will run, fails to present a claim within a specified time period he will have waived his right to make a claim at a later time.

In reviewing the supplementary information furnished this office, it appears that there was substantial compliance with statutory procedures in establishing Joint Drainage District Calhoun-Pocahontas 1-54 and establishing the easement. The information shows that proper notice was made and appraisers appointed. It would appear the opportunity to present a claim was made available to land owners to be affected by these

improvements. Those who made claim were properly compensated for damages; those who failed to make claim waived their right to compensation.

The drainage district has continued to maintain these improvements and the drainage right-of-way for approximately 70 years. It has acquired a "use as of right," of a pre scriptive easement. This prescriptive easement runs with the land and cannot be extinguished by sale. Subsequent purchasers or successors in interest take the land subject to this easement. The Supreme Court in *McKeon vs. Brammer*, 238 Iowa 1113, 29 N.W.2d 518 (1947), definitively discusses prescriptive easements. Assuming that Joint Drainage District Calhoun-Pocahontas 1-54 is a constitutionally established drainage district, having expended money and labor in constructing and maintaining a drainage system exceeding the statutory time of ten years, it would seem apparent that the District has acquired a prescriptive easement to the right-of-way and improvements, and the present owners of land through and across which that right-of-way passes cannot successfully challenge or extinguish this easement.

We would therefore conclude that the District now has a valid easement over land which has been actively used for operation of the drainage ditch. If repair and maintenance now require extension of the easement, the procedures provided in section 455.135(6) Iowa Code, 1979, must be followed to acquire the additional easements required.

June 12, 1979

COUNTIES: WELFARE: Residency Requirement: Chapter 255, 1979 Code of Iowa, 8 USC §1101(a)(15); 8 USC §1182(e). The limitation on medical treatment of the indigent at University Hospitals under Chapter 255, Code of Iowa, 1979, to "legal residents of Iowa" is constitutional. Aliens in the United States on temporary student visas are not residents of Iowa and are not eligible for treatment under Chapter 255. (Appel and Cosson to Murray, State Senator, 6-12-79) #79-6-12

The Honorable John Murray, State Senator: You have asked for an opinion of the Attorney General as to "whether foreign nationals, in the United States temporarily for purposes of studying at Iowa State University, or their spouses, are entitled to receive papers from Story County for treatment at University Hospitals under Chapter 255 of the Iowa Code". In order to provide an answer, we must address questions of statutory construction and constitutional law.

I.

Chapter 255 of the Code establishes a framework for providing free medical care for indigent legal residents of Iowa at University Hospitals. Chapter 255 proceedings are initiated when an adult resident of the state files a complaint charging that a legal resident of Iowa residing in Iowa "is pregnant or suffering from some malady or deformity that can probably be improved or cured or advantageously treated by medical or surgical treatment or hospital care, and that neither such person nor persons legally chargeable with his support are able to pay therefore," §255.1, Code of Iowa, 1979. Thereafter, county officials conduct an investigation of eligibility and an examination is conducted by a local physician, §255.4, §255.6. Copies of these reports are filed with the clerk of the juvenile court, §255.6, 255.8. When the physician's report has been filed, the clerk of juvenile court is directed to set a hearing date. §255.7.

At such hearing, the complainant, the county attorney and welfare officials, or other agent of the board of supervisors, and the patient are entitled to be represented by counsel, present evidence, and offer arguments, §255.8.

The key question of statutory interpretation is the meaning of the term "legal resident of Iowa" as used in §255.1. This question has been addressed in a previous opinion of the attorney general, 1930 OAG 153, where it was said:

The term "legal resident of Iowa" . . . in our opinion should be defined as a residence in the county with the good faith intention of making a home in said county coupled with the physical facts showing such intention. That is, the residence must not be for a temporary purpose only but must be with the present good faith intention of making it a home without any present intention of removing therefrom.

The "legal residence" requirement of Chapter 255 contrasts with the residency requirement for voting in Iowa. Section 47.4, Code of Iowa, 1979, states that residency for voting purposes is the place which a voter "declares as his home with intent to remain there permanently or for a definite or indefinite period of time." Thus, under Iowa law, a person who declares his home in a given place with intent to remain for a definite period of time is entitled to vote in that locality. *See* OAG (Appel to Daggett, 5-18-79), #79-5-21. In contrast, legal residence under Chapter 255.1 requires a good faith intention to remain without a present intention of leaving.

We do not believe aliens on student visas are entitled to free medical care under Chapter 255. While legal residence as interpreted by the attorney general requires some intention to remain, a student visa is inherently temporary. In order to be admitted to the country, such student must be "an alien having a residence in a foreign country which he has no intention of abandoning . . .". 8 U.S.C. §1101(a)(15)(j). And, subject to enumerated exceptions, a person on a student visa may not apply for an immigrant visa or permanent residence "until it is established that such person has resided and been physically present in the country of his nationality or his last residency for at least two years following departure from the United States, 8 U.S.C. §1182(e). Under these circumstances, we think a student visa, which has on its face a specific departure date, negates any possible claim of Iowa residence with "present good faith intention of making it a home without any present intention of removing therefrom." 130 OAG at 153.

Since the statute expressly states that pregnancy is a condition which may qualify a legal resident for medical treatment, §255.1, Code of Iowa, 1979, some discussion of the peculiar circumstances of childbearing is appropriate. In the case of pregnancy, an argument could be made that the medical care is rendered not to the nonresident mother, but to the child who, by virtue of being born on American soil, is a United States citizen. Whatever their citizenship status, however, we doubt that an intent to remain permanently in the state could be imputed to the offspring of a student alien mother present in the country on a temporary visa. Barring a showing to the contrary, we think a court would probably assume the child's presence in Iowa, like that of his or her mother, is temporary.

II.

We next turn to potential constitutional challenges to the statute. While it is not clear that a noncitizen student alien could raise all these arguments, the statute could be attacked on grounds that it infringes on the right to travel, unduly deprives citizens of privileges and immunities, or offends constitutional principles of equal protection.

We do not believe that the statute is susceptible to successful right to travel or privileges and immunities attack. Since the legal residency requirement of Chapter 255 does not contain a durational residency requirement, the statutory limitation of welfare assistance does not unconstitutionally burden the right of interstate travel. *See Shapiro v. Thompson*, 394 U.S. 636, 89 S.Ct. 739, 35 L.Ed.2d 201 (1973), *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed. 201 (1973). These cases also imply that residency requirements for free medical care do not offend the privileges and immunities of citizens of the Several States, U.S. Const., art. IV, §1, or of the United States, U.S. Const., amend. XIV, §1. For instance, in *Doe v. Bolton, supra*, the court emphasized the absolute character of a law prohibiting nonresidents from obtaining abortions within the state even at private hospitals at their own expense. 410 U.S. at 200, 93 S.Ct. at 751, 35 L.Ed. at 217. And, as recently as last year, the Supreme Court cited *Shapiro v. Thompson* in the privileges and immunities context for the proposition that a state is not always required to provide services "equally to anyone, resident or nonresident, who may request it to do so," *Baldwin v. Fish & Game Comm. of Montana*, 436 U.S. 371 at 383, 98 S.Ct. 1852 at 1860, 56 L.Ed. 354 at 365 (1978).

A statute dividing persons into resident and nonresident categories is also subject to review under the equal protection clauses of the Iowa and U.S. Constitutions. But where the statute does not impinge on a fundamental right and is not based on a suspect classification, a rational basis is sufficient to sustain the statutory scheme. We think it clear that the state has a rational basis for extending free medical care only to residents, i.e. those who intend to remain in a location and who are at least free to do so permanently for an extended period of time. The state, with its limited resources, has a more durable interest in protecting the health of its residents who might otherwise prove a serious long-term burden on society if medical care is denied. And, the prospects of eventually recovering the cost of benefits provided is greater where the recipient intends to remain in the jurisdiction and may well replenish the state treasury through payment of future taxes.

Of course, if the statute denied free medical care only to aliens, it might be subject to greater constitutional scrutiny since the United States Supreme Court has identified alienage as a suspect classification. *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed. 534 (1971). But under Chapter 255, the classification is not, at least on its face, based on alienage, but on residency. A nonresident citizen of another state traveling through Iowa or temporarily within the state for business or other purposes also would not qualify for medical care under the statute.

It is, of course, possible to invoke strict equal protection scrutiny against statutes which are on their face not based on suspect classifications if there is discriminatory application of the law, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) or if the statute, notwithstanding its apparent neutrality, is plainly a device that purposefully discriminates against

specially protected classes. Here, however, there has been no showing that the residency requirement has been waived with respect to nonresident American citizens but rigorously applied to aliens. And, where a generally applicable nondiscretionary rule of law that is neutral on its face is challenged, mere disproportionate impact on a suspect class is not sufficient to trigger strict scrutiny, *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed. 450 (1977). The statistical evidence must be overwhelming or there must be some other clear evidence of discriminatory purpose such as statements by officials or unambiguous historical background. *See Washington v. Davis*, 426 U.S. 229, 97 S.Ct. 2040, 48 L.Ed. 2d 597 (1976). Barring such an extraordinary factual showing, we think the statute would survive any equal protection attack.[1]

III.

In conclusion, we hold that alien students on temporary visas are not legal residents of Iowa under Chapter 255, 1979 Code of Iowa, and are therefore not entitled to free medical care. The statute does not unduly burden the right to travel, impinge on citizens' privileges and immunities, and barring an extraordinary factual showing, does not violate equal protection.

June 13, 1979

COUNTIES — WORKMEN'S COMPENSATION INSURANCE: Section 309.9, Iowa Code, 1979. Premiums for insurance covering county road employees may not be paid out of the secondary road fund. (Ferree to Bradley, Keokuk County Attorney, 6-13-79) #79-6-13

Mr. Glenn M. Bradley, Keokuk County Attorney: This office has received your letter of May 7, 1979, in which you asked for an opinion on the following matter:

Whether premiums for insurance covering county road employees may be paid out of the secondary road fund.

After studying the appropriate statute, the County Home Rule Amendment and previous Attorney General Opinions, the conclusion must be that the fund is not available for the stated purpose.

Two prior Attorney General's Opinions have addressed the particular question and have answered it in the negative. 1928 O.A.G. 353; 1962 O.A.G. 173. Each is founded upon the rationale that the purposes for which the secondary road fund may be used are specifically set out by

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[1] A word of caution is in order here. Chapter 255 does not establish policy regarding the treatment of indigents who present themselves on the hospital premises in need of emergency medical care. If the University hospital generally renders emergency treatment to indigent non-Iowa residents who are United States citizens, we doubt that the hospital may deny similar care to nonresident aliens. Such a classification would be based on alienage rather than residency and therefore subject to strict equal protection scrutiny. *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed. 534 (1971). In order to survive strict scrutiny review, it must be shown that the policy is necessary to further a compelling government interest. *Shapiro v. Thompson*, 394 U.S. 618, 638, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). It would be very difficult for an emergency policy that discriminates based on alienage to meet this requirement.

statute. There is no reason to overrule either of these Attorney General's Opinions.

The 1962 Opinion was developed in consideration of the same statute still in effect today. *Compare* §309.9 Iowa Code, 1962 *with* §309.9 Iowa Code, 1979. The only development possibly having any effect on this matter is the recently adopted County Home Rule Amendment. Iowa Constitution Amendment 37. However, that Amendment, which grants wide authority to counties in the conduct of their affairs, specifically states that the exercise of county power must not be inconsistent with laws of the General Assembly. The two previous Attorney General's Opinions were grounded upon specific statutory limitations on the use of the secondary road fund which are controlling in this matter and their effect is not changed by County Home Rule.

June 13, 1979

PUBLIC EMPLOYERS: Payment for sick leave. Iowa Const., Art. III, §38A (amendment 1968); Iowa Const., Art. III, §39A (amendment 1978); §20.9, §79.1, §279.40, §332.3(10), §372.13(4), The Code (1979). Public employers have authority to pay employees for sick leave. (Powers to Longnecker, Director, State Retirement Systems, IPERS, 6-13-79) #79-6-14

Mr. Ed R. Longnecker, Administrator, State Retirement Systems Iowa Public Employers Retirement System: You have requested an opinion of this office as to whether or not a public employer may pay an employee on account of sickness under a plan or system established by the employer.

The state as an employer is permitted by §79.1 to pay an employee for sick leave for the reasons and at the rate stated in the section.

County boards of supervisors are permitted by §332.3(10) "to fix the compensation for all services of county and township officers not otherwise provided by law, and to provide for the payment of the same". This section has been interpreted as authorizing county boards to pay for sick leave. 1964 OAG 118, 1970 OAG 462. Counties now have home rule which may be exercised where not inconsistent with state law. Iowa Const., Art. III, §39A (amendment 1978). Pursuant to these sources of constitutional and statutory authority, county boards of supervisors may pay employees for sick leave.

Municipalities are permitted by §372.13(4) to ". . . appoint city officers and employees, and prescribe their powers, duties, compensation, and terms." Like counties, in addition to this express authority, Iowa Const., Art. III, §39A (amendment 1968), which states:

Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the General Assembly, to determine their local affairs and government, except that they shall not have power to levy 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.

granted municipalities the power to determine their own affairs where such action is not inconsistent with the laws of the state. Thus, municipalities have the authority to pay employees for sick leave.

School boards are authorized by §279.40 to grant school employees sick leave with full pay.

In addition to the specific authority cited above, the Iowa Public Employement Relations Act, §20.9 The Code (1979), designates leaves of absences as a topic over which the public employer must bargain if requested. This section further demonstrates legislative approval for public employers to grant payment for sick leave.

In conclusion, there is legal authority in both the Constitution and statutes and no statutory or constitutional restrictions on a public employer's ability to pay an employee for sick leave.

June 13, 1979

COUNTIES: COUNTY ATTORNEY: LAWSUITS AGAINST COUNTY SUPERVISORS: Chapter 613A, Chapter 125, Section 336.2(6), Code of Iowa (1979). County Attorney has primary obligation to defend a county supervisor who is a member of the board of directors of a nonprofit corporation pursuant to Code §125.39 who is sued for an act or omission of the supervisor as a member of that corporation. (Cleland to Hutchins, State Senator, 6-13-79) #79-6-15

The Honorable C. W. Hutchins, State Senator: You have requested an Attorney General's Opinion concerning the relationship between the county and a county supervisor who represents the county as a member of the board of directors of a nonprofit corporation pursuant to Section 125.39, Code of Iowa (1979). Specifically, you pose the question:

If a member of a county board of supervisors who, under Code §125.39, serves on the board of directors of a nonprofit corporation organized pursuant to Code Chapter 504A is sued in his or her individual capacity for an act or omission of the supervisor as a member of that corporation, does the county have an obligation to provide counsel for the supervisor?

The answer is yes. This result derives from an analysis of Chapter 613A, §125.39, and §336.2(6), Code of Iowa (1979).

Section 125.13(1), Code of Iowa (1979) provides that "a person may not maintain or conduct any chemical substitutes or antagonists program, residential program or nonresidential outpatient program, the primary purpose of which is the treatment and rehabilitation of substance abusers without having first obtained a written license for the program" from the Iowa Department of Substance Abuse. Section 125.39, Code of Iowa (1979) provides, *inter alia*, that one-third of the membership of the board of directors of a nonprofit corporation organized pursuant to Chapter 504A and licensed under Chapter 125 shall consist of representatives of the governmental units providing funds to the corporation.

If the county board of supervisors designates one of its members to sit on the board of directors of a Chapter 504A nonprofit corporation organized to treat substance abusers, that person represents the county. In our opinion, the purpose of this provision is to guarantee the county some measure of control over the activities of the corporation. Thus, every act which the county supervisor performs in his capacity as a member of the board of directors is necessarily included in his or her duties as a member of the county board of supervisors.

Under the Iowa Tort Claims Act, the county board of supervisors is obligated to "*defend* . . . its officers . . . and except in cases of mal-

feasance in office, willful and unauthorized injury to persons or property, or willful or wanton neglect of duty,shall save harmless and indemnify such officers . . .." Section 613A.8, Code of Iowa (1979) (emphasis added). Furthermore, the county is liable for the torts of its officers committed while "acting within the scope of their duties . . .." Section 613A.2, Code of Iowa (1979). Section 613A.2 further provides that "[a] tort shall be deemed to be within the scope of . . . duties if the act or omission reasonably relates to the business or affairs of the [county] and the officer . . . acted in good faith and in a manner a reasonable person would have believed to be in and not opposed to the best interests of the [county]." Under Chapter 613A, a tort is defined as:

every civil wrong which results in wrongful death or injury to person or injury to property or injury to personal or property right and includes but is not restricted to actions based upon negligence; error or omission; breach of duty, whether sttautory or other duty or denial or impairment of any right under any constitutional provision, statute or rule of law. (emphasis added)

The county thus has a general obligation to defend a member of the board of supervisors who is sued for an act or omission reasonably related to the affairs of the county. Moreover, the county has an obilgation to indemnify a member of the board of supervisors who is sued for a tort reasonably related to the affairs of the county except in the limited circumstances set forth in Code §613A.8. Therefore, the county is "interested" in such an action brought against a member of the board of supervisors.

In our opinion, an "act or omission" by a member of the board of supervisors while serving in his or her capacity as a member of a nonprofit corporation pursuant to §125.39 is reasonably related to the affairs of the county. First, the board of supervisors designates the particular supervisor who sits on the board of directors of the corporation. Second, the supervisor's presence on the board of directors of the corporation is required by law. *See* Section 125.13(1), Code of Iowa (1979). Finally, the purpose of the supervisor's presence on the board is to protect the interests of the county.

Section 336.2(6), Code of Iowa (1979) provides that it is the duty of the county attorney to "defend all actions . . . in which any county officer, in his official capacity, or the county, is interested, or a party." While it appears clear under this section that the county attorney is obligated to defend a member of the board of supervisors under the circumstances presented in your question, there are at least two prior Attorney General's Opinions which suggest a contrary result. *See* 1940 O.A.G. 111 and 1932 O.A.G. 30. This instant opinion hereby supersedes these prior Attorney General's Opinions with respect to when a county attorney must defend an action pursuant to Code §336.2(6). The 1932 opinion concluded that the county attorney did not have a duty to represent a member of the board of supervisors who was sued in his individual capacity for the removal of a bridge from a township road. Similarly, the 1940 opinion concluded that the county attorney did not have a duty to represent a sheriff who was sued for false arrest and trespass in connection with the service of arrest warrants. The implied rationale in both opinions seems to be that a county attorney has no obligation to represent a county officer who is sued in his individual capacity even

though the county officer performed the underlying act as part of his official duties.

While it may be possible to interpret the language in Code §336.2(6) to mean that the county officer must only commit the underlying act in his official capacity before the county attorney has a duty to defend him or her, it is not necessary to do so in light of requirements of Chapter 613A. Chapter 613A virtually eliminated the doctrine of governmental immunity as applied to city and county governments. See *Strong v. Town of Lansing*, 179 N.W. 365, 366 (Iowa 1970). The two Attorney General's Opinions discussed above were issued before the General Assembly passed Chapter 613A.

On the basis of the above discussion, it is our opinion that an act or omission of a county supervisor under the circumstances described in your question is within the scope of his or her duties as a county supervisor. Therefore, under Chapter 613A, the county has an obligation to defend the county supervisor and, except as provided in Code §613A.8, must indemnify the county supervisor in the event that he or she loses the lawsuit. Under these circumstances, the county is "interested" in the action against the supervisor, and, therefore, under Code §336.2(6) the county attorney has an obligation to defend the county supervisor.

In any event, since the county board of supervisors is obligated under Code §613A.8 to defend the county supervisor, it is at least implied in this section that the county board of supervisors can employ private counsel to represent the county supervisor. *See* also 1916 O.A.G. 166 and 1932 O.A.G. 30. There is also a possibility that the county has insurance to cover its liability in this situation, and, in that event, counsel for the insurance company might represent the county supervisor. Moreover, the nonprofit corporation can provide counsel for the county supervisor. *See* Code §§504A.4(14), 504A.4(16), and §504A.101.

In summary, the county attorney has the primary obligation to defend a county supervisor who is a member of the board of directors of a nonprofit corporation pursuant to §125.39 who is sued for an act or omission of the supervisor as a member of that corporation. However, the supervisor can also obtain counsel from any of the other sources listed in this opinion.

June 14, 1979

PUBLIC RECORDS: Confidentiality: Trade Secrets. Sections 17A.2(7), 17A.3, 68A.1, 68A.7, 68A.8. An agency in possession of an item makes the preliminary determination of whether it is a trade secret within the meaning of §68A.7(3). If an agency has reasonable grounds for concluding the item is a trade secret, it need not make the item available for inspection and copying. (Schantz and Cosson to Nelson, Director of Data Processing, Office of the State Comptroller, 6-14-79) #79-6-16

Mr. Dale L. Nelson, Director of Data Processing, Office of the State Comptroller: You have asked for an opinion of the Attorney General as to whether or not Iowa's public records law, Chapter 68A, Code of Iowa, would permit a citizen to inspect and copy computer programming methodology manuals used by the state under a license from the developer. For the reasons stated below, it is our opinion that you may reasonably conclude that these manuals are confidential and not subject to inspection and copying pursuant to Chapter 68A.

Chapter 68A, 1979 Code of Iowa, permits all citizens of Iowa to examine and copy all public records unless specifically made confidential. Section 68A.1, Code of Iowa, reads in part as follows: "Wherever used in this chapter, 'public records' includes all records and documents of or belonging to this state . . ." The developer of the materials in question contends that these materials are not public records because the state has only acquired the right to use them under a license agreement. The contention essentially is that by use of the terms "of or belonging to this state" the legislature intended to incorporate by reference basic principles of property law into the coverage of Chapter 68A, that under those principles a state agency may not be free to disclose every record or document physically in its possession, and that under the terms of the license under which these computer programming methodology manuals were obtained, the agency is not in this instance free to disclose them. In the circumstances, however, we need not resolve this plausible but novel contention. In our opinion, assuming without deciding that these materials are records "of or belonging to this state," you have reasonable grounds for concluding they are trade secrets which are specifically exempted from disclosure by §68A.7(3).

Section 68A.7 provides in pertinent part:

The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information:

. . .

3. Trade secrets which are recognized and protected as such by law.

The most recent decision of the Iowa Supreme Court involving trade secrets is *Basic Chemicals, Inc. v. Benson*, 251 N.W.2d 220 (Iowa 1977). In that case, the Court adopted as a starting point for analysis the definition of trade secrets provided by the Restatement of Torts, section 757, comment b. We quote from 251 N.W.2d at 226:

b. Definition of trade secret. A trade secret may consist of any formula, pattern, or device or compilation of information which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, . . .

Secrecy. The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret. . . . It is not requisite that only the proprietor of the business know it. He may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy. Others may also know of it independently, as, for example, when they have discovered the process or formula by independent invention and are keeping it secret. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information. An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent

of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

As the Iowa Supreme Court makes clear in *Basic Chemicals*, the question of whether an item is or is not a trade secret is ultimately a question of fact to be determined by consideration of evidence relating to the particular item against the factors identified in the Restatement. Because it is a fact question, an issue arises concerning the application of the trade secret exception to Chapter 68A in particular circumstances. In some situations, a court will previously have determined that an item is a trade secret, but in others, as here, the question may first arise when an agency receives a request for inspection and copying of the item.

This office does not have the authority to make *final* determinations whether, as a matter of fact, a particular item is a trade secret. Only a court can do that. However, it would appear that Chapter 68A commits the *preliminary* determination of whether an item is a trade secret to the agency in possession of the item. Section 68A.7 provides that certain "public records *shall* be kept confidential unless otherwise ordered by . . . the lawful custodian of the records. . . ." As with all agency action, of course, the factual determination of whether an item is a trade secret must be reasonable. In this context, the agency should have reasonable grounds to believe that an item is a trade secret within the definition set forth in *Basic Chemicals*. An agency which arbitrarily asserts that an item is a trade secret or which accepts without examination the claim of a third party that an item is a trade secret risks violation of the act. It may be noted that if an agency, after examination, has substantial doubt that an item is a trade secret, resort may be had to a court for a judicial determination pursuant to the provisions of §68A.8. And, of course, a requesting party who disagrees with an agency determination that an item is a trade secret may also seek a final determination by the courts.

Because this is the first instance in which this office has considered the question of the trade secret exception, George Cosson, one of the undersigned, met with Mr. Duane Abbey of your office to discuss the material involved here in relation to the exception.

The material involved is a package called "SDM-70," consisting of seven volumes and various supplemental forms and other materials developed by Atlantic Software, Inc. These materials were described as a methodology or approach to issues in computer programming, or as a series of steps or procedures to be used by programming personnel in developing, using and maintaining computer programs for the State of Iowa.

Our discussion revealed that Mr. Abbey is familiar with the contents of SDM-70 and how it is used by your division, with the steps taken by Atlantic Software[1] and your division to maintain limited access to the

[1] The license agreement under which SDM-70 was obtained by the State provides that the product shall be solely the property of ASI and that the client acquires only the right for its own personnel to use the product as specified in these terms and conditions. Other parts of the license agreement restrict copying of the material, even by the State, and forbid disclosure of the product to any third party without the express written permission of ASI.

material, and with the material of competitors to which it might be compared. In his judgment, SDM-70 fit the definition of a trade secret. Based on that discussion, it would appear to us that you would have reasonable grounds for concluding that the material is a trade secret within the meaning of §68A.7(3) and declining to permit inspection or copying of the material.

We should also note that Chapter 17A, the Code, does not require publication of the material. Section 17A.3 requires that all agency rules be published and "rule" is initially defined by §17A.2(7) to include agency "procedure". While the SDM-70 material may in some sense be characterized as a "procedure," it plainly falls within the exemption from the definition of a "rule" contained in §17A.2(7)(c):

An intergovernmental, interagency, or intraagency memorandum, directive, manual or other communication which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof.

See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process," 60 Ia.L.Rev. 731, 832-36 (1975).

In summary, it is our opinion that an agency may decline to permit inspection of a public record if it has reasonable grounds to believe the material is a trade secret within the meaning of §68A.7(3). It would appear that you would have reasonable grounds for determining that the SDM-70 material is a trade secret. The SDM-70 material is not a rule which must be pubilshed within the meaning of §17A.2(7)(c).

June 14, 1979

STATE OFFICERS AND DEPARTMENTS: Department of Social Services, Office of Communications. Sections 217.30 and 229.27, 1979 Code of Iowa; §§770-17.5(1), 770-18.6(1), 770-19.3(1), 770-20.3(1), 770-21.4(3), 770-22.6(1), and 770-28.5, Iowa Administrative Code. A written release should be secured from a client before his photograph is taken for a departmental publication. Such release should describe the publication for which the photograph is to be used, including the purpose and date of release of the publication. A client release should be executed each time the photograph is used or the publication is reprinted. The Office of Communications should investigate the status of the client before the photograph is used or released in a publication. In instances where the status of the client has changed since the taking of the photograph, the photograph should not be used for publication, notwithstanding a prior secured written release from the client. (McDonald to Fredericci, Director, Office of Communications, 6-14-79) #79-6-17 (L)

June 15, 1979

STATE OFFICERS AND DEPARTMENT: Credit Union Department. Chapter 533, 1979 Code of Iowa; §§533.1, 533.6, 533.37, 533.51, 533.53, 533.54, and 533.55, 1979 Code of Iowa; §533.1, 1977 Code of Iowa. The Credit Union Review Board may review and reverse important decisions of the Administrator if such action is deemed necessary or suitable to effect the provisions of Chapter 533. The Board should not reverse routine, day-to-day administrative decisions made by the Administrator. The Credit Union Department should promulgate rules to more specifically define the relationship of the Board and the Administrator. (McDonald to Reed, Acting Deputy Administrator, Credit Union Department, 6-15-79) #79-6-18 (L)

June 15, 1979

OPEN MEETINGS; COUNTIES AND COUNTY OFFICERS: Drainage districts. §§28A.2(1), 28A.2(2), 455.1, 455.2, 455.4, 455.7, 455.18, 455.28, 455.30, 455.135, Iowa Code (1979). A county board of supervisors, when it is in charge of a drainage district, is covered by the open meetings law. A board of trustees, when it is in charge of a drainage district, is covered by the open meetings law, if it is multi-membered, formally and directly created, and has policy-making or decision-making duties. The decision to make minor repairs in a drainage district must be made by the county board of supervisors or the board of trustees itself and must be in open session. (Haskins to Cochran, State Representative, 6-15-79) #79-6-19

The Honorable Dale M. Cochran, State Representative: You ask our opinion as to whether the open meetings law, Chapter 28A, Iowa Code (1979), applies to drainage districts under Chapter 455, Iowa Code (1979).

Drainage districts are established by the board of supervisors of any county. *See* §455.1, Iowa Code (1979). The purpose of a drainage district is the drainage of surface waters from agricultural and other land. *See* §455.2, Iowa Code (1979). The drainage district accomplishes this through construction of a levee, ditch, drain, or watercourse, or settling basins in connection therewith, or straightening, widening, dispersing, or changing a natural watercourse. *See* §455.1. More than one drainage district can be established in a county. *See* §455.1. The initial step for foundation of a district is the filing of a petition by two or more landowners. *See* §455.7, Iowa Code (1979). The county board of supervisors hires an engineer who prepares a written report on the proposed drainage district. *See* §455.18, Iowa Code (1979). The board may then create a drainage district, *see* §455.28, Iowa Code (1979), and assess the cost of any needed improvements to the affected landowners, *see* §455.30, Iowa Code (1979). Once the improvements have been made, repairs thereof may be undertaken. *See* §455.135, Iowa Code (1979). The body in charge of a drainage district is either the county board of supervisors or a board of trustees appointed by the county board of supervisors. *See* §455.1; 455.4, Iowa Code (1979).

The provision governing the applicability of the open meetings law is §28A.2(1), Iowa Code (1979), which states:

"As used in this chapter:

1. *"Governmental body" means:*

a. A board, council, commission or other governing body expressly created by the statutes of this state or by executive order.

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.

d. Those multimembered bodies to which the state board of regents or a president of a university has delegated the responsibility for the management and control of the intercollegiate athletic programs at the state universities."

Our office has opined that in order to be subject to subsection "a" §28A.2(1), a body must have policy-making or decision-making duties.

See O.A.G., Haskins to Thole, 5-16-79. It must, in other words, be a "governing body". The county board of supervisors, when it is in charge of a drainage district, clearly falls under subsection "a". *See* Chapter 331, Iowa Code (1979); *Mandicino v. Kelly*, 158 N.W.2d 854 (Iowa 1968). A county board of supervisors is also plainly a governmental body with the meaning of subsection "a."

Likewise, we have opined that in order to be subject to subsection "c", a body must be "multi-membered", "formally" and "directly" created, and have delegated to it policy-making or decision-making duties. *See* O.A.G., Schantz and Haskins to Hansen, 5-4-79. A board of trustees, when it is in charge of a drainage district, thus falls under subsection "c" if it is multi-membered, formally and directly created, and has policy-making or decision-making duties. In most instances, their requisites will be met and a board of trustees will be covered by the open meetings law.

You further ask whether, if the county board of supervisors or a board of trustees of a drainage district is covered by Chapter 28A, the decision to issue work orders for minor repairs must be done by the board itself or whether it may simply be delegated to an administrator, who would not be subject to Chapter 28A. Repairs in drainage districts are governed by §455.135, Iowa Code (1979), which states in relevant part:

1. When any levee or drainage district shall have been established and the improvement constructed, the same shall be at all times under the supervision of the board of supervisors except as otherwise provided for control and management by a board of trustees and it shall be the duty of the board to keep the same in repair as provided herein. The board at any time on its own motion, without notice, may order done whatever is necessary to restore or maintain a drainage or levee improvement in its original efficiency or capacity, and for that purpose may remove silt and debris, repair any damaged structures, remove weeds and other vegetable growth, and whatever else may be needed to restore or maintain such efficiency or capacity. In the event permanent restoration of a damaged structure is not feasible at the time, the board may order such temporary construction as it deems necessary to the continued functioning of the improvement. If in maintaining and repairing tile lines the board finds from the engineer's report it is more economical to construct a new line than to repair the existing line, such new line may be considered to be a repair. If the estimated cost of any repair exceeds seventy-five percent of the original cost of the district and subsequent improvements therein, the board shall set a date for a hearing on the matter of making such repairs, and shall give notice as provided in sections 455.20 to 455.24. At such hearing the board shall hear objections to the feasibility of such repairs, and following the hearing the board shall order made such repairs as it deems desirable and feasible. Any interested party shall have the right of appeal from such orders in the manner provided in this chapter. The right of remonstrance shall not apply to repairs as defined in this section.

2. In the case of minor repairs, or in the eradication of brush and weeds along the open ditches, not in excess of one thousand dollars where *the board* finds that the same will result in a saving to the district *it* may cause the same to be done by secondary road equipment, or weed fund equipment, and labor of the county and then reimburse the secondary road fund or the weed fund from the fund of the drainage district thus benefited. [Emphasis added]

It is clear from the above section that the board — either the county board of supervisors or its appointed board of trustees — must authorize even minor repairs. Once the board has decided to make the minor re-

pairs, it could, of course, delegate the task of carrying them out to an administrator. But it is the board which is to make the actual decision to undertake repairs. This being the case, a majority of the board would have to be present to authorize minor repairs.[1] Once that is so, §28A.2(2), Iowa Code (1979), defining a "meeting" comes into play. That section states:

> 2. "*Meeting*" means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is a deliberation or action upon any matter within the scope of the governmental body's policy-making duties. Meetings shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discusssion of policy or no intent to avoid the purposes of this chapter. [Emphasis added]

It should be noted that the words "policy-making duties" encompass decision-making of an ad hoc nature and are not limited to the formulation of plans or rules. *See* O.A.G., Cook to Pellett and Crab, 5-16-79. The decision to undertake even minor repairs for a drainage district obviously involves some judgment or discretion and hence is not "purely ministerial" in nature. Thus, the decision to authorize minor repairs must be made in open session.

In sum, a county board of supervisors, when it is in charge of a drainage district, is covered by the open meetings law. A board of trustees, when it is in charge of a drainage district, is covered by the open meetings law if it is multi-membered, formally and directly created, and has policy-making duties. The decision to make minor repairs in a drainage district must be made by the county board of supervisors or the board of trustees itself and must be in open session.

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[1] Absent a special statute, a majority of a board or commission constitutes a quorum for the transaction of business. *See City of Hiawatha v. Regional Planning Commission*, 267 N.W.2d 31, 32 (Iowa 1978).

June 15, 1979

CONSERVATION COMMISSION: Wildlife habitat stamps — Sections 110.1, 110.3, 110.7, 110A.5, 110A.6, Iowa Code, 1979. Persons hunting upon licensed Game Breeding and Shooting Preserves must possess a wildlife habitat stamp. Nonresidents hunting upon licensed Game Breeding and Shooting Preserves must also possess an unused pheasant tag issued pursuant to section 110.7, Iowa Code, 1979. (Benton to Brabham, Acting Director, Iowa Conservation Commission, 6-15-79) #79-6-20(L)

June 21, 1979

LEGAL RELATIONSHIP OF THE IOWA MORTGAGE LOAN ACT, CHAPTER 535A, 1979 CODE OF IOWA, AND THE FEDERAL HOME MORTGAGE DISCLOSURE ACT, 12 U.S.C. §2801, et seq., AND THE ACTS' STATUTORY REQUIREMENTS REGARDING DISCLOSURE AND/OR FILING OF MORTGAGE LOAN INFORMATION AND DATA BY CERTAIN FEDERAL AND STATE FINANCIAL INSTITUTIONS: United States Constitution, 12 U.S.C., §2801-8; Chapter 535A.1(2-4), 535A.4, 535A.4(4), 1979 Code of Iowa; Board of Governors of the Federal Reserve System, May 9, 1977, 42 F.R. 24314, May 13, 1977. While the federal Mortgage Loan Disclosure Statement may be filed by state financial institutions, additional mortgage information or data not contained in the federal Mortgage Loan Disclosure Statement can be required and collected pursuant to Section 535A.4(1-3), 1979 Code of Iowa, and 12 U.S.C. §2805. State financial institutions

may petition the Federal Reserve Board for an exemption from the federal Home Mortgage Disclosure Act. The State cannot, however, require that federal financial institutions file any disclosure information as the federal Home Mortgage Disclosure Act preempts the application of state mortgage loan disclosure laws to federal financial institutions. Chapter 535A is constitutional except insofar as it requires federal financial institutions file disclosure reports pursuant to 535A.4 (1-3), 1979 Code of Iowa. (Hagen to Chiodo, State Representative, 6-21-79) #79-6-21

The Honorable Ned Chiodo, State Representative: You have requested an opinion of the Attorney General regarding Section 535A.4, 1979 Code of Iowa, and specifically asked the following:

1. If a financial institution is required to file a disclosure report pursuant to the federal Home Mortgage Disclosure Act, will a filing of a duplicate copy with the Iowa Housing Finance Authority be sufficient on the part of a financial institution in order to comply with Iowa law as stated in Section 535A.4?

2. If a financial institution is not required to file a disclosure report pursuant to the federal Home Mortgage Disclosure Act, can the report that is required by the Iowa Housing Finance Authority ask for more information than is required by the federal Home Mortgage Disclosure Act?

3. Enclosed are copies of the proposed Iowa Mortgage Loan Disclosure Statement which is under consideration to be used to comply with Section 535A.4 of the Code of Iowa. Pages 1 and 2 encompass the information required by the federal Home Mortgage Disclosure Act. Pages 3, 4 and 5 ask for information in addition to what is asked under the federal Home Mortgage Disclosure Act. Can a financial institution be required to report this additional information under the law as stated in Section 535A.4?

Section 535A.4, 1979 Code of Iowa, states:

Disclosure. *Each reporting financial institution* accepting an application for a mortgage loan shall:

1. Maintain a record of mortgage loan applications by census tract.

2. Annually make a report based on the mortgage loan application records which shall:

a. State the total number of mortgage loan applications filed by census tract.

b. Clearly show the total number of mortgage loans which were approved and which were not approved by census tract.

3. The report required by this section shall be placed on file with the Iowa Housing Finance Authority and shall be available to the public.

4. In accordance with subsections 1, 2 and 3, the superintendent of banking, the auditor of state, the administrator of the credit union department and the commissioner of insurance *shall establish rules* for the enforcement of the provisions of this section. [Emphasis supplied].

Rules established pursuant to this chapter shall permit a financial institution which is required to file a disclosure report pursuant to the federal Home Mortgage Disclosure Act of 1975, 12 U.S.C. 2801 to 2809, and the regulations promulgated under that Act, to file a copy of that report with the Iowa Housing Finance Authority a report that conforms

in form and substance with the requirements of the federal Home Mortgage Disclosure Act.

In analyzing the specific questions you propounded regarding the application of Section 535A.4, 1979 Code of Iowa, four basic issues must be addressed. First, does the Iowa Mortgage Act differ from the federal Home Mortgage Disclosure Act? Second, other than the information sought in the two-page federal Loan Disclosure Statement or the first two pages of the Iowa Loan Mortgage Disclosure Statement, does Section 535A.4 require that any other additional disclosure be made or information be filed by the affected financial institutions in Iowa? Third, if additional information other than that sought in the federal report can be collected, is Chapter 535A, 1979 Code of Iowa constitutional as it applies to all financial institutions of a certain size including federal financial institutions. Fourth, if Chapter 535A, 1979 Code of Iowa, is unconstitutional in part, can the statute be severed so as to preserve the remaining provisions of Chapter 535A?

I. DOES THE IOWA MORTGAGE LOAN ACT DIFFER FROM THE FEDERAL HOME MORTGAGE DISCLOSURE ACT?

While both the federal and Iowa Acts seek to disclose and prohibit "red-lining" as defined at Section 535A.1 (1 and 2) and 12 U.S.C. §2801, a comparison of the basic provisions of the two Acts reveal significant differences. Distinctions can be found between the two Acts in the definitions of the affected transactions and institutions, the precise disclosure systems and in the very mortgage loan information or data to be disclosed. These distinctions will be reviewed below as they provide an insight into the respective coverage of each Act and are probative of intent of the Iowa Legislature to provide a separate, distinctive state scheme of red-lining regulation.

Chapter 535A, 1979 Code of Iowa, requires that each "reporting financial institution" accepting an application for "mortgage loan" "shall" provide the information pursuant to §535A.4(1-3), 1979 Code of Iowa, in a disclosure report filed annually with the Iowa Housing Finance Authority. The terms "mortgage loans" and "reporting financial institutions" are defined in §535A.1(2-4) and encompass both federal and state-chartered institutions in Iowa cities over 50,000 in population as follows:

2. "Mortgage loan" means a loan for the purchase, construction, improvement or rehabilitation of residential property containing or to contain four or fewer family dwelling units in which the property is used as security for the loan.

3. "Financial institution" means any bank, credit union, insurance company, mortgage banking company or savings and loan association, industrial loan company, or like institution which operates or has a place of business in this state.

4. "Reporting financial institution" means a financial institution with an excess of ten million dollars in assets which during a reporting period accepts mortgage loan applications from persons in any Iowa city with a population in excess of fifty thousand as determined in the most recent regular census or in any standard metropolitan statistical area.

The federal Home Mortgage Disclosure Act, 12 U.S.C., §§2802 and 2803(a)(1) define those same terms as follows:

§2802: For purposes of this chapter;

(1) the term "mortgage loan" means a loan which is secured by residential real property or a home improvement loan;

(2) the term "depository institution" means any commercial bank, savings and loan association, building and loan association, or homestead association (including cooperative banks) or credit union which makes federally related mortgage loans as determined by the Board;

(3) the term "Secretary" means the Secretary of Housing and Urban Development.

§2803: (a)(1) Each depository institution which has a home office or branch office located within a standard metropolitan statistical area, as defined by the Office of Management and Budget shall compile and make available, in accordance with regulations of the Board, to the public for inspection and copying at the home office, and at least one branch office within each standard metropolitan statistical area in which the depository institution has an office the number and total dollar amount of mortgage loans which were (A) originated, or (B) purchased by that institution during each fiscal year (beginning with the last full fiscal year of that institution which immediately preceded the effective date of this chapter).

Regulation "C" of the Board of Governors of the Federal Reserve, 12 C.F.R. 203, effective June 28, promulgates the regulations enforcing the federal Home Mortgage Disclosure Act. In its more precise definition of mortgage loans at 12 C.F.R. 203.2(h), construction loans are considered temporary loans and exempted from reporting under the federal Act. Section 535A.1(2), 1979 Code of Iowa, specifically includes construction loans as a category of loans included within the definition of mortgage loans under the Iowa Act. On the other hand, Regulation "C" at 12 C.F.R. 203.2(f) does include secured and unsecured home improvement loans. However, Iowa at §535A.2, 1979 Code of Iowa, defines mortgage loans so as to include secured but not unsecured home loan mortgages.

The coverage of financial institutions also differs slightly. Both include federal and state financial institutions with assets in excess of $10,000,000. The federal encompasses an institution with the institution or its branch in a standard metropolitan statistical area (SMSA), as defined by the Office of Management and Budget. Iowa's Act affects financial institutions within an SMSA or any Iowa city with a population in excess of fifty thousand (§535A.1[4]). These definitions may not necessarily be synonymous to coverage of cities in excess of 50,000.

The Iowa Act requires at §535A.4(1-3) that each reporting financial institution file the requisite information with the Iowa Housing Finance Authority. The federal Act at 12 U.S.C., §2803(a)(1) requires that the information be "made available . . . to the public for inspection and copying." While the state Act thus requires each covered institution to take the affirmative step of filing a report in a centralized depository for review, no filing with or review by any federal agency is required under the federal law. The affected financial institutions under the federal Act must have the following mortgage loan information available on the federal Mortgage Loan Disclosure Statement:

[T]he number and total dollar amount of mortgage loans which were (A) originated, or (B) purchased by that institution during each fiscal year . . . itemized . . . by census tracts [where practicable] . . ., otherwise by ZIP code, for borrowers, under mortgage loans secured by property located within that standard metropolitan statistical area . . . [and] for all such mortgage loans which are secured by property located

outside that standard metropolitan statistical area." (12 U.S.C., §2803 (1976).

The information to be made available at the financial institution by the federal Act is again expressly set out in Regulation "C" of the Federal Reserve Board at 12 C.F.R. 203.4-5. Included in Regulation "C" is a specimen form of the two-page federal "Mortgage Loan Disclosure Statement." As you point out, these two pages of the federal report are repeated verbatim in the first two pages of the Iowa Loan Mortgage Disclosure Statement. However, the Iowa Act requires that the report "clearly show the total number of mortgage loans approved and which were not approved" (§535A.4(3), 1979 Code of Iowa). This information is sought by means of the last three pages of the Iowa Mortgage Loan Disclosure Statement attached to your letter. This information or disclosure regarding mortgage loans approved and those not approved is not required under the federal Act.

The distinctions set out above are probative of the legislative intent. The coverage of the Iowa Mortgage Loan Act is not simply a parroting of the federal Home Mortgage Disclosure Act passed several years earlier. The affected institutions, mortgage loan transactions, mechanisms for disclosure of the mortgage loan information, and the exact information to be disclosed differ under each respective Act. Such differences are indicative of the Iowa Legislature's intent to establish a distinctive pattern of state regulation of "red-lining" independent and in addition to the federal Act.

II. OTHER THAN INFORMATION SOUGHT IN THE TWO-PAGE FEDERAL MORTGAGE LOAN DISCLOSURE STATEMENT OR THE FIRST TWO PAGES OF THE IOWA MORTGAGE LOAN DISCLOSURE STATEMENT, DOES §535A.4 REQUIRE THAT ANY OTHER ADDITIONAL DISCLOSURE BE MADE OR INFORMATION BE FILED BY THE AFFECTED FINANCIAL INSTITUTIONS IN IOWA?

Under §535A.4, 1979 Code of Iowa, the financial institutions issuing mortgage loans as defined above are required annually to report certain specified information. Section 535A.4(4) mandates that the superintendent of banking, the auditor of state, the administrator of the credit union department and the commissioner "shall" promulgate rules to enforce the collection of the specified information. The word "shall" imposes a duty, (§4.2, [36a], 1979 Code of Iowa). The respective financial institutions and state agencies have no alternative but to disclose and procure the information as described in §535A.4(1-3), 1979 Code of Iowa.

Simultaneously, §535A.4, 1979 Code of Iowa, provides that the rules for filing of information shall provide for the filing of the Federal Disclosure Statement by those financial institutions affected by 12 U.S.C. §§2801-9. The Iowa provision further provides that financial institutions not required to file a Federal Disclosure Statement shall file a report that conforms in form and substance to the Federal Disclosure Statement. The apparent conflict within §535A.4 must be reconciled.

The first two pages of the five-page Iowa Disclosure Statement which you submitted to us certainly are similar in form and substance to the Federal Disclosure Statement. In fact, pages 1 and 2 of the Iowa Disclosure Statement are virtually identical to the forms contained in 12 C.F.R.

203. Pages 1 and 2 of the Iowa Loan Mortgage Disclosure Statement certainly comply with the Iowa law.

A question then arises as to the statutory authorization for collecting the additional information sought on pages 3 through 5 of the Iowa Disclosure Statement. This information as noted earlier is sought to comply with the mandate of §535A.4(3), 1979 Code of Iowa. The Legislature will be presumed to have inserted every part in a statute for the purpose and to have intended that every part shall be carried into effect. *See State v. Jennie Coulter Day Nursery*, 218 N.W.2d 579 (Iowa 1974). A reasonable construction of the statute must be made so as to best effect its purpose and intent. *See Crow v. Shaeffer*, 199 N.W.2d 45, 47 (Iowa 1972); §4.7, 1979 Code of Iowa. The Iowa court's declaration regarding principles of statutory construction in *Doe v. Ray*, 251 N.W.2d 496 (Iowa 1977), is noteworthy:

> In interpreting these statutes we are guided by familiar prinicples of statutory construction. Of course, the polestar is legislative intent. *Iowa Department of Revenue v. Iowa Merit Employment Commission*, 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 one which will defeat it. Peters v. Iowa Employment Security Commission*, Iowa 235, 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 Cemetery Association v. Personnel Assoc., Inc.*, Iowa 178 N.W.2d 343, 347. [Emphasis supplied].

While the Legislature does permit the filing of the federal report, they do not state that such a filing shall be in lieu of any additional state report or supplement. Rather the Iowa statute seems to contemplate the avoidance of paperwork or duplication. It must be presumed and is obvious on the fact of Section 535A.4 that the Iowa Legislature was aware of the federal Home Mortgage Disclosure Act. *See Hubbard v. State*, 163 N.W.2d 904 (Iowa 1969). By allowing the filing of the federal report in part, financial institutions and the state avoid unnecessary and redundant paperwork. By allowing other institutions, not covered by the federal Act, to file similar reports in part to the federal Mortgage Loan Disclosure Statement a minimum standard of uniformity is created so as to facilitate effective and efficient review and scrutiny of the data collected.

The requirement in §535A.4(1-3), 1979 Code of Iowa, that certain information or data be collected cannot be ignored. To interpret the filing requirements in any other way would violate the express statutory declaration to collect the specified information. It will not be presumed that useless and meaningless words are used in a legislative enactment, and a construction holding that the Legislature enacted a meaningless provision should be avoided if possible. *See Iowa Civil Rights Commission v. Massey-Ferguson, Inc.*, 207 N.W.2d 57 (Iowa 1973), *State v. Downing*, 261 Iowa 965, 155 N.W.2d 517, 522 (Iowa 1968), *Holzhauser v. Iowa State Tax Commission*, 245 Iowa 525, 535 62 N.W.2d 229 (Iowa 1954). Consequently, we are of the opinion that the specified state agencies can and must collect the requisite information listed in §535A.4(1-3), 1979 Code

of Iowa, even if the information required exceeds that required in the federal Mortgage Loan Disclosure Statement.

III. IF ADDITIONAL INFORMATION, OTHER THAN THAT SOUGHT IN THE FEDERAL DISCLOSURE STATEMENT CAN BE COLLECTED, IS CHAPTER 535A, 1979 CODE OF IOWA, CONSTITUTIONAL AS IT APPLIES TO ALL FINANCIAL INSTITUTIONS OF A CERTAIN SIZE INCLUDING FEDERAL FINANCIAL INSTITUTIONS?

Both the federal Home Mortgage Disclosure Act, 12 U.S.C. §1201-8, and the Iowa Mortgage Loan Act, Chapter 535A, 1979 Code of Iowa, regulate financial institutions of a certain size whether state or federally chartered. In our opinion, state agencies acting pursuant to Chapter 535A cannot require that *federal* financial institutions file any disclosure information because Congress has, with respect to federal institutions, preempeted the field by passage of the federal Act. Congress did not intend, however, to prevent additional state regulation of state chartered institutions. Two recent cases support our conclusions.

In *Glen Ellyn Savings and Loan Association et al. v. A. T. Tsousmes*, 337 N.E.2d 1 (Illinois 1978), *cert. denied*, the Illinois Supreme Court held that under the Supremacy Clause of the United States Constitution, the Federal Home Mortgage Disclosure Act preempted application of the Illinois "Financial Institutions Disclosure Act" to certain federally chartered institutions. The Illinois law preceded the federal and did not contemplate any federal provision. In *Glen Ellyn*, *supra*, at 2-3, the Illinois court reviewed the Illinois and federal Acts and stated:

Even a quick comparison of the two statutes reveals substantial differences in the coverage and mechanics of the two disclosure schemes. Those differences, however, are immaterial in light of the more specific treatment given the question of preemption in Section 306 of the Federal Act (12 U.S.C. sec. 2804 (1976).

Sec. 2804: Relation to state laws:

(a) This chapter does not annul, alter, or affect, or exempt any state-chartered depository institution subject to the provisions of this chapter from complying with the laws of any state or subdivision thereof with respect to public disclosure and recordkeeping by depositor institutions, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency. The Board is authorized to determine whether such inconsistencies exist. *The Board may not determine that any such law is inconsistent with any provision of this chapter if the Board determines that such law requires the maintenance of records with greater geographic or other detail than is required under this chapter, or that such law otherwise provides greater disclosure than is required under this chapter.*

(b) The Board may by regulation exempt from the requirements of this chapter any state-chartered depository institution within any state or subdivision thereof if it determines that, under the law of such state or subdivision, that institution is subject to requirements substantially similar to those imposed under this chapter, and that such law contains adequate provisions for enforcement. Notwithstanding any other provision of this subsection, compliance with the requirements imposed under this subsection shall be enforced under:

(1) Section 1818 of this title in the case of national banks, by the comptroller of the currency; and

(2) Section 1464(d) of this title in the case of any institution subject to that provision, by the federal Home Loan Bank Board.

The language of section 306 plainly states that the federal Act is not intended to preempt the application of equally stringent, antiredlining disclosure acts to state-chartered institutions. Under the doctrine of expressio unius exclusio alterius est *People ex rel. Moss v. Page* (1964), 30 Ill. 2d 271, 195 N.E.2d 641, this language cannot be presumed to be surplusage *Hirschfield v. Barrett* (1968), 40 Ill. 2d 224, 239 N.E.2d 831, and it thus demonstrates Congress understanding that in the absence of such language, the federal Act would be preemptive of similar state legislation. "The purpose of Congress is the ultimate touchstone." *Retail Clerks International Association v. Schermerhorn* (1963), 375 U.S. 96, 103 84 S.Ct. 219, 223, 11 L.Ed. 2d 179, 184: accord, *Malone v. White Motor Co.* (1978), 98 S.Ct. 1185, 1190, 55 L.Ed. 2d 443, 450. Here, the plain language demonstrates not only Congress' understanding that the federal Act normally would be construed to preempt the Illinois Act, *but also its intention that only the regulation of state-chartered institutions be exempted from such preemption.* Of course, if construction of the plain language of section 306 of the statute led to a result which was clearly repugnant to the purpose of the statute read as a whole and in light of its history, we would find that the above-quoted statutory language was, after all, mere surplusage. E.g., *People v. Todd* (1975), 57 Ill. 2d 534, 322 N.E. 2d 447. That is not the case here, however. Although the stated purpose of the federal Act is "* * * to provide the citizens and public officials of the United States with sufficient information to enable them to determine whether depository institutions are filling their obligations to serve the housing needs of the communities and neighborhoods, in which they are located and to assist public officials in their determination of the distribution of public sector investments in a manner designed to improve the private investment environment" (12 U.S.C. Sec. 2801(b) (1976); and although subjecting federally-chartered institutions to the additional requirements of the Illinois Act could only further the above-quoted purpose of the federal Act, it is plain from the legislative history of the statute that Congress retreated somewhat from its stated purpose in order to protect the interests of certain federal agencies. The Senate version of the federal Act would not have preempted the application of state laws to federally-chartered institutions. The House, however, apparently responding to suggestions from the amicus curiae in this case, the Federal Home Loan Bank Board (FHLBB) (see 121 Cong. Rec. H 10, 517 daily ed. Oct. 31, 1975, remarks of Rep. Stevens), insisted that federally-chartered institutions not be subjected to state disclosure laws. *The House apparently accepted the FHLBB's reasoning that "subjecting a federally-chartered institution to state [disclosure] law would threaten the dual banking system." See* H. Conf. Rep. No. 726, 94th Cong., 1st Sess. 10, reprinted in [1975] U.S. Code Cong. & Admin. News, pp. 2333, 2336 ("Conference Report"). [Emphasis supplied]

In an even more recent decision, a United States District Court in New Jersey issued a decision on January 9, 1979, in *National State Bank v. Long* — Fed. Supp. — (D.C.M.J., 1979) (47 U.S. L.W. 2490), holding that Section 306 of the federal Home Mortgage Disclosure Act, 12 U.S.C. 2805, preempts the application of state disclosure laws to national banks. The court stated as follows:

Section 306 of the Home Mortgage Disclosure Act, 12 U.S.C., §2805, does not specifically state that national banks are exempt from state reporting and disclosure laws. *Nevertheless, the court agrees with the Illinois Supreme Court that Section 306 demonstrates the intent of Congress to preempt state reporting and disclosure laws with respect to national banks. See Glen Ellyn Savings and Loan Association v. Tsoumas,* 377 N.E.2d 1, cert. denied, 47 LW 3301 (October 31, 1978). Any other conclusion would have the anomalous result of subjecting state banks to only state disclosure laws in certain circumstances but subjecting national banks to state and federal disclosure laws in all circumstances. Furthermore, this conclusion is clearly supported by the legislative history of Section 306.

The banking commissioner does not appear to seriously contest the conclusion that Section 306 preempts the application of state disclosure laws to national banks to some extent. Rather, her position appears to be that the scope of such preemption is restricted to state laws that are purely reporting and disclosure laws. Since the New Jersey law prohibits redlining as well as requires reporting and disclosure, she argues that reporting and disclosure deemed necessary for the state to enforce the prohibition are not preempted.

This view of section 306 is too restrictive. The commissioner has not cited any case that supports her apparent contention that the preemptive effect of a federal statute can be avoided where a state statute, touching the same field, has a different purpose than the federal statute. In the court's view, disclosure is disclosure, regardless of what the purpose of the disclosure may be.

The court does find, however, that the scope of Section 306 is limited to state reporting and disclosure laws. The legislative history indicates that it was intended to have such a limited impact. [Emphasis supplied]

In *National State Bank, supra*, the court did indicate that New Jersey could, however, prohibit national banks from red-lining. The court stated in part as follows:

Federal banking laws do not preempt application to national banks of New Jersey statute prohibiting redlining.

The federal interest in the national banking system does not require the preemption of the state law's prohibitory requirements. National banks are subject to operation of state law except where such law expressly conflicts with federal law or frustrates the purpose for which the national banks were created, or impairs their efficiency to discharge the duties imposed on them by federal law. The banks have not demonstrated that the state law's prohibitory requirements expressly conflict with federal law, frustrate the purposes of national banks, or impair the efficiency of nation banks . . .

. . . Any congressional prohibition of redlining will more than likely have an impact on every lending institution in the nation. Congress may be reluctant to enact such sweeping regulation in the absence of affirmative evidence that the practice exists. That reluctance, however, does not necessarily mean that Congress intended to preclude individual states from taking more direct measures to combat redlining and from making those measures applicable to national banks. *Indeed, the legislative history with respect to Section 306 of the HMDA suggests that Congress did not wish to preempt states from taking additional steps to combat redlining.* Given this history, and the lack of any other affirmative indication of congressional intent with respect to the preemption issue, *the court cannot conclude the banks have shown that the clear and manifest purpose of Congress was to exempt national banks from state laws prohibiting the practice of redlining.* [Emphasis supplied]

The court also concluded in *National State Bank* that the commissioner could not investigate a federally-chartered bank's violation of the state's reporting Act. The court stated as follows:

Thus, the state Act's prohibitory requirements are not preempted with respect to national banks. The statutory provision giving the state banking commissioner power to investigate "any matter pertaining to their Act" present a more difficult problem. In the court's view, this provision must be declared unconstitutional in its entirety. Clearly, the banking commissioner cannot conduct investigations of matters dealing with the state Act's reporting and disclosure requirements. Furthermore, permitting the commissioner to investigate violations of the provision prohibiting redlining would inevitably result in the disclosure, on a case by case basis, of information that the commissioner is precluded from obtaining from the banks on a general basis. Thus, the provision authorizing the

commissioner to conduct investigations into violations of the law is unconstitutional in its entirety.

The Iowa law attempts to tread between these boundaries of preemption and state and federal requirements. Iowa recognizes the existence of the federal Mortgage Disclosure Act in Section 535A.4(4), 1979 Code of Iowa, and the United States Congress expressly recognized the authority of states to control state-chartered or controlled financial institutions with even more stringent reporting criteria in 12 U.S.C., §2805. However, in our opinion, Section 535A.4 is unconstitutional to the extent that it seeks to regulate nationally or federally-chartered institutions and requires greater disclosure of information than is required by the federal Home Mortgage Disclosure Act, 12 U.S.C., §2801. *See Glen Ellyn, supra,* and *National State Bank, supra.* Federally or nationally chartered institutions may voluntarily submit the disclosure report submitted pursuant to the Home Mortgage Act, 12 U.S.C. §2801 et al. or the state may obtain such disclosure reports under the Freedom of Information Act from the Federal Reserve Board.

IV. IF CHAPTER 535A, 1979 CODE OF IOWA, IS UNCONSTITUTIONAL IN PART, CAN THE STATUTE BE SEVERED SO AS TO PRESERVE THE REMAINING PROVISIONS OF CHAPTER 535A?

Whether the invalidity of the coverage of federal financial institutions renders the entire statute unconstitutional is a close question. The test of separability is legislative intent.

It is a recognized principle that the objectionable part of a statute may alone be voided when the remaining portion is complete and enforceable by itself and when it appears the legislature intended the remainder to stand even if a part was invalid.

State v. Books,, 255 N.W.2d 322, 325 (Iowa 1975). As stated in *State v. Monroe*, 236 N.W.2d 24, 35 (Iowa, 1975), quoting approvingly from 82 C.J.S. Statutes §93, pages 154-155:

> A statute may be unconstitutional in part and yet be sustained with the offending part omitted, if the paramount intent or chief purpose will not be destroyed thereby, or the legislative purpose not substantially affected or impaired, if the statute is still capable of fulfilling the apparent legislative intent, or if the remaining portions are sufficient to accomplish the legislative purpose deducible from the entire act construed in the light of contemporary events.

Chapter 535A, 1979 Code of Iowa, does not contain a separability clause. "When there is no such clause, the presumption is that the statute was meant to stand or fall in its entirety." *Motor Club of Iowa v. Department of Transportation*, 251 N.W.2d 510, 519 (Iowa 1977); *State v. Books*, 225 N.W.2d 322, 325 (Iowa 1975). In *Motor Club*, the administrative rules in question were found to be interdependent since the invalid provisions were conditions precedent to the remaining provisions and there was legislative history that the commission had previously refused to pass the resolution without the invalid conditions. However, "The presumption against separability in absence of a separability clause is a weak one." 2 Sutherland, Statutory Construction §44.09, p. 353. "In all cases, the determining factor is legislative intent." *State v. Books*, 225 N.W.2d at 325, finding such presumption overcome where the amendment to a long-standing enactment was invalid and the effect of total invalidation would be to have no regulation covering gifts to public officials.

The central question is whether the Legislature would have enacted Chapter 535A, 1979 Code of Iowa, and not have included the federally-regulated or chartered financial institutions. The invalid part cannot be separated if the provisions in 535A are "connected and dependent upon each other so that if you reject the unconstitutional part you destroy the legislative intent . . . " *Smith v. Thompson*, 219 Iowa 888, 258 N.W. 190, 196 (1934). Unlike the New Jersey legislation as reviewed in *National State Bank, supra*, the provision contained in 535A.4(4) clearly contemplated an interrelationship with the Federal Home Mortgage Disclosure Act. This interrelationship allowed enough flexibility to avoid redundancy or duplication of unnecessary paperwork. The intent of the Iowa Legislature appears to have been to create greater disclosure requirements for those financial institutions not preempted by the federal Act. Unlike the factual situation in *Glen Ellyn, supra*, the Iowa Legislature's mortgage disclosure requirements were passed subsequent to the federal legislation. One must presume that the Iowa Legislature was aware of the federal Act and of the specific Congressional statutory allowance in 12 U.S.C., §2805 of additional "geographic and other detail" or of "greater disclosure" on the part of state-chartered financial institutions to state agencies simultaneously regulating red-lining. *See Hubbard v. State*, 163 N.W.2d 904 (1969). Consequently, we conclude the Legislature would have passed the same legislation applying only to state-chartered financial institutions. To conclude otherwise would make the actions of the Iowa Legislature redundant, unnecessary, and absurd. *See Graham v. Worthington*, 259 Iowa 845, 146 N.W.2d 626 (1966); *Crow v. Shaeffer*, 199 N.W. 2d 45, 47 (Iowa 1972).

The regulation of state financial institutions is basic to Iowa law. Disclosure requirements greater for state financial institutions than those of federal financial institutions do not deprive the state financial institutions of any constitutional rights. State-chartered financial institutions or state agencies under 12 U.S.C., §1205 and the Supplement to 12 C.F.R. 203, may petition for an exemption from compliance with the federal Home Mortgage Disclosure Act, thereby eilminating unnecessary duplication. *See* e.g. *Board of Governors of the Federal Reserve System*, May 9, 1977. 42 C.F.R. 24314, May 13, 1977, "New York Lender Exemption From Mortgage Disclosure".

Consequently, other state-chartered institutions covered by the federal Home Mortgage Act may submit the federal disclosure report but are required to submit additional information required under 535A.4 (1-3) pursuant to the administrative regulations propounded by their supervising state agency. All state financial institutions not covered by the federal Act must file the state disclosure report information requested. To conclude otherwise would make the Iowa Mortgage Act §535, 1979 Code of Iowa, nothing more than surplusage and violate the mandatory disclosure requirements of the chapter.

In summary, the answers to your specific questions are as follows:

1. Question: If a financial institution is required to file a disclosure report pursuant to the federal Home Mortgage Disclosure Act, will a filing of a duplicate copy with the Iowa Housing Finance Authority be sufficient on the part of a financial institution in order to comply with Iowa law as stated in Section 535A.4?

Answer: No, not necessarily. Federal financial institutions may voluntarily file the federal Mortgage Loan Statement pursuant to the federal Home Mortgage Disclosure Act. However, under §535A.4(1-3) and 12 U.S.C., §2805, the state may require additional information of state-chartered financial institutions obtained pursuant to 535A.4(1-3), 1979 Code of Iowa.

2. Question: If a financial institution is not required to file a disclosure report pursuant to the federal Home Mortgage Disclosure Act, can the report that is required by the Iowa Housing Finance Authority ask for more information than is required by the federal Home Mortgage Disclosure Act?

Answer: Yes, in the case of state financial institutions, more information can be collected than is required by the federal Home Mortgage Disclosure Act. No, in the case of federal financial institutions. The federal Act, 12 U.S.C. §2805, expressly addresses preemption as to state-chartered financial institutions and provides that the states may regulate mortgage loans and each state may require greater geographic or other detail or greater disclosure than the federal Act. With the Iowa Act, greater disclosure is required under 535A.4(1-3), 1979 Code of Iowa. The Board of Governors of Federal Reserve System has issued no decision relative to Iowa's mortgage Acts and 12 U.S.C., §2805. Iowa agencies must require additional information from state financial institutions in order to satisfy the statutory mandate of §535A.4(1-3), 1979 Code of Iowa.

3. Question: Enclosed are copies of the proposed Iowa Mortgage Loan Disclosure Statement which is under consideration to be used to comply with Section 535A.4 of the Code of Iowa. Pages 1 and 2 ask for information in addition to what is asked under the federal Home Mortgage Disclosure Act. Can a financial institution be required to report this additional information under the law as stated in Section 535A.4?

Answer: State-chartered institutions can be required to file the additional information required by the Iowa statute but federal institutions do not have to file information under the doctrine of preemption as a result of the federal Home Mortgage Disclosure Act. (See answers above.

June 22, 1979

COUNTIES AND COUNTY OFFICERS: Sections 125.43, 125.45, 125.48, 230.15, 230.25, 252A.3, 336A.4, and 627.6, 1979 Code of Iowa; County boards of supervisors may make a reasonable assessment of the ability to pay of persons legally liable for the support of patients in the mental health or alcoholism treatment programs. Such an assessment is limited to a person's present ability to pay for support, based on the person's nonexempt assets and the economic needs of the person and his/her family. The board may subsequently review the ability to pay of persons legally liable for the support of patients receiving treatment in these programs. Such redeterminations apply only to current charges, and may not be applied retroactively. (McDonald to Huffman, Pocahontas County Attorney, 6-22-79) #79-6-22

Mr. H. Dale Huffman, Pocahontas County Attorney: You have requested an opinion of the Attorney General concerning contribution to the county's mental health and alcoholism treatment accounts by persons liable for the support of patients receiving assistance thereunder. With respect to sections 125.45(2) (formerly §125.28(2)) and 230.25(1), 1979 Code of Iowa, you have specifically inquired as follows:

(1) What criteria should the Board of Supervisors use in determining ability to pay, for example, may they look at a person's expectancy of receiving income, from inheritance or otherwise in the future. May they look at the person's assets, whether they be income producing assets or not, or must they make their decisions solely on present income or present ability to pay.

(2) What is the effect concerning liability for the patient's charges, if the Board determines there is no present ability to pay. Is there then no liability, so that if the patient in subsequent years acquires assets he cannot be made to pay the account and does such a finding change liability to the County for all charges which the County has paid in behalf of the patient occurring before the Board's determination.

Sections 125.45(2) and 230.25(1) address the present ability to pay for treatment of persons legally liable for the support of such patients. Therefore, the expectancy of receiving income in the future would be beyond the scope of review granted to the board of supervisors under these sections. Such expectancies should be considered only when realized as income.

Chapter 230 of the Code of Iowa governs the determination of the costs and payment for treatment of patients receiving treatment in a state mental health institution. Chapter 230 also governs the determination of costs and payment for treatment provided for substance abusers in a mental health institution. See §125.43, 1979 Code of Iowa.

Section 230.15 addresses personal liability for patients receiving treatment in these programs. Section 230.15 defines "persons legally liable for the support" of such patients, and sets forth the extent of liability for such patients, as follows:

230.15 Personal liability. Mentally ill persons and persons legally liable for their support shall remain liable for the support of such mentally ill. Persons legally liable for the support of a mentally il person shall include the spouse of the mentally ill person, any person, firm, or corporation bound by contract for support of the mentally ill person, and, with respect to mentally ill persons under eighteen years of age only, the father and mother of the mentally ill person. The county auditor, subject to the direction of the board of supervisors, shall enforce the obligation herein created as to all sums advanced by the county. The liability to the county incurred under this section on account of any mentally ill person shall be limited to one hundred percent of the cost of care and treatment of the mentally ill person at a state mental health institute for one hundred twenty days of hospitalization, whether occurring subsequent to a single admission or accumulated as a consequence of two or more separate admissions, and thereafter to an amount not in excess of the average minimum cost of the maintenance of a physically and mentally healthy individual residing in his own home, which standard shall be established and may from time to time be revised by the department of social services. No lien imposed by section 230.25 shall exceed the amount of the liability which may be incurred under this section on account of any mentally ill person.

Nothing in this section shall be construed to prevent a relative or other person from voluntarily paying the full actual cost of the care and treatment of any mentally ill person as established by the department of social services.***

The board of supervisors is charged with the duty to investigate and determine the ability to pay expenses for treatment of each person receiving treatment and of those legally liable for such persons' support under §230.15. See §230.25, 1979 Code of Iowa.

Your inquiry turns on the extent to which the board of supervisors may, under §230.25, consider assets of persons legally liable for support pursuant to §230.15. Rephrased, the question is: What assets may be considered by the board to determine if persons legally liable for the support of these patients should be assessed under §§230.15 and 230.25 (1)?

Section 230.15 clearly establishes the extent of liability, and makes the assessment subject to the investigation of the board of supervisors under §230.25(1). However, §230.25(1) is silent concerning the criteria to be used by the board of supervisors to determine ability to pay. Therefore, reference to Chapter 252A, Uniform Support of Dependent's Law, is appropriate because in construing statutes, other acts and statutes relating to closely allied subjects are in pari materia, and should be read together. See *Northwestern Bell Telephone Co. v. Hawkeye State Telephone Co.*, 165 N.W.2d 771 (Iowa 1969).

Section 252A.3 recites the obligation to support as follows:

[The spouse, the parent, etc.] . . . if possessed of sufficient means or able to earn such means, may be required to pay for [the dependent's] support a fair and reasonable sum according to his or her means.

Therefore, the duty of the board of supervisors under §230.25(1) is to determine whether or not persons legally liable, under §230.15, for the support of patients in these programs possess sufficient means to pay for or contribute to such support.

The extent to which the board may consider assets of one liable for the support of such patients is limited by exemptions found in §627.6, 1979 Code of Iowa. Furthermore, the board's review is modified by reasonableness, as is made clear by §252A.3. The board should refrain from assessing a person to contribute to the support of a patient if such an assessment would prejudice the person's ability to provide economic necessities for himself or for his family. To render such an assessment would be to force the person into a position of indigency, as defined in §336A.4, 1979 Code of Iowa.

Support for patients who receive treatment for substance abuse in facilities other than mental health institutes is governed by §§125.45 (formerly §125.28(2)) and 125.48, 1979 Code of Iowa. Section 125.48 establishes the extent of liability for such patients, and §125.45(2) directs the board of supervisors to make the same sort of investigation as in §230.25(1). Because the language in §§125.45(2) and 230.25(1) is substantially similar, and because both statutes address contribution for state-provided treatment, sections 125.45(2) and 230.25(1) are in pari materia, and should be construed together. See *Northwestern Bell Telephone Co. v. Hawkeye State Telephone Co.*, supra. Therefore, the scope of review of assets under §§125.45(2) and 230.25(1) is the same.

Therefore, in determining the ability to pay for support under §§125.45 (2) and 230.25(1), the board should consider only a person's present ability to pay, on a case-by-case basis. Such a determination should be made by a reasonable assessment of the person's income and income-producing, nonexempt assets, followed by a determination of what the person could reasonably contribute to the patient's support without prejudicing the person's ability to provide economic necessities for himself and his family. Such a determination would necessarily include a consideration of all of the person's debts and liabilities. Should a question arise as to the propriety of attaching a person's nonexempt, nonincome-producing assets, the board should be guided by reasonableness. In such instances, the court will be the final arbiter of such assessments.

Sections 125.45(2) and 230.25(1) authorize subsequent reviews and redeterminations of the ability to pay of persons legally liable for the support of patients in these programs. However, such redeterminations apply only to current charges before the board, and may not be applied retroactively.

In summary, sections 125.45(2) and 230.25(1), 1979 Code of Iowa, allow the county boards of supervisors to make a reasonable assessment of the ability to pay of persons legally liable for the support of patients in the mental health or alcoholism treatment programs. Such an assessment is limited to a person's present ability to pay for support, based on the person's nonexempt assets and the economic needs of the person and his/her family. The board may subsequently review the ability to pay of persons legally liable for the support of patients receiving treatment in these programs. Such redeterminations apply only to current charges, and may not be used retroactively.

June 22, 1979

STATE OFFICERS AND DEPARTMENTS: Commission for the Blind; §601B.6(9), §17A.2; Rule prescribing use of guide dogs in adjustment centers is not outside jurisdictional authority of Commission. Such a rule may be subject to rulemaking under Iowa Administrative Procedure Act, but question need not be decided since commission has voluntarily agreed to promulgate appropriate rule. Such rules may be subject to judicial challenge under §17(19)(g) of the IAPA. (Appel to Kudart, 6-22-79) #79-6-23 (L)

June 25, 1979

MOTOR VEHICLES: Left turns — Ch. 321, §§320, 354, 1979 Code of Iowa. Complete stops on the travelled portion of a roadway which are made pursuant to §320 are not forbidden by §321.354. (Gregersen to Gallagher, State Senator, 6-25-79) #79-6-24 (L)

June 26, 1979

MUNICIPALITIES: Soil Conservation Districts—Tort Liability—Chapters 467A and 613A, §§626.24 and 627.18, Code of Iowa (1979). Soil conservation districts are municipalities, not state agencies, for purposes of tort liability. These districts cannot levy a tax to satisfy judgments arising out of successful tort actions. (McNulty to Vance, Director, Iowa Department of Soil Conservation, 6-26-79) #79-6-25

Mr. Lawrence G. Vance, Director, Iowa Department of Soil Conservation: You have requested the opinion of this office regarding the potential tort liability of soil conservation districts established by Code chapter 467A. Your questions are as follows:

1. May soil conservation districts, established by Chapter 467A of the Code of Iowa, be sued for torts allegedly committed by their officers, employees, or agents?

2. If so, are soil conservation districts included within the provisions of Chapter 25A, Chapter 613A, or some other provision of the Code of Iowa regarding tort actions against governmental agencies?

3. May soil conservation district commissioners, elected or appointed under the provisions of Chapter 467A of the Code of Iowa to serve as the governing body of the district, be sued personally for torts allegedly committed by commissioners, their employees, or their agents while acting in an official capacity?

4. Are soil conservation district commissioners protected from personal liability in tort actions by Chapter 25A, Chapter 613A, or other provisions of the Code of Iowa?

5. If a judgment is entered against a soil conservation district, does the district have authority under Chapter 467A, Chapter 613A, or some other Code provision to levy a tax to pay the judgment?

6. If no such authority exists to enable soil conservation districts to levy taxes to pay judgments, how can such judgments be satisfied?

7. Does the Department of Soil Conservation bear a liability to provide funds to soil conservation districts to satisfy judgments entered against them?

The answers to your first four questions are dependent upon whether soil conservation districts are, for purposes of tort liability, agencies of the state or municipalities. We have concluded that they are municipalities.

A soil conservation district is defined in Code section 467A.3(1) as a

governmental subdivision of this state, and a public body corporate and politic, organized for the purposes, with the powers, and subject to the restrictions [of Chapter 467A].

Although the Supreme Court of Iowa has viewed governmental subdivisons as instrumentalities of the state for purposes of the exercise of their governmental functions, *see Graham v. Worthington*, 259 Iowa 845, 853, 146 N.W.2d 626, 632 (1966), the Court has nonetheless held that governmental subdivisions are not state agencies for purposes of tort liability. *Id.* at 854, 146 N.W.2d at 633. Thus, tort actions against governmental subdivisions are not governed by Code Chapter 25A, "the State Tort Claims Act."

The tort liability of municipalities is governed by Code chapter 613A. A municipality is defined as a "city, county, township, school district, and any other unit of local government." §613A.1(1), the Code. A "unit of local government" is synonymous with "governmental subdivision". 72 C.J.S. *Political Subdivision* 223 (1951). Moreover, the Supreme Court of Iowa, in interpreting chapter 613A, has used the terms "municipality" and "governmental subdivision" interchangeably. *See Symmonds v. Chicago M. St. P. & P. R. Co.*, 242 N.W.2d 262, 264 (Iowa 1976); *Boyle v. Burt*, 179 N.W.2d 513, 517 (Iowa 1970). Since soil conservation districts are governmental subdivisions,[1] their tort liability is governed by Code chapter 613A.

Section 613A.2 provides the answer to your first question. It provides in pertinent part:

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[1] §467A.3(1), the Code. The districts are not made agencies of the state by the Iowa Department of Soil Conservation, a state agency, exercising some control over them, *see* §467A.4(4), or by the Iowa Attorney General rendering legal services to the commissioners of the districts, *see* §467A.6. As bodies corporate and politic, *see* §467A.3(1), districts are viewed as independent public corporations and not mere agencies of the state despite such affiliation with the state. *Cf. Stanley v. Southwestern Community College Merged Area in the Counties of Adair, et. al.*, 184 N.W.2d 29, 33-34 (Iowa 1971) (Community college merged area was viewed as an independent public corporation despite being under the direct control of the State Board of Public Instruction).

every municipality 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.

Thus, soil conservation districts may indeed be sued for torts allegedly committed by their officers, employees, or agents.

With respect to questions three and four, it is clear that soil conservation district commissioners, employees, or agents may be sued and held personally liable for torts allegedly committed in the scope of their duties. As the Supreme Court of Iowa noted in *Harryman v. Hayles*, 257 N.W.2d 631 (Iowa 1977):

> . . . [T]he abrogation of governmental immunity [in Code chapter 613A] means the same principles of liability apply to officers and employees of municipalities as to any other tort defendants, except as expressly modified or limited by the provisions of Chapter 613A.

Id. at 638. Code section 613A.8 militates, however, the rule of personal liability. It provides that the governing body of a municipality shall indemnify its officers, employees and agents against any tort claim or demand except those acts which constitute malfeasance in office, willful and unauthorized injury to persons or property, or willful or wanton neglect of duty. Also, section 613A.8 declares that the governing body shall defend any of its officers, employees and agents against tort actions. The commissioners of soil conservation districts may, however, call upon the Attorney General to provide this defense. §467.6, the Code.

Finally, it should be noted that the district, not the district commissioners, is vicariously liable for the tortious acts of district employees and agents. *See* §613A.2, the Code. This rule of vicarious liability would not prohibit, however, the imposition of liability on commissioners for their acts or omissions relating to the tortious acts of district employees. For example, commissioners could be sued for failing to adequately supervise the conduct of district employees which is allegedly tortious. The indemnity provisions of section 613A.8 would, of course, also apply in this situation.

Questions 5, 6, and 7 raise the issue of how a judgment against a soil conservation district arising from a successful tort action can be satisfied. It is the opinion of this office that such a judgment could be satisfied in two ways: 1) payment by the district if sufficient funds are available, either internally or from the department of soil conservation, and 2) execution by the creditor of non-exempt property owned by the district. Taxes could not be levied by the district, however, to pay the judgment.

The department of soil conservation arguably has the authority to satisfy tort judgments arising out of acts committed by district commissioners, employees or agents in carrying out their duties by virtue of Code section 467A.4(4), subsections (a) and (f). They provide that the department has the duty to offer assistance, financial or otherwise, to soil conservation districts to aid them in the carrying out of their duties. In view of the broad language of subsections (a) and (f), a definitive answer to the department's responsibility to provide funds sufficient enough to satisfy tort judgments against districts or their employees cannot be offered. Yet, it does not seem unreasonable to interpret these

statutory provisions as allowing the department to provide financial assistance to the districts in order that they may satisfy such judgments.

Execution of any non-exempt property owned by the district would be another way for a judgment creditor to obtain payment. A creditor would only be able to execute, however, on such property of the district that was not necessary or proper for the carrying out of its duties. §627.18, the Code.[2] If such property cannot be found and if the district cannot come up with sufficient funds, the question arises as to whether a district can levy a tax to pay the judgment. The answer seems to be that it cannot.

It is clear that Iowa municipalities cannot levy a tax except as authorized by the legislature; taxing power cannot be implied. *E.g.*, *Clark v. City of Des Moines*, 222 Iowa 317, 323, 267 N.W. 97, 100 (1936). Nowhere in Code chapters 467A and 467B can there be found authority for a soil conservation district to levy taxes.[3] Code section 626.24[4] does allow a municipality to levy a tax to pay off a judgment. The Supreme Courts of Iowa and the United States have held, however, that the nearly identical precursor of section 626.24 did not independently authorize municipalities to levy such a tax. *Iowa Railroad Land Co. v. Sac County*, 39 Iowa 124, 137 (1874); *Supervisors v. United States*, 85 U.S. 71, 81 (1873). That is to say, unless a municipality could find authority to tax in its enabling statute or elsewhere in the Code, it could not avail itself of the specific taxing purpose of section 626.24. An identical result seems evident with regard to whether the authorization in Code section 613A.10[5] for municipalities to levy taxes to satisfy judgments creates an independent taxing

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[2] 627.18 *Public property.* Public buildings owned by the state, or any county, city, school district, or other municipal corporation, or any other public property which is necessary and proper for carrying out the general purpose for which such corporation is organized, are exempt from execution. The property of a private citizen can in no case be levied on to pay the debt of any such.

[3] Chapter 467A does expressly grant special taxing power to soil conservation subdistricts. *See* §467A.20, .23-41, the Code. It is unclear whether the proceeds of this special tax could be used to satisfy a judgment against a subdistrict in view of the tax's limited purposes.

[4] 626.24 *Levy against municipal corporation — tax.* If no property of a municipal corporation against which execution has issued can be found, or if the judgment creditor elects not to issue execution against such corporation, a tax must be levied as early as practicable to pay off the judgment. When a tax has been levied and any part thereof shall be collected, the treasurer of such corporation shall pay the same to the clerk of the court in which the judgment was rendered, in satisfaction thereof.

613A.10 *Tax to pay judgment or settlement.* When a final judgment is entered against or a settlement is made by a municipality for a claim within the scope of section 613A.2 or 613A.8, payment shall be made and the same remedies shall apply in the case of nonpayment as in the case of other judgments against the municipality. If said judgment or settlement is unpaid at the time of the adoption of the annual budget, it shall budget an amount sufficient to pay the judgment or settlement to gether with interest accruing thereon to the expected date of payment. Such tax may be levied in excess of any limitation imposed by statute.

power. Thus, judgments against soil conservation districts cannot be satisfied unless the district has sufficient funds available or property can be found against which a creditor can properly execute.

Corrective legislation is necessary. Not only does the lack of means to pay penalize the injured plaintiff deserving of recovery, but it also leaves the commissioners, employees, and agents of the districts, if sued, amenable to personal liability without the guarantee of indemnification — a result clearly not intended by the legislature in enacting chapter 613A. *See* §613A.8, the Code. Liability insurance could, however, protect these individual district employees from personal liability and also recompense deserving plaintiffs. Indeed, Code section 613A.7 gives municipalities explicit authority to purchase such insurance.

In summary, soil conservation districts are municipalities within the meaning of Code chapter 613A, but absent adequate funds or the existence of property which can be executed upon, judgments against soil conservation districts obtained under chapter 613A cannot be satisfied. Such a result may leave an injured plaintiff a right without a remedy and may also subject employees of the district to personal liability without the guarantee of indemnification. In lieu of a statutory change to alleviate this situation, liability insurance should be purchased.

June 26, 1979

CONSERVATION COMMISSION: Disposition of obsolete state property — Sections 18.3, 18.3(4), 18.6, 18.9, 18.12(3), 18.12(6) (b) and (c), 18.12(8), 107.17, 107.24(7), The Code, 1979; Section 19.23, The Code, 1971; Art. XI, Sec. 8, Iowa Constitution; Chapter 84, Section 99, Laws of Sixty-Fourth G.A., First Session; Chapter 121, Section 12, Laws of the Sixty-Fifth G.A., 1973 Session. The Conservation Commission need not seek the authorization of the Director of the Department of General Services to conduct a sale of obsolete personal property not under the Director's control. The proceeds from such a sale conducted by the Conservation Commission should be deposited in those funds specified in Section 107.17, The Code, 1979. (Benton to Brabham, Iowa Conservation Commission, 6-26-79) #79-6-26(L)

June 27, 1979

MENTAL RETARDATION: County financial responsibility for services for mentally retarded in sheltered work/work activity. §222.60, Code of Iowa. The cost of services for a mentally retarded individual at a sheltered work/work activity center can properly be charged to the county of legal settlement if the costs are necessary and legal; the costs are related to admission, commitment or treatment; and, the costs are for a patient at an authorized facility. (Fortney to Williams, Acting Commissioner, 6-27-79) #79-6-27

Mrs. Catherine G. Williams, Acting Commissioner, Department of Social Services: You inquired whether under §222.60, Code of Iowa, the county of legal settlement has final financial responsibility for payment of services, such as sheltered work/work activity services, for the mentally retarded when Title XX or other funds are not available.

Section 222.60 reads as follows:

All necessary and legal expenses for the cost of admission or commitment or for the treatment, training, instruction, care, habilitation, support and transportation of patients in a state hospital-school for the mentally retarded, or in a special unit, or any public or private facility

within or without the state, approved by the commissioner of the department of social services, shall be paid by either:

1. The county in which such person has legal settlement as defined in section 252.16.

2. The state when such person has no legal settlement or when such settlement is unknown.

Your question assumes that no funding is available from state or federal sources to reduce or shift the costs imposed on the counties by §222.60. Your question, therefore, narrows to an inquiry as to under what circumstances, if any, the section requires counties to pay for services for the mentally retarded, particularly in sheltered work/work activity.

I believe §222.60 can best be understood if it is broken down into its component parts. The section imposes an obligation to pay:

1. Necessary and Legal Expenses
   for
2. a) Admission, or
   b) Commitment, or
   c) Treatment, training, instruction, care, habilitation, support and transportation
   of
3. Patients who are in:
   a) a state hospital-school, or
   b) a special unit, or
   c) any public or private facility within or without the state approved by the commissioner.

From the foregoing, it can be seen that §222.60 sets three criteria which must be met before the responsibility of bearing costs is imposed on a county, to wit: the costs must be necessary and legal; the costs must be related to admission, commitment or treatment; and, the costs must be for a *patient* at an authorized facility. If the cost of services for a mentally retarded individual at a sheltered work/work activity center meet these three criteria, the cost would be properly charged to the county of legal settlement.

Dependent upon the particular facts applicable to the individual receiving services, it is possible to answer your question either affirmatively or negatively. Not *all* mentally retarded persons would be eligible for *all* types of sheltered work/work activity services at county expense. The three criteria outlined above must be met.

It is important to note that not all mentally retarded individuals are covered by the standards of §222.60. An individual must initially qualify as a patient in an authorized facility. Of course, there is no requirement that such person be an inpatient of a facility. A person who is on a rehabilitative leave from a facility could still be considered a patient at the facility until totally discharged.

Participation in sheltered work/work activity could qualify as treatment, training, habilitation, etc., but whether this is so would have to be determined with regard to the treatment needs of the individual in question. It is presumed that the charges for the services are in fact "necessary" charges.

In summary, if the cost of services for a mentally retarded individual at a sheltered work/work activity center can meet the three criteria contained in §222.60, the county of legal settlement has final financial responsibility for payment of those services.

June 27, 1979

PUBLIC EMPLOYEES: Retirement — §§97B.45 and 97B.47, the Code, 1979. A member of IPERS must retire on the first day of a month. A member must retire on the first day of the month in which he or she reaches retirement age, unless the employer permits the member to work beyond the retirement age. A member reaches the retirement age on his or her birthday. (Blumberg to Priebe and Tieden, State Senators, 6-27-79) #79-6-28 (L)

July 2, 1979

JUVENILE LAW: Detention/shelter care of runaways. Chapter 232, 1979 Code of Iowa. §§232.19(1), 232.19(2), 232.20(1), 232.21(1)(c), 232.21(1)(d), 232.21(4), 232.22(1), 232.139(4), 232.139(5), 232.139(6). An out-of-state nondelinquent runaway may not be held in detention in Iowa. He may be held in shelter care a maximum of 48 hours unless a court order authorizes continuing shelter care for a reasonable time to effectuate his return to the home state. (Hoyt to Williams, Acting Commissioner, Department of Social Services, 7-2-79) #79-7-1

Ms. Catherine Williams, Acting Commissioner, Iowa Department of Social Services: You have requested an official Attorney General's Opinion regarding the detention and/or shelter care of out-of-state nondelinquent runaways pursuant to the new juvenile justice bill effective July 1, 1979.

Specifically you have asked:

1. May an out-of-state nondelinquent runaway be held in a secure facility at the request of the demanding state according to 232.139, Article IV or 232.139, Article VI of the Interstate Compact on Juveniles?

2. Does the Interstate Compact on Juveniles take precedence over 232.19 and 232.20 which provides for runaways to be held only in shelter facilities?

3. May an out-of-state nondelinquent runaway be held beyond the seventy-two hours in shelter care or detention while awaiting arrangements to be returned to his or her home state?

4. May an out-of-state nondelinquent runaway be held in detention while the Iowa Court is awaiting a requisition from the demanding state under Article IV of the Juvenile Compact?

5. May an escapee or absconder from another state be held in detention under Article V of the Juvenile Compact if she or he has been taken into custody only as a runaway in Iowa?

The issue controlling questions one, two, and four is:

Can an out-of-state nondelinquent runaway be held in detention in Iowa?

The answer is no.

Questions three and five will be separately addressed.

I

Can an out-of-state nondelinquent runaway be held in detention in Iowa?

The new Juvenile Justice Bill reenacts the Interstate Compact on Juveniles by incorporating it in Section 232.139, 1979 Code of Iowa. The Compact, then, is a part of Iowa law just as are the other sections of the new act. The problem raised concerns the conflict between Section 232.139, Article IV, which allows for out-of-state nondelinquent runaways to be

taken into custody and detained; and Sections 232.21(1) and 232.22(1), which provide that nondelinquent runaways may be held only in shelter care.

In resolving this conflict, we are guided by familiar principles of statutory construction. The crucial consideration in construing statutes is the legislative intent. The goal is to ascertain that intent and, if possible, give it effect. *Doe v. Ray*, 251 N.W.2d 496 (Iowa 1977). In seeking the meaning of the new law the entire act should be considered and each section construed together. The subject matter, reason, consequence and spirit of the enactment must be considered, as well as, the words used. Additionally, a statute should be accorded a sensible, practical, workable and logical construction. *Matter of Estate of Bliven*, 236 N.W.2d 366 (Iowa 1975). In sum, where there is a conflict between sections of a statute, we must seek to harmonize the conflicting sections in accord with legislative intent. If after attempting to harmonize the conflicting sections the conflict remains, than the more specific provisions control the more general. Section 4.7, 1979 Code of Iowa.

Applying these principles to the conflict at hand, we conclude that the more specific provisions of the statute combined with the expressed legislative intent dictate that out-of-state nondelinquent runaways may not be held in detention in Iowa.

One of the fundamental principles underlying the new Juvenile Justice Bill is that juveniles coming within the system shall be placed in the least restrictive appropriate environment available at that time. In drafting the new Act, the Iowa Legislature was guided by the Federal Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §5601. A cornerstone principle of the Federal Act is that nondelinquent juveniles should not be placed in secure facilities. The Federal Act specifically addresses runaways in Section 223(a)(12)(A), which provides that an out-of-state runaway may not be placed in detention on the basis of his or her runaway status.

The new Iowa Juvenile Justice Bill contains two separate and distinct sections which specify when a juvenile shall be placed in shelter care and when a juvenile shall be placed in detention.

232.21 Placement in shelter care.

1. No child shall be placed in shelter care unless one of the following circumstances applies:

a. The child has no parent, guardian, custodian, responsible adult relative or other adult approved by the court who will provide proper shelter, care and supervision.

b. The child desires to be placed in shelter care.

c. It is necessary to hold the child until his or her parent, guardian, or custodian has been contacted and has taken custody of the child.

d. It is necessary to hold the child for transfer to another jurisdiction.

e. The child is being placed pursuant to an order of the court.

232.22 Placement in detention.

1. No child shall be placed in detention unless:

a. The child is being held under warrant for another jurisdiction; or

b. The child is an escapee from a juvenile correctional or penal institution; or

c. There is probable cause to believe that the child has violated conditions of release imposed under section 232.54 and there is a substantial probability that the child will run away or otherwise be unavailable for subsequent court appearance; or

d. There is probable cause to believe the child has committed a delinquent act, and:

(1) There is a substantial probability that the child will run away or otherwise be unavailable for subsequent court appearance; or

(2) There is a serious risk that the child if released may commit an act which would inflict serious bodily harm on the child or on another; or

(3) There is a serious risk that the child if released may commit serious damage to the property of others.

It is apparent from the language of these sections that the Iowa Legislature intends that delinquent and nondelinquent juveniles shall be provided different placements. These sections indicate that a nondelinquent runaway should be placed in shelter care. This requirement is consistent with the spirit of the new act which calls for juveniles to be placed in the least restrictive appropriate environment.

The provisions of Section 232.139, Article IV, on the other hand, are more general. The language of the Compact is more permissive and the words custody and detain are not defined. Moreover, the Compact contains no express provision requiring that a nondelinquent runaway be placed in a secure facility.

On balance, the provisions of Section 232.139, Article IV, are clearly less specific than those contained in Sections 232.21(1) and 232.22(1), 1979 Code of Iowa. More important, adherence to the provisions of sections 232.21(1) and 232.22(1) will best effect the legislative intent underlying the statute.

For these reasons, out-of-state nondelinquent runaways should not be placed in detention in Iowa.

II

May an out-of-state nondelinquent runaway be held beyond seventy-two hours in shelter care or detention while awaiting arrangements to be returned to his or her home state?

We have already determined that an out-of-state nondelinquent runaway must be placed in shelter care. Thus, the question posed here is:

How long may an out-of-state nondelinquent runaway be held in shelter care?

As previously indicated, the crucial consideration in construing a statute is the legislative intent. In giving effect to that intent, the statute should be accorded a sensible, practical, and workable construction. *Matter of Estate of Bliven*, 236 N.W.2d 366 (Iowa 1975).

The Interstate Compact on Juveniles fosters cooperation between states with regard to:

1. Cooperative supervision of delinquent juveniles on probation or parole;

2. The return from one state to another of delinquent juveniles who have escaped or absconded;

3. The return from one state to another of nondelinquent juveniles who have run away from home;

It is apparent that by reenacting the Compact and incorporating it within the new Juvenile Justice Bill, the Iowa Legislature sought to ensure continuing cooperation between Iowa and other states with respect to the return of runaways. This intent is further evidenced by the specific language of Section 232.21(1)(d), which provides that out-of-state nondelinquent runaways awaiting transfer to another jurisdiction should be held in shelter care.

The new Juvenile Justice Bill outlines the process for dealing with runaways in Iowa. Runaways are first taken into custody pursuant to Section 232.19(1)(c). Then, if the runaway cannot be released to a parent, guaradian or custodian under Section 232.19(2). Section 232.20 (1) requires that the runaway must be immediately taken to a shelter care facility as specified in Section 232.21. Section 232.21(1)(d) provides for the placement and holding of a child awaiting transfer to another jurisdiction. Thus, an out-of-state nondelinquent runaway is taken into custody pursuant to Section 232.19(1)(c), taken to a shelter care facility pursuant to Section 232.20(1), and then placed and held for transfer to the home state pursuant to Section 232.21(1)(d).

It is the time frame governing Section 232.21(1)(d), then, that controls our determination of how long an out-of-state nondelinquent juvenile may be held in shelter care. That time frame is delineated in Section 232.21(4):

> A child placed in a shelter care facility under *this section* shall not be held for a period in excess of forty-eight hours without a court order authorizing such shelter care. A child placed in shelter care pursuant to section 232.19, subsection 1, paragraph "C" shall not be held in excess of seventy-two hours in any event.

Thus, if a juvenile is being held pursuant to Section 232.21, he may not be held for a period in excess of forty-eight hours without a court order authorizing continuing shelter care. If a juvenile is being held pursuant to Section 232.19(1)(c) he may not be held in excess of seventy-two hours in any event. Out-of-state nondelinquent runaways are held for transfer to their home state pursuant to Section 232.21(1)(d). Therefore, out-of-state nondelinquent runaways may not be held in excess of forty-eight hours without a court order allowing them to be held until they can be returned to their home state.[1] Such a court order should aim at holding the out-of-state nondelinquent runaway the shortest time necessary to

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[1] It is important to differentiate between in-state and out-of-state nondelinquent runaways being held in shelter care since the language of the statute is somewhat confusing. Again, one must attempt to determine the legislative intent and give it effect in construing the statute.

Both in-state and out-of-state nondelinquent runaways are taken into custody pursuant to Section 232.19(1)(c), 1979 Code of Iowa. If the runaway cannot be released to a parent or another approved person, he must immediately be taken to shelter care. Out-of-state nondelinquent

effectuate his return to the home state. The home state should be encouraged to arrange for the immediate return of the nondelinquent runaway held in Iowa.

As previously indicated, a statute should be accorded a practical and workable construction. It would make no sense if an out-of-state nondelinquent runaway could not be held in shelter care a reasonable time to allow his return to the home state. Such an interpretation would undermine the fundamental purpose of the Interstate Compact on Juveniles and thus defeat the legislature's purpose in reenacting it. Similarly, to determine that an out-of-state nondelinquent runaway could be held in shelter care indefinitely while awaiting return to his home state would run counter to the legislature's intent to provide less restrictive alternatives and maximum due process to juveniles coming within the system.

Out-of-state nondelinquent runaways may be held in shelter care a reasonable time necessary to allow for their return to the home state in order to effect the legislative intent underlying Sections 232.21 and 232.139 of the 1979 Code of Iowa.

III

May an escapee or absconder from another state be held in detention under Article V of the Juvenile Compact if he or she has been taken into custody only as a runaway?

(Footnote Cont'd)

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runaways are placed and held in shelter care pursuant to Section 232.21 (1) (c). In-state nondelinquent runaways are placed and held in shelter care pursuant to Section 232.21 (1) (c).

The confusion regarding the time frame for holding runaways in shelter care emanates from Section 232.21 (4) which provides, in part:

A child placed in shelter care pursuant to Section 232.19 (1) (c) shall not be held in excess of seventy-two hours in any event.

Technically, a runaway is not placed in shelter care pursuant to Section 232.19 (1) (c). Rather, he is taken into custody under that section and placed in shelter care pursuant to Section 232.21. The language contained in Section 232.19 (1) (c), however, is very similar to the language contained in Section 232.21 (1) (c) which governs the placement of in-state nondelinquent runaways. Thus, while in-state nondelinquent runaways are not technically placed in shelter care under Section 232.19 (1) (c), the similarity of language between Sections 232.19 (1) (c) and 232.21 (1) (c) makes it apparent that the legislature intended that in-state nondelinquent runaways be held a maximum of 72 hours in any event. If this were not the case, there would be no reason for the second sentence in Section 232.21 (4). Moreover, this interpretation is consistent with the legislative intent to provide less restrictive alternatives and maximum due process to juveniles coming within the system.

Thus, Sections 232.19 (1) (c) and 232.21 (1) (c) control the placement and holding of in-state nondelinquent runaways while Section 232.21 (d) controls the placement and holding of out-of-state nondelinquent runaways awaiting return to the home state. In-state nondelinquent runaways may be held a maximum of 72 hours. Out-of-state nondelinquent runaways may be held a reasonable time to allow their return to the home state pursuant to a court order. This construction harmonizes Sections 232.19, 232.21, and 232.139 and best effects the underlying legislative intent.

The requisites for the detention and for the return of out-of-state escapees and absconders are set forth in Sections 232.22(1) and 232.139 (V), 1979 Code of Iowa. The requisites for the placement and for the return of out-of-state runaways are set forth in Sections 232.21(1) and 232.139(IV), 1979 Code of Iowa. In reading and applying these sections, we are guided by the spirit of the new juvenile justice bill which dictates that nondelinquent juveniles should be held in shelter care while delinquent juveniles should be held in detention.

An out-of-state juvenile taken into custody in Iowa may be either delinquent or nondelinquent.

If a juvenile is taken into custody pursuant to a requisition from another state indicating that he or she is a delinquent escapee or absconder, the juvenile should be placed in detention.

If a juvenile is taken into custody as a runaway, absent knowledge that he or she is a delinquent, the juvenile should be placed in shelter care.

If after taking an out-of-state runaway into custody and placing him or her in shelter care one discovers that he or she is a delinquent escapee or absconder, he should then place the juvenile in detention.

Thus, the key factor in placement is whether the out-of-state runaway is delinquent or nondelinquent. When one knows or subsequently discovers that the out-of-state juvenile is a delinquent escapee or absconder, the juvenile should be placed in detention. Absent knowledge of delinquency, the juvenile should be placed in shelter care.

July 2, 1979

HIGHWAYS: Transfer of jurisdiction — §§306.4, 306.8, The Code, 1979. As a result of the reclassification of a road or street under Chapter 306, a transfer of control between two jurisdictions will take place despite the absence of an agreement to that effect. Section 306.8 does not require that money transferred thereunder be used for repair of the transferred road or street. (Ferree to Hutchins, State Senator, 7-2-79) #79-7-2

The Honorable C. W. Hutchins, State Senator: I am in receipt of your letter of April 9, 1979, in which you requested information on the effect of §306.8, The Code, 1979. More specifically you asked the following:

I. Whether as a result of the reclassification of a road or street under Chapter 306 a transfer of control between two jurisdictions will take place despite the absence of an agreement to that effect; and

II. Whether §306.8 requires that money transferred thereunder be used for repair of the transferred road or street.

I.

Whether as a result of the reclassification of a road or street under Chapter 306 a transfer of control between two jurisdictions will take place despite the absence of an agreement to that effect.

There are two methods of transferring control over roads and streets among governmental bodies. The first is mentioned both in the second paragraph of §306.8 and in §313.2. It involves simply an agreement between the jurisdictions to the transfer of control. The second method is by classification as established by Chapter 306.

Chapter 306 sets up a functional classification scheme to allocate jurisdiction and control over the state's roads and streets among the Department of Transportation, counties and municipalities. The Chapter envisions placing every road or street into several classifications and subclassifications defined in the Chapter. As a direct result of a particular classification, jurisdiction and control over a road or a street "is vested" in one of the above mentioned bodies in accordance with the provisions of §306.4.

The legislature contemplated that in applying the functional system a road over which one body now has responsibility may be classified or reclassified out of that body's jurisdiction, §306.8. When such a reclassification occurs, the above question asks whether the bodies involved must agree to the transfer of jurisdiction. The language of Chapter 306 seems to make the agreement irrelevant except in the circumstances described in §306.8.

Set forth below are portions of two statutes which in particular are helpful in answering the questions:

306.4 *Jurisdiction of systems.* The jurisdiction and control over the roads and streets of the state are vested as follows:

1. Jurisdiction and control over the primary roads shall be vested in the department.

2. Jurisdiction and control over the secondary roads shall be vested in the county board of supervisors of the respective counties.

3. Jurisdiction and control over the muncipal street system shall be vested in the governing bodies of each municipality.

306.8 *Transfer of jurisdiction.* When a change of jurisdiction occurs as a result of the classification or reclassification of a road or street, the unit of government having jurisdiction shall, prior to such changes of jurisdiction, either place the road or street and any structures on the road in good repair or provide for the transfer of money to the appropriate jurisdiction sufficient for the repairs to the road or street and any structures on the road.

Section 306.4 states that jurisdiction shall "vest" in the body to which the class of road is assigned. The vesting language indicates that the change in jurisdiction is automatic with the reclassification. This interpretation is supported by the wording of §306.8 in which it is stated ". . . a change of jurisdiction occurs as a result of the classification or reclassification . . . ." Jurisdiction and changes of jurisdiction thus "result" directly from classification. One should also note that §306.8 postpones any change of jurisdiction in the case of an unrepaired road. This provision, being a specific reference to the instance when some action must be taken prior to a change of jurisdiction, would suggest that in all other cases not mentioned the change is automatic. One must conclude that the legislature intended the change in jurisdiction to follow from a classification unless the exception applies.

Having examined the statutory scheme and discovered the legislative intent, it would be useful to determine how the Department of Transportation has provided for its implementation. One finds that the rigid language of the Chapter relative to automatic transfers is modified and the parties may engage in limited negotiations in all cases.

Regulations promulgated by the Department in effect assume that all reclassified roads are in a state of disrepair and allow the jurisdictions to negotiate terms for their repair and transfer. 820-[08, C] 3.15(7)(b) IAC. All disputes arising during negotiations are to be resolved on appeal to the functional classification review board. However, if no agreement is reached or no appeal filed within one year of reclassification, the road is assumed to be in good repair and the transfer then takes place automatically. 820-[08, C] 3.15 (7)(g) and (i) IAC.

II.

Whether §306.8 requires that money transferred thereunder be used for repair of the transferred road or street.

Section 306.8 postpones changes in jurisdiction as a result of reclassification pending repaid of roads or transfer of money sufficient for the repairs. The choice of alternatives appears to be within the purview of the transferor. *But see* 820-[08, C] 3.15(7) IAC. If the choice is made to transfer money rather than repair the road, the question asks whether §306.8 requires that that money be used to repair that road. Here we are faced with the problem that the statute says nothing on the subject addressed. On the simple grounds that what was left unsaid was meant to be so left, one might conclude that there is no requirement that the funds be used for the specific purpose. However, one must delve further to determine whether that is the case or whether the statute was intended to say or implies more, for each enactment must be read in consideration of related law and all must be interpreted together to form a rational and workable whole. *In the Matter of the Estate of Bliven*, 236 N.W. 2d 366, 369 (Iowa 1975); *Jahnke v. Des Moines*, 191 N.W. 2d 780, 787 (Iowa 1971); 2A Sutherland on Statutory Constructions §51.02 (4th ed. 1973).

Two possible interpretations of §306.8 are presented, one of which is more likely correct. First, the statute by implication requires that the funds be used for the purpose of repairing the particular road transferred. The effect of such a requirement would be to impose a concommitant requirement either that the work be done expeditiously or that the funds be idled and separately accounted for until that road is reached in the transferee's schedule of priorities. Second, if the omission was intentional, the transferred road and moneys would be added to the transferee's system and the work accommodated in orderly fashion within a schedule of priorities. The first alternative would set priorities or idle funds in a trust-like arrangement through legislative edict while the second would allow the transferee to insert the road and moneys into its program without special consideration. The first imposes burdens probably not contemplated or intended.

More than likely the roads under a jurisdiction's control, including those transferred to it, will be in various stages of disrepair. It becomes necessary, therefore, to set priorities for improvement. Kindred statutes seem to recognize that no better informed decision maker is presented than the body under which control of the road is vested. In perusing the statutes relating to the repair, replacement and improvement of roads one is struck by the paucity of specific dictates from the legislature. Rather one finds directives in the most general terms. Chapter 313, The

Code, sets out for the Department of Transportation the uses to which the primary road fund may be applied, but other than to require the overall improvement and equalization of the system sets no priorities; that is left to the agency. §§313.4, 313.8, The Code. Counties on the other hand are directed in §309.25 to look to certain classes of roads more closely. But the thrust of Chapter 309 as a whole is to allow the Board of Supervisors, in consultation with the county engineer and Department of Transportation, to establish priorities within the guidelines mentioned. §§309.9, 309.22, 309.25, 309.26, 309.28, The Code. As to the farm-to-market roads, for which a special fund is created, the primary requirement is that existing roads be improved before new ones are built. §310.10, The Code. The only prescription for municipalities is that they keep their roads and streets "in repair and free from nuisance." §364.12, The Code.

Until now the legislature has refrained from imposing specific priority directives on the jurisdictions and has left it to those closer to the problem and better able to make those determinations. Section 306.8 transfers money along with the road not so the road may be repaired immediately but so that the transferee will not be made to bear the burden of repairs necessitated by the neglect of the transferor. The section in effect demands the transfer of a repaired road or its equivalent, nothing more. To accept the first alternative interpretation would be to admit substantial departure from past legislature policy. Such a departure must be evidenced by more than a pregnant silence.

July 2, 1979

SCHOOLS: Age of Admission to School: Const. of Iowa, Article IX, §7; §281.2(1) and (2); §282.3(1), (2) and (3), Code of Iowa 1979). 1971 Acts, G. A., 181 (Ch. 163. School districts are without discretion to admit a student to kindergarten unless the child has attained the age of five on or before September fifteenth of the particular school year. (Hagen to Murray, State Senator, 7-2-79) #79-7-3

Honorable John S. Murray, State Senator: You have asked for an opinion of the Attorney General as to whether a school district has discretion to admit children to a school who have not reached the age of five years on or before September 15 of the opening of a particular school year. For the reasons stated below, it is our opinion that the district board is without discretion to admit children who have not attained the requisite age. The specific questions you have propounded are as follows:

1) Does a school district have any discretion whether or not to enroll in kindergarten a child who has not reached the age of 5 years by September 15? If it does, must this discretion be based upon past educational experience, current test results, or some other objective criterion?
2) If a child is not 5 years of age by September 15 but has been attending a certified kindergarten in another state prior to moving into the district, can the receiving school district legally enroll this child in its kindergarten program? Does the school district have any discretion in this case?

The Constitution of Iowa contains a relevant provision as follows:

The money subject to the support and maintenance of common schools shall be distributed to the districts in proportion to the number of youths, between the ages of five and twenty-one years, . . .

Const. of Iowa, Article IX, Sec. 7. The specific statutory language related to the first question submitted is found in the third unnumbered paragraph of §282.3(2):

No child shall be admitted to school work for the year immediately preceding the first grade *unless he is five years* of age *on or before* the *fifteenth of September* of the *current school year.* [Emphasis supplied]

The language of that paragraph and of the first paragraph of that section have been the same for many years, except for changes in the requisite age of children who could be admitted to first grade and those who could be admitted to kindergarten. In 1961, the General Assembly amended Ch. 282 to provide in pertinent part:

On and after July 1, 1962, the conditions of admission to public schools for work in the school year immediately preceding the first grade and in the first grade shall be as follows:

"*No child* under the age of six years on the fifteenth of *October* of the current school year *shall be admitted* to any public school unless the board of directors of the school (or the county board of education) shall have adopted and put into effect courses of study for the school year immediately preceding the first grade, approved by the department of public instruction and shall have employed a teacher or teachers for this work with standards of training approved by the department of public instruction. No child shall be admitted to school work for the year immediately preceding the first grade unless he is *five years* of age *on or before* the fifteenth of *October* of the current school year.

* * * *

On and after July 1, 1963, the conditions of admission to public schools for work in the school year immediately preceding the first grade and in the first grade shall be as follows:

"*No child under* the age of six years on the fifteenth of *September* of the current school year *shall be admitted* to any public school unless the board of directors of the school (or the county board of education) shall have adopted and put into effect courses of study for the school year immediately preceding the first grade, approved by the department of public instruction and shall have employed a teacher or teachers for this work with standards of training approved by the department of public instruction.

No child shall be admitted to school work for the year immediately preceding the first grade unless he is *five years* of age *on or before* the fifteenth of *September* of the current school year.

1971 Acts, G.A., 181 (Ch. 163). [Emphasis added]

Except for the editorial change of 1970, which eliminated the implementing sections of the 1961 enactment, the language of these paragraphs has been in effect since 1961.

The operative language of the statute, as emphasized in the text above, is "*No child shall be admitted . . . unless* he is *five years of age on or before* the *fifteenth* of September . . ." The Iowa Supreme Court on numerous occasions has spoken to the impact of the word "shall" when it is addressed to a public official. For example, in *Schmidt v. Abbott*, 261 Iowa 886, 890, 156 N.W. 2d 649, 651 (1968) it was said "When addressed to a public official the word "shall" is ordinarily mandatory, excluding the idea of permissiveness or discretion." In *Hansen v. Henderson*, 244 Iowa 650, 665, 56 N.W. 2d 59, the court stated:

For the reasons stated the directions in section 399.14 are held to be demands and are mandatory. In each sentence in the section the verb contains the word "shall." In each of them it is not permissive or discretionary but means six years. And in the first sentence the word "shall" definitely means that the council must elect a board of trustees and that the action is not a matter of choice or discretion. The word "shall" appearing in statutes is generally construed to be mandatory.

In *City of Newton v. Board of Supervisors*, 135 Iowa 27, 30, 112, N.W. 167, 168, 124 Am. St. Rep. 256, the court said:

"Sometimes courts are justified in interpreting the word 'shall' as 'may', but, when used in a statute directing that a *public body do* certain acts, it is manifest that the word is to be construed as *mandatory and not permissive.* * * * The uniform rule seems to be that the word 'shall', when addressed to public officials, is mandatory and *excludes* the *idea of discretion.* * * * There are many reasons for this rule which need not be elaborated upon, as the cases cited fully present the grounds upon which it is based." (Citing authorities.) [Emphasis supplied]

Based on these interpretations of the use of the word "shall", and especially when addressed to public officials, it is clear that district boards have a mandate *not to admit* children who are *younger* than the law provides. The principle is well settled that in considering a statute, the intent of the legislature as expressed in the statute should be followed, *State v. Ricke*, 160 N.W. 2d 499 (Iowa 1968), and that the language is to be understood in accordance with the plain meaning of words used. *In re Miller's Estate*, 159 N.W. 2d 441 (Iowa 1968).

We conclude on the basis of the legislative history in which the legislature changed only the relevant requisite month in which a child's birthday occurs and continually used the mandatory language "no child shall be admitted" — that the district board is without discretion to admit children who are younger than that specified in the code section under any circumstances.

This conclusion is supported further by the fact that the legislature vested the district boards with discretion to exclude children who are under six. The board, pursuant to Sec. 282.3(1), Code of Iowa (1979) "*may exclude* from school children *under the age of six years* when in its judgment such children *are not sufficiently mature* to be benefited from regular instruction . . ."

Further discretion with respect to attainment of a *greater* age is as follows:

Nothing herein provided shall prohibit a school board from *requiring* the *attainment of a greater age than the age requirements herein set forth.*

Sec. 282.3(3), Code of Iowa (1979). [Emphasis added] Thus, the discretion which the legislature *did permit* the district board *to exercise in connection with the age of school* children relates to children who would otherwise satisfy the school age requirement *being older.* Where, within the same statute, the legislature has allowed discretion and in the opposite direction, in our opinion, the mandatory meaning of "*no child shall be admitted*" *unless* the child is of the required age is reinforced.

The special education chapters of the Code furnish further support. "Children requiring special education" are defined as follows:

"Children requiring special education" means persons under twenty-one years of age, including children under five years of age, who are handicapped in obtaining an education because of physical, mental, emotional, communication or learning disabilities or who are chronically disruptive, as defined by the rules of the department of public instruction.

Sec. 281.2(1), Code of Iowa (1979). Those children are *not to be admitted to school* before they are five on or before September 15, however. Rather,

Special aids and services shall be provided to children requiring special education who are less than five years of age *if the aids and services will resonably permit* the child *to enter* the educational process or school environment *when the child attains school age.*

Sec. 281.2:2 (Third Paragraph.), Code of Iowa (1979) [Emphasis supplied] Thus, the child requiring special education receives aids and services but does not *enter* school until reaching the age as provided in Sec. 282.2. *Accord,* 1962 O.A.G. 340.

We conclude that there is no discretion in district boards to admit children who have not attained the specified age. Inasmuch as the answer to your first question is negative, your other questions require no answer.

July 3, 1979

COUNTY HOSPITAL — POWERS OF BOARD OF HOSPITAL TRUSTEES. §§347.13(5), 347.14(1) and 347.18, Code of Iowa (1979). A board of trustees of a county hospital may restrict the use of the hospital by a duly licensed and qualified physician pursuant to reasonable rules and regulations and appropriate safeguards. (Johnson to Soldat, Kossuth County Attorney, 7-3-79) #79-7-4 (L)

July 3, 1979

CITIES AND TOWNS; COUNTIES AND COUNTY OFFICERS: Authority of peace officers outside the confines of their jurisdictions. Chapter 28E, section 801.4, Code of Iowa (1979). The exercise of the official powers of a peace officer is limited to that geographical and political unit comprising his or her bailiwick, unless expressly expanded by statute; otherwise, outside of his or her bailiwick a peace officer retains only those powers of a private citizen. An officer's bailiwick may be expanded or altered by appropriate action of cooperating political subdivisions pursuant to chapter 28E, Code of Iowa (1979). (Dallyn to Callaghan, Iowa Law Enforcement Academy, 7-3-79) #79-7-5

Mr. John F. Callaghan, Director, Iowa Law Enforcement Academy: You have requested an Attorney General's Opinion concerning the jurisdictional limits on the powers of a peace officer in Iowa. Specifically, you pose the following questions:

1. Does a certified peace officer retain the powers of a peace officer when acting outside of the geographical limits of his or her employing muncipality or county, or has he or she only the residual powers of a private citizen?

2. What is the effect on the answer to question number one if the officer is not a certified peace officer?

3. Does the existence of a "mutual aid" agreement between local governments pursuant to Chapter 28E, Code of Iowa (1979) alter the powers of such officers outside of their usual jurisdiction?

With regard to the distinction made in your first two questions between certified and non-certified peace officers, Iowa law treats these two

classifications alike for purposes of the substance of your questions. Section 801.4, Code of Iowa (1979) defines "peace officers" as, *inter alia*, sheriffs and their regular deputies who are subject to mandated law enforcement training, marshals and policemen of cities, and peace officer members of the department of public safety. The question of certification certainly may be relevant to the issue of the scope of an officer's particular powers, but it is not relevant to the issue of whether these powers may be similarly exercised without as within the officer's territorial jurisdiction.

As Professor Rollin M. Perkins has noted, when considering the place where the powers of a peace officer may lawfully be exercised, it is convenient to speak in terms of "jurisdiction" and "bailiwick":

> The word "jurisdiction" (to speak the law) has reference to the authority of a judge or court. It is sometimes used to refer to territory recognized for other purposes and it is not improper to speak of the "jurisdiction" of a peace officer; but there is a better word for the latter purpose, the use of which tends to avoid confusion. This word is "bailiwick" (bailiff's village) which, although it once had a narrower meaning, now refers to the special district or territory of a peace officer. Thus the bailiwick of a state agent may be the state, the bailiwick of a sheriff, his county, and the bailiwick of a policeman, his town or city.

25 Iowa L. Rev. 214, 222 (1940), quoted in 1950 O.A.G. 72, 73.

Generally, a peace officer has no authority to exercise his or her powers as an officer outside of his or her bailiwick unless authorized by some special provision of the law. "In the absence of statute the power of a sheriff or officer is limited to his own county; he is to be adjudged a sheriff in his own county, and not elsewhere. He cannot, therefore, execute a writ [unless authorized by statute] out of his own county, and if he actually does so, he becomes a trespasser." 61 A.L.R. 378, quoted in 1950 O.A.G. 72, 73. "An officer who seeks to make an arrest without warrant outside his territory must be treated as a private person." 5 Am. Jur. 2d *Arrest* §50 at 742 (1962), quoted in *State v. O'Kelly*, 211 N.W.2d 589, 595 (Iowa 1973).

This conclusion is buttressed by a recent Ohio case which held that the express statutory conferral of statewide arrest power to those officers armed with a warrant and the silence of the statute when no warrant exists are persuasive that no such statewide non-warrant power of arrest for misdemeanor offenses was intended to be granted. Therefore, two on-duty municipal police officers were unauthorized to make a warrantless arrest for a traffic offense that they had observed outside of the city limits. *City of Cincinnati v. Alexander*, 54 Ohio 2d 248, 375 N.E.2d 1241 (1978).

A similar presumption is clear in the Iowa Code, i.e., that the exercise of a peace officer's powers is limited to his or her bailiwick unless expressly expanded by the language of a particular statute. *See* 1972 O.A.G. 439. Thus, the general language of section 804.4, Code of Iowa (1979) (an arrest warrant may be delivered to any peace officer for execution, and served in any county in the state) has been construed as *not* authorizing the sheriff of one county to make an arrest (i.e., execute the warrant) in another county of the state. 1950 O.A.G. 72. That a similar limitation exists in section 808.5 of the Code, which provides that a "search warrant may be executed by any peace officer," is clear by

the fact that section 808.5 provides for and limits an exception to this limitation, i.e., "where the property to be seized has been, or is susceptible of being, removed *from the officer's jurisdiction*, the officer executing the warrant may pursue it and search for property designated in the warrant" (emphasis added). Similar examples include Iowa Rule Civil Procedure 59 (sheriff shall serve original notice in his or her own or a contiguous county); section 817.2 (a peace officer called to the aid of the governor or attorney general shall have the same powers throughout the state as possessed by the sheriff of the county in which such peace officer is acting); and section 337.4, (sheriff shall make special investigation of infraction within his or her county at the request of the county attorney).

Hence, a peace officer is limited in the exercise of his or her official powers to the confines of his or her territorial unit, unless this "bailiwick" is statutorily enlarged for a particular purpose. When acting outside of his or her bailiwick, unless aided by some special authority of the law, a peace officer has only that authority which a private person would have in acting under like circumstances. Thus, for example, an officer who seeks to make an arrest without a warrant outside of his or her territory must be treated as a private person, but the officer's action will be lawful if the circumstances are such as would authorize a private person to make the arrest. *State v. O'Kelly*, 211 N.W.2d 589, 595 (Iowa 1973). *See State v. Crum*, 323 So.2d 673 (Fla. Dist. Ct. App. 1975). Such circumstances would include an arrest for a public offense committed in the person's presence pursuant to section 804.9(1) Code of Iowa (1979).

Your third question may be answered through an analysis of how a peace officer's bailiwick is altered when two or more political subdivisions of the State enter into a "mutual aid" agreement pursuant to chapter 28E of the Code. As noted above, a peace officer's bailiwick is usually limited to that geographical unit over which his or her employing political subdivision exercises governmental control. However, this bailiwick is subject to statutory modification or expansion.

July 3, 1979

MOBILE HOME: MAXIMUM FINANCE CHARGE AND DEFINITION. Section 20 of Chapter 1190, Acts of the 1978 Regular Session of the 67th General Assembly; Sections 135D.1, 321.1, (68) (a), 413.3, 535, 535.2, 537, 537.1301, 562B.7, 1979 Code of Iowa. The maximum finance charges stated in Section 537.2602 apply to mobile home "loans" as defined by the Code of Iowa but do not apply to consumer credit sales of mobile homes which are covered by §537.2201. "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 designed, constructed, or reconstructed as will permit the vehicle to be used as a place for human habitation by one or more persons but shall also include any such vehicle with motive power not registered as a motor vehicle in Iowa. (Clauss to Wilson, Deputy, Industrial Loan Division, Auditor of State, 7-3-79) #79-7-6(L)

July 3, 1979

MENTAL HEALTH: Supreme Court rules of procedure under Chapter 229. §§229.4(3), 229.11, 229.13-14, 229.22-23, 229.40, 684.18-19, Code of Iowa. The requirement of Rule 31 that a facility be able to state that a patient confined under Chapter 29 requires chemotherapy because such treatment is "necessary to preserve the patient's life or to appropriately control behavior by the person which is likely to result in physical injury to that person or others if allowed to continue" is only applicable to circumstances of involuntary hospitalization prior to a due process hearing. In other situations such a statement is not required in order to institute chemotherapy. (Fortney to Williams, Acting Commissioner, Department of Social Services, 7-3-79) #79-7-7

Mrs. Catherine G. Williams, Acting Commissioner, Department of Social Services: You inquired as to the scope of cases which are controlled by Rule 31 adopted by the Iowa Supreme Court to govern proceedings relating to hospitalization of mentally ill persons.

Rule 31 reads as follows:

Whenever chemotherapy is instituted, the person in charge of the facility where the respondent is hospitalized shall notify the respondent's attorney or advocate in a letter indicating in what way the treatment is "necessary to preserve the patient's life or to appropriately control behavior by the person which is likely to result in physical injury to that person or others if allowed to continue." Moreover, the person in charge of the facility will keep the respondent's attorney or advocate apprised of any undesireable side effects and changes in treatment which occur.

You inquired whether the facility must comply with Rule 31 in relation to all patients hospitalized at a facility or whether the Rule applies to a narrower class of patients. It is our opinion that the class of individuals covered by the rule is narrow and is limited by various provisions of Chapter 229, Code of Iowa.

The underlying authority for Rule 31 is found in §§229.40, 684.18-19. Section 229.40 was enacted by the 67th General Assembly as an amendment to Chapter 229. The section reads as follows:

1. The supreme court may prescribe rules of pleading, practice and procedure, and the forms of process, writs and notices, for all proceedings in any court of this state arising under this chapter. Any rules so prescribed shall be drawn for the purpose of simplifying and expediting the proceedings, so far as is consistent with the rights of the parties involved. *The rules shall not abridge, enlarge nor modify the substantive rights of any party to a proceeding arising under this chapter.*

2. Rules prescribed pursuant to this section shall be subject to section 684.19. (Emphasis supplied.)

§§684.18-19 are the general statutes authorizing the Supreme Court to prescribe rules of practice and procedure. It is important to note that §684.18(1) states in part, that "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

Because §229.40 authorizes the Court to adopt rules governing Chapter 229 proceedings and because the section expressly prohibits such rules from altering substantive rights, it is necessary to look to Chapter 229 to determine what are the substantive rights of individuals hospitalized under Chapter 229. Rule 31 would then be read in light of the substantive rights conferred by the Chapter.

Contained within Rule 31 is a phrase set off in quotation marks. The phrase, "necessary to preserve the patient's life or to appropriately control behavior by the person which is likely to result in physical injury to that person or others if allowed to continue," is not attributed to any quoted source. However, the phrase is taken verbatim from four sections of Chapter 229 which are interdependent. The sections are §§229.4(3), 229.11, 229.22, and 229.23. These sections can best be understood if attention is first given to §229.23 dealing with the rights and privileges of hospitalized persons.

§229.23(2), dealing with chemotherapy, states:

Every person who is hospitalized or detained under this chapter shall have the right to: . . .

(2.) The right to refuse treatment by shock therapy or chemotherapy, unless the use of these treatment modalities is specifically consented to by the patient's next-of-kin or guardian. The patient's right to refuse treatment by chemotherapy shall not apply during any period of custody authorized by section 229.4, subsection 3, section 229.11 or section 229.22, but this exception shall extend only to chemotherapy treatment which is, in the chief medical officer's judgment, *necessary to preserve the patient's life or to appropriately control behavior by the person which is likely to result in physical injury to that person or others if allowed to continue.* The patient's right to refuse treatment by chemotherapy shall also not apply during any period of custody authorized by the court pursuant to sections 229.13 or 229.14. In any other situation in which, in the chief medical officer's judgment, chemotherapy is appropriate for the patient but the patient refuses to consent thereto and there is no next-of-kin or guardian to give consent, the chief medical officer may request an order authorizing treatment of the patient by chemotherapy from the district court which ordered the patient's hospitalization. (Emphasis supplied)

§222.23(2) confers a right to refuse treatment by chemotherapy, but then defines three circumstances in which the right does not exist. These circumstances are:

1. during periods of involuntary hospitalization prior to a full hearing as provided by §§229.13-14 when such treatment is "necessary to preserve the patient's life or to appropriately control behavior by the person which is likely to result in physical injury to that person or others if allowed to continue";

2. during periods of involuntary hospitalization *after* a full hearing as provided by §229.13-14;

3. when chemotherapy is deemed appropriate and consent is obtained from a next-of-kin, guardian or committing court.

The first circumstance is the relevant one as the Code employs the same language adopted by the Court in Rule 31. There are three situations in which an individual can legally be hospitalized without his/her consent prior to the proceeding provided in §229.13-14. These situations are:

1. §229.4(3) — detention of a voluntary patient requesting discharge, who is believed to be seriously mentally impaired, and against whom an involuntary hospitalization order is sought;

2. §229.11 — immediate custody is ordered by a court pending a hearing under §229.13;

3. §229.22 — emergency hospitalization when there is no means of access to a court to obtain an order.

Of critical importance to a resolution of your question is the fact that the three Code sections which authorize involuntary confinement prior to the due process hearing provided in §229.13 all permit the facility to begin treatment without the patient's consent only if the facility's chief medical officer is able to state that treatment is "necessary to preserve the patient's life or to appropriately control behavior by the person which is likely to result in physical injury to that person or others if allowed to continue." In contrast, once a patient is hospitalized after a §229.13 due process hearing, there is no such limitation on the circumstances under which the facility can employ chemotherapy [See §229.23(2)]. In fact, once the hearing is held, no right to refuse chemotherapy exists under the Code.

Returning to Rule 31, and remembering that §229.40 bars the Court from adopting rules which alter substantive rights, it can be seen from the above discussion that the Rule only applies to the three circumstances of involuntary hospitalization prior to a due process hearing. To read Rule 31 in a broader sense would result in a conflict between Rule 31 and §229.23(2). For example, once a due process hearing has been held under §229.13, the individual has no right to refuse chemotherapy under §229.23 (2). To say that Rule 31 applied after the §229.13 hearing would result in greater restrictions on the use of chemotherapy than contemplated by the Code.

The phrase "necessary to preserve the patient's life or to appropriately control behavior by the person which is likely to result in physical injury to that person or others if allowed to continue" was adopted by the Supreme Court directly from §§229.4(3), 229.11, 229.22 and 229.23(2). The reasonable reading of Rule 31 is that it only applies in circumstances of involuntary hospitalization prior to a due process hearing.

July 5, 1979

MENTAL HEALTH: Commitment of juveniles under Chapter 229. Chapters 229 and 232, §§229.1-2, 229.6-18, 229.21, 232.47, 232.49, 232.51-52, 232.96, 232.98-99, Code of Iowa. There are four situations in which a juvenile could be the subject of a Chapter 229 proceeding. Two of these involve juveniles who are already involved in the juvenile justice system under Chapter 232. Three of the four situations are handled by the juvenile court, rather than the district court. However, all Chapter 229 actions are independent of any concurrent Chapter 232 actions. Consequently, the "least restrictive alternative" approach favored under §232.52 and §232.99 is inapplicable to the disposition entered under Chapter 229. (Fortney to Jackson, Department of Social Services, 7-5-79) #79-7-8

Mr. Larry Jackson, Director, Division of Field Operations, Iowa Department of Social Services: You requested an Opinion of the Attorney General on two related questions. First, you inquired under which situations or conditions a juvenile could be processed under Chapter 229, Code of Iowa, regulating hosiptalization of mentally ill persons. Second, you inquired whether a district court is required to accept and process a Chapter 229 application when it concerns a juvenile, or whether the applicant could be directed to the juvenile court.

There are four circumstances under which a juvenile could be processed under Chapter 229. Under only one circumstance is the proceeding handled by the district court or the hospitalization referee appointed

under §229.21. Under the other three circumstances the proceeding is handled by the juvenile court, however, it is important to bear in mind that under all circumstances the proceeding is still a Chapter 229 proceeding regardless of the court which is handling the matter.

The four circumstances under which a juvenile could be processed under Chapter 229 are:

1) a voluntary admission under §229.2 by a parent or guardian;

2) an involuntary admission under §229.6;

3) admission of a child in need of assistance who requires treatment for a period in excess of 30 days; and

4) admission of a juvenile delinquent pursuant to §232.51.

Under only circumstance two would the proceeding be handled by the district court or the hospitalization referee. Circumstances one, three and four are handled by the juvenile court. It should be noted that in the first two situations the juvenile is not currently involved in a juvenile court proceeding under Chapter 232 which is directly connected to his/her need for hospitalization.

The first circumstance under which a juvenile could be processed under Chapter 229 is a voluntary admission under §229.2. This section authorizes voluntary admission of an individual who is "mentally ill or has symptoms of mental illness." This is in contrast to the finding of "serious mental impairment" which is required for involuntary hospitalization.[1] (*See* §229.13).

§229.2 authorizes a parent or guardian to make application for the voluntary admission of a minor. However, if the minor objects to the admission, the parent or guardian must obtain the approval of the *juvenile* court prior to admission. In reviewing the application, the juvenile court is to employ a "best interest of the minor" test. §229.2 does not impose a requirement that a minor who objects to hospitalization under that section be found to be "seriously mentally impaired."

The second circumstance under which a juvenile could be involved in a Chapter 229 proceeding is the only situation handled by the district court or the hospitalization referee. §229.6 provides that "proceedings for the involuntary hospitalization of an individual may be commenced by any interested person . . ." At no point does §229.6 draw a distinction between adult respondents and minor respondents. Consequently, any "interested person" could seek the involuntary hospitalization of a minor respondent by filing an application under §229.6. If such an application were filed, it would be processed by the district court under §§229.6-18. These sections make no provision for a referral to the juvenile court simply because a respondent is a minor. Under this circumstance all of the procedural protections afforded an adult respondent would be extended to the minor.

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[1] 229.1 Definitions. As used in this chapter, unless the context clearly requires otherwise:

(1) "Mental illness" means every type of mental disease or mental disorder, except that it does not refer to mental retardation as defined

The third and fourth circumstances under which a juvenile could be processed under Chapter 229 relate to situations in which the minor is already involved in the juvenile justice system as a result of a proceeding under Chapter 232. The situations relate to minors alleged to be, or adjudicated as being, children in need of assistance or juvenile delinquents who additionally require evaluation and/or treatment for mental illness.

§232.98 authorizes mental examinations either prior to or after an adjudication that a minor is a child in need of assistance. The Code favors examinations conducted on an outpatient basis, but does permit post-adjudicatory examinations to be conducted on an inpatient basis. However, §232.98 specifies that an inpatient examination shall not extend beyond a period of thirty days. Additionally, the appropriation bill for the Department of Social Services prohibits confinement of a child in need of assistance at a state mental health institute for a period longer than thirty days. (*See* House File 755, section six, subsection four.) However, the appropriation bill does permit confinement of children in need of assistance at a mental health institute or other appropriate secure facility *without time limit* as long as the confinement is not based on the adjudication of child in need of assistance. The confinement must be based on a separate adjudication of "serious mental impairment" under Chapter 229. This proceeding would be handled by the juvenile court, but would not be a Chapter 232 proceeding. It is an action separate from that resulting in the child in need of assistance adjudication. Consequently, the restrictions on dispositions available to the juvenile court following a §232.96 adjudication would not apply to the §229.13-14 adjudication. In contrast, the examination authorized by §232.98 is a Chapter 232 proceeding and that Chapter's restrictions apply.

§232.49 authorizes the juvenile court to order the mental examination of a minor who is alleged to be, or has been adjudicated, a juvenile delinquent. As in the case of a child in need of assistance under §232.98, such examination, if conducted under confinement, cannot exceed a period of thirty days. This order for examination is not considered a Chapter 229 order. [*See* §§232.49(2) and (3).] In the event that treatment for mental illness is indicated, a minor who is a juvenile delinquent can be the subject of a Chapter 229 action. §232.51 authorizes such a proceeding to be handled by the juvenile court, but again, this is a Chapter 229 proceeding, not a Chapter 232 proceeding. Consequently, the restrictions on dispositions available to the juvenile court following a §232.47 adjudication would not apply to the §§229.13-14 adjudication. In contrast, the

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in section 222.2, subsection 5.

(2) "Seriously mentally impaired" or "serious mental impairment" describes the condition of a person who is afflicted with mental illness and because of that illness lacks sufficient judgment to make responsible decisions with respect to his or her hospitalization or treatment, and who:

(a) Is likely to physically injure himself or herself or others if allowed to remain at liberty without treatment; or

(b) Is likely to inflict serious emotional injury on members of his or her family or others who lack reasonable opportunity to avoid contact with the afflicted person if the afflicted person is allowed to remain at liberty without treatment.

examination authorized by §232.49 is a Chapter 232 proceeding and that Chapter's restrictions apply.

In conclusion, there are four situations in which a juvenile could be the subject of a Chapter 229 proceeding. Two of these involve juveniles who are already involved in the juvenile justice system under Chapter 232. Three of the four situations are handled by the juvenile court, rather than the district court. However, all Chapter 229 actions are independent of any concurrent Chapter 232 actions. Consequently, the "least restrictive alternative" approach favored under §232.52 and §232.99 is inapplicable to the disposition entered under Chapter 229.

July 5, 1979

CERTIFICATE OF NEED — CHANGE OF OWNERSHIP. Sections 135.61(19), 135.61(19)c, 135.63(1), 135.64 and 135.83, Code of Iowa (1979). Sections 135.61 through 135.83, Code of Iowa (1979) do not provide authority to review changes of ownership of institutional health facilities. (Johnson to Pawlewski, Commissioner of Public Health, 7-5-79) #79-7-9(L)

July 5, 1979

STATE OFFICERS AND DEPARTMENTS: Iowa Board of Pharmacy Examiners — Chapter 155, Chapter 204, Chapter 152, Chapter 148B, §234.22, Code of Iowa (1979). Dispensing of prescription drugs is limited to licensed practitioners who are allowed by the code to prescribe and to pharmacists. (McGrane & Blumberg to Johnson, Iowa Board of Pharmacy Examiners, 7-5-79) #79-7-10(L)

July 6, 1979

OPEN MEETINGS — Agenda amendments. Section 28A.4, Iowa Code (1979). An agenda which had been posted more than twenty-four hours prior to a scheduled meeting may be amended to include additional matters only if good cause exists requiring expeditious discussion or action on such matters. In the absence of factors making twenty-four hours notice impossible or impractical, an existing agenda may not be amended within twenty-four hours of a meeting and such matters must be scheduled for future meetings so that the public may receive the prescribed notification. (Cook to Martens, Emmet County Attorney, 7-6-79) #79-7-11

Mr. John G. Martens, Emmet County Attorney: By your letter of April 20, 1979, you have requested an opinion of this office on the notice provisions of the open meetings law, Chapter 28A, Iowa Code (1979). Your specific question is as follows:

"Does the Legislature's use of the word 'tentative' as it relates to the agenda requirement, mean that a tentative agenda posted more than twenty-four hours prior to a meeting can be amended to add additional items for discussion and action within the twenty-four hours prior to the meeting and up to the time of the meeting?"

The provisions which relate to your question appear in §28A.4, subsections one and two.[1] These subsections must be read together and

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[1] In relevant parts, §28A.4 provides:

"1. A governmental body, except township trustees, shall give notice of the time, date, and place of each meeting, and its tentative agenda, in a manner reasonably calculated to apprise the public of that information. Reasonable notice shall include advising the news media who have filed a request for notice with the governmental body and posting the notice on a bulletin board or other prominent place which is easily

reconciled if at all possible. As your question suggests, the use of the term "tentative" in subsection one rather clearly indicates that an agenda may be amended subsequent to publication. However, subsection one is silent as to the timing of and the grounds for amendment. Subsection two requires notice conforming with subsection one to be given twenty-four hours prior to the commencement of a meeting unless for good cause such notice is impossible or impractical. Although this language is aimed in the first instance at specifying the time for the first notice, analysis suggests it should apply to amendments to the notice as well. For example, if a notice specifying the time of a meeting as 4:00 p.m. is issued twenty-four hours prior to a meeting and it is subsequently decided to move the meeting to 1:00 p.m. without a new notice twenty-four hours prior to the meetings, the body would be in violation of the statute, absent a showing of "good cause." In short, subsection two makes clear that the requirements of subsection one are not mere formalities, but rather requires that meetings are to be conducted in conformity with the notice provided the public, absent good cause. Because the requirement of a tentative agenda is obviously important to providing real access to the business of government, we think it clear the legislature intended that the agenda not be amended within twenty-four hours of the meeting absent good cause. An opposite interpretation would render the requirement of publishing notice of an agenda totally meaningless as a safeguard of accessibility to government, permitting an abuse of the intended purpose of this law. Moreover, our interpretation seems fully workable because the "good cause" exception allows for flexibility when genuinely required by the circumstances.

July 6, 1979

OPEN MEETING — Civil Service Commission. Sections 4.7, 28A.2(1), 28A.2(2), 28A.5(1), 28A.5(1)(f), 28A.5(1)(i), 28A.5(2), 28A.5(3), 28A.5(4), 400.1, 400.3, 400.26, 400.27. Civil service commissions, created and operating under the provisions of Chapter 400, are subject to the open meetings provisions of Chapter 28A. Section 400.26 requires that the hearing on an employee's appeal be conducted open to the public notwithstanding the exceptions in §28A.5 of the open meetings law. The deliberations of the commission may be conducted in a closed session only if they fall within an exception in §28A.5, to include subsection (i). To close the deliberations pursuant to subsection (i), the general requirements of §28A.5 must be complied with and (1) there must be a request for a closed session from the individual concerned and (2) there must be a need to close the session to "prevent needless and irreparable injury to that individual's reputation." (Cook to Larsen, State Representative, 7-6-79) #79-7-12

(Footnote Cont'd)

accessible to the public and clearly designated for that purpose at the prinicpal office of the body holding the meeting, or if no such office exists, at the building in which the meeting is to be held.

"2. Notice conforming with all of the requirements of subsection 1 of this section shall be given at least twenty-four hours prior to the commencement of any meeting of a governmental body unless for good cause such notice is impossible or impractical, in which case as much notice as is reasonably possible shall be given.

"When it is necessary to hold a meeting on less than twenty-four hours notice, . . . the nature of the good cause justifying that departure from the normal requirements shall be stated in the minutes."

The Honorable Sonja Larsen, Iowa State Representative: You have written our office seeking an opinion on several questions pertaining to the open meetings law, Chapter 28A, Iowa Code (1979). The following questions are noted:

1. Are the meetings of a civil service commission, constituted and operating under Chapter 400 of the Iowa Code, covered by Chapter 28A?

2. May a commission close hearings held pursuant to §400.23 on the basis that they are considered a quasi-judicial function not covered by Chapter 28A or on any other grounds. If so, is the request of the appellant required before closing the hearing?

3. May the deliberative session be closed on the basis that it is considered a quasi-judicial function not covered by Chapter 28A? Alternatively, may the deliberative session be deemed a purely ministerial function of a commission and not classified as a "meeting" under Chapter 28A?

I.

Your initial question is one of basic coverage of the open meetings law. Is a civil service commission, created pursuant to the provisions of Chapter 400,[1] a "governmental body", as defined in §28A.2(1)? If so, then the open meeting provisions of Chapter 28A are triggered and must be followed.

Section 28A.2(1) defines a "governmental body" as follows:

"a. A board, council, commission or other governing body expressly created by the statutes of this state or by executive order.

"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.

"d. Those multimembered bodies to which the state board of regents or a president of a university has delegated the responsibility for the management and control of the intercollegiate athletic programs at the state universities."

A civil service commission, created pursuant to the provisions of Chapter 400, appears to fall squarely within the subsection (b) definition. First, it is clear that such a commission is a "commission . . . of a political subdivision", within the terms of the statute. Second, in our

[1] Civil service commissions are authorized in cities by §§400.1 and 400.3 which, in pertinent parts, provide:

"400.1. In cities having a population of eight thousand or over, having paid fire department or a paid police department, the mayor, . . . with the approval of the council, shall appoint three civil service commissioners . . . .

"400.3. In cities having a population of less than eight thousand, the city council may, by ordinance, adopt the provisions of this chapter in which case it shall either appoint such commission or provide, by ordinance, for the exercise of the powers and performance of the duties of the commission by the council."

opinion to Thomas D. Hanson, issued May 4, 1979, OAG number 79-5-4 (copy enclosed), we opined that a subsection (c) body must be a "governing body", "in the sense of having been delegated some policy-making authority". Without repeating the Hanson analysis here, we believe the same is true of a subsection (b) body. In this respect, a cursory examination of the provisions of Chapter 400 reveals that a civil service commission has significant policy and decision-making responsibilities with respect to a civil service programs. Such a commission thus constitutes a "governmental body" under §28A.2(1)(b) and is subject to the open meeting provisions.

II.

Your second inquiry relates to the appeal proceedings before a civil service commission. In general, §§400.21 through 400.27 establish an administrative appeal procedure to resolve civil service rights disputes before a commission. The commission has 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." §400.27, Iowa Code (1979). Section 400.23, to which you refer, requires the commission to set an employee's appeal for hearing and to notify the parties of such hearing. Your question is whether the hearing may be closed.

Section 400.26 provides:

"The trial of all appeals *shall be public*, and the parties may be represented by counsel." (Emphasis added)

This section clearly requires that employee appeal proceedings before a commission, including the presentation of any evidence and arguments, be conducted open to the attendance of the public at large. There are no exceptions to this public appeal requirement. Moreover, §400.26, relating solely to civil service appeals, transcends the general open meetings law, and requires public appeals whether or not an exception in §28A.5 (closed meetings) would permit a closed session. *See*, §4.7, Iowa Code (1979). Accordingly, we conclude that a civil service commission may not close an appeal hearing held pursuant to §400.23.

III.

Your final question raises the matter of the deliberations of a commission when deciding an employee's appeal. May such deliberations be conducted in a closed session of the commission? You suggest two theories upon which to justify closing such deliberations — that they constitute quasi-judicial action and that the deliberations are purely ministerial functions of a commission.

Initially, we note that §400.26, quoted above, does not reach the deliberations process of a commission. The language of that section requires only that the "trial" of appeals be conducted in public. Thus, it appears that §400.26 is limited to those proceedings prior to submission to the commission for determination, and not the deliberations themselves. The question thus becomes whether the deliberations must be conducted in an open session pursuant to the open meeting provisions.

We have already said that a civil service commission is subject to the open meeting laws since, by definition, such commission is a "governmental body". A second consideration is whether the deliberations of a commission constitute a "meeting", as defined in §28A.2(2). If so, then the law requires that such discussions be conducted in public, unless within certain exception drawn in §28A.5.

In our earlier opinion to State Representatives Pellett and Crabb, issued May 16, 1979, OAG number 79-5-14 (copy enclosed), we said that two elements must appear to constitute a "meeting" under §28A.2(2): (1) a majority of the members of a governmental body must be involved in the particular gathering or assemblage, and (2) the acts or duties of the members involve policy-making or decision-making responsibilities. We observed that "ministerial" acts are excluded from the definition of "meeting" and discussed the meaning of "ministerial" acts. Again, without repeating the analysis of a former opinon of our office, we have applied the ministerial acts exemption to the deliberations of a civil service commission and are of the opinion that such acts are not "ministerial". Rather, we believe that such discussions involve decision-making responsibilities of the commissioners and fall within the definition of "meeting" in §28A.2(2).

This brings us to the most difficult aspect of your opinion request. Although the commission deliberations constitute a "meeting" under §28A.2(2), may they nevertheless be conducted during closed session because they are a "quasi-judicial" function of the commission?

"Quasi-judicial" is broadly defined as:

"A term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existance of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." *Black's Law Dictionary*, p. 1411 (Rev. 4th ed. 1968).

As examination of the open meetings law, specifically §28A.5, reveals that the legislature did not carve out a general exception, for local commissions, permitting "quasi-judicial" actions to be conducted in closed session.[2] We have reviewed judicial authorities which have dealt with the "quasi-judicial" exemption issue in various contexts. *See e.g., Canney v. Board of Public Instruction of Alachua - County*, 278 S. 2d 260 (Fla. 1973); *Arizona Press Club v. Arizona Board of Tax Appeals*, 558 P. 2d 697 (Ariz. 1976); *Stillwater Savings and Loan Association v. Oklahoma Savings and Loans Board*, 534 P. 2d 9 (Okl. 1975). We

[2] We are mindful that §28A.5(1)(f) authorizes a closed session "to discuss the decisions to be rendered in a contested case conducted according to the provisions of Chapter 17A." Because Chapter 17A is limited to state agencies, *see* 516A.2(1), Iowa Code (1979), this exception applies in terms only to the quasi-judicial deliberations of a state agency — despite the fact that a local agency may be performing identical functions in a contested case such as an appeal before a civil service commission. Although an argument might be made that a local agency which voluntarily adopts the contested case procedures of Chapter 17A should be entitled to invoke the exception provided by §28A.5(1)(f), we feel constrained to reject it. It appears to us that the legislature chose its terms advisedly and we are admonished by §28A.1 to resolve ambiguity in favor of openness.

recognize the sensitive due process considerations noted by the dissent in the *Canney* case. We are, however, persuaded by the following excerpt from the majority opinion in *Canney*:

"Once the Legislature transforms a portion of a board's responsibilities and duties into that of judicial character so that the board may exercise quasi-judicial functions, the prerogatives of the Legislature in the matter do not cease. ***If the Legislature may delegate these quasi-judicial powers to [a board] and regulate the procedure to be followed in hearings before the board, it follows as a matter of common logic that the Legislature may further require all meetings of the board at which official acts are to be taken to the public meetings open to the public. A board exercising quasi-judicial functions is not a part of the judicial branch of government."

The language of §28A.5, "A governmental body may hold a closed session only to the extent a closed session is necessary for any of the following reasons", makes it clear that only those exceptions provided may be invoked to hold a closed session. The exceptions provided for are narrowly drawn and do not include "quasi-judicial" actions of a local commission. The legislature has delegated quasi-judicial duties to local commissions. It has not, however, provided that such duties may be conducted in closed session. As a result, we are constrained to conclude that the deliberative processes of an employee's appeal before a civil service commission are required by the open meetings law to be conducted in open session, unless the discussions fall within an exception of §28A.5 and the procedural requirements of that section are followed.

IV.

Before concluding, it must be noted that §28A.5(1)(i) authorizes a closed session:

"To evaluate the professional competency of an individual whose appointment, hiring, performance or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session."

It is apparent that this subsection may apply to the deliberative processes of certain, isolated cases before a civil service commission. We can perceive of situations where a commission's discussion of an employee's appeal may involve directly those matters covered by this subsection. If it is anticipated that such matters will enter into the discussions of a commission, they may properly discuss such matters during a closed session if they comport with the requirements of §28A.5.

To rely upon subsection (i), it is clear that (1) the individual must request a closed session, and (2) a closed session must be necessary to "prevent needless and irreparable injury to that individual's reputation". The latter element is necessarily flexible and the circumstances justifying a closed session will undoubtedly vary in concrete cases. The determination whether an individual's reputation will suffer lies within the commission's discretion, based upon the facts and circumstances presented in a partircular case in support of holding a closed session. The statute makes clear, however, that in the absence of factors showing a need to close a session on the basis of injury to the requtation of an employee or of the employee's request, the commission may not close the deliberations of an employee's appeal under subsection (i).

Additionally, we point out that to hold a closed session, pursuant to subsection (i), it is necessary to comport with the general requirements of §28A.5. Briefly outlined, the requirements are that there be an "affirmative public vote of either two-thirds of the members of the body or all of the members present at the meeting" to hold a closed session [§28A.5(1)]; "the vote of each member on the question of holding the closed session by reference to a specific exemption . . . shall be announced publicly at the open session and entered in the minutes," [§28A.5(2)]; the session should be closed "only to the extent a closed session is necessary", [§§28A.5(1) and 28A.5(2); detailed minutes including the matters discussed, persons present, and action taken shall be made, and the closed session tape recorded, [§28A.5(4)]; and, "final action" of a commission "shall be taken in an open session unless some other provision of the Code expressly permits such actions to be taken in closed session," [§28A.5(3)].

V.

To summarize, we are of the opinion that civil service commissions, created and operating under the provisions of Chapter 400, are subject to the open meetings provisions of Chapter 28A. When confronted with an employee's appeal, §400.26 requires that the hearing before the commission be conducted open to the public notwithstanding the exceptions contained in §28A.5 of the open meetings law. The deliberations of the commission with respect to such appeal may be conducted in a closed session only if they fall within an exception provided for in §28A.5, to include subsection (i). To close the deliberations pursuant to subsection (i), the general requirements o f§28A.5 must be complied with and (1) there must be a request for a closed session from the individual concerned and (2) there must be a need to close the session to "prevent needless and irreparable injury to that individual's reputation".

July 6, 1979

SCHOOLS: Chapter 232, Child Abuse Investigation and Reporting Act. Teachers in public schools are not "persons responsible for the care of the child" within the investigative and reporting provisions of Iowa's Child Abuse Reporting Act. Teachers, however are subject to criminal, civil, and professional sanctions should they abuse a child. (Appel to Horn, State Representative, 7-6-79) #79-7-13

Honorable Wally E. Horn, State Representative: We are in receipt of your opinion request concerning the applicability of Iowa's child abuse statute, Chapter 232, Code of Iowa, 1979, to employees of Iowa's public schools. Specifically, you ask:

Initially, does the proposed legislation or existing law subject the employees of Iowa's public schools and specifically teachers and administrators such as principals to any criminal or civil penalties pursuant to Chapter 235A [now Chapter 232] or the legislation and administrative rules being proposed thereunder.

Secondly, what specific civil or criminal penalties or procedures would impact upon public school officials, specifically teachers and administrators.

Thirdly, if there are civil penalties or procedures, or even a potential civil cause of action to which a public school official could be subject, would the public school official so involved, and the employing public

school body, come under the provisions of the State Tort Liability Act, Chapter 613A, Code of Iowa, 1979.

Lastly, it would be helpful if your office could speak to the distinction, if any, between "child abuse" and "corporal punishment" that exists under the proposed legislation or administrative rules, or the existing act itself, assuming that a school district would have properly adopted policies on corporal punishment that are, in a hypothetical factual situation, not deviated from.

An overview of Iowa's child abuse laws will provide a framework of analysis of the questions you pose. Chapter 232 of the Code establishes a reporting and investigation procedure for alleged cases of child abuse. Health practitioners, social workers, certified psychologists, certified school employees, and other specified individuals are required to file a report with the Department of Social Services when the person "reasonably believes a child has suffered from abuse." §232.69. The reporting requirement with respect to these persons is mandatory. Any person, official, agency, or institution subject to the mandatory requirements who knowingly and willfully fails to file a report is guilty of a simple misdemeanor, and any person who knowingly fails to file is civilly liable for such damages proximately caused by such failure. §232.75.

Upon filing of a report, the Department of Social Services is required to promptly commence an appropriate investigation. §232.71. Based on the results of the investigation, the department is required to offer the family of any child believed to be the victim of abuse such services as appear appropriate, §232.71(8), or file appropriate juvenile court action, §232.71(9), which under the Code can include proceedings to terminate parental rights in extreme cases, §232.111.

In order to determine under what circumstances reports must be filed and investigations initiated, it is necessary to look to the sections of the Code which define "child abuse." Section 232.68(2) states:

2. "Child abuse" or "abuse" means harm or threatened harm occurring through:

a. Any nonaccidental physical injury or injury which is at variance with the history given of it, suffered by a child as the result of the acts or omissions *of a person responsible for the care of the child.*

b. The commission of any sexual abuse with or to a child as defined by chapter seven hundred nine (709) of the Code Supplement, as a result of the acts or omissions *of the person responsible for the care of the child.*

c. The failure *on the part of a person responsible for the care of a child* to provide for the adequate food, shelter, clothing or other care necessary for the child's health and welfare when financially able to do so or when offered financial or other reasonable means to do so. A parent or guardian legitimately practicing religious beliefs who does not provide specified medical treatment for a child for that reason alone shall not be considered abusing the child, however this provision shall not preclude a court from ordering that medical service be provided to the child where the child's health requires it.

The above sections demonstrate that in order to determine whether alleged child abuse by teachers is within the scope of the reporting and investigation provisions of the Iowa child abuse law, the term "person responsible for the care of a child" must be defined. In Section 232.68(6), Code of Iowa, 1979, the Legislature defined the term as follows:

"Person responsible for the care of a child" means:

a. A parent, guardian, or foster parent.

b. A relative or any other person with whom the child resides, without reference to the length of time or continuity of such residence.

c. An employee or agent of any public or private facility providing care for a child, including an institution, group home, mental health center, residential treatment center, shelter care facility, detention center or child care facility.

A case could be made that, given the Legislature's broad interest in protecting children, teachers in public schools should be considered within the scope of the term "persons responsible for the care of the child." Specifically, the term "institution" in (c) above could be construed broadly to cover public schools, notwithstanding the fact that all other entities in (c) usually exercise broader custodial control over children than do the public schools. Indeed, at first blush, we thought such an interpretation plausible. However, our consideration of the background of child abuse laws, the slender body of relevant case law, and scheme of Iowa's child abuse statutes as a whole, convinces us that Iowa courts would not likely apply the reporting and investigation provisions of the child abuse statute to alleged conduct by teachers in the public school setting.

To begin with, the academic authorities on child abuse laws universally focus on the closed character of the residential setting. It is observed that incidents of child abuse are difficult to detect since most cases do not come to the attention of anyone other than the immediate family. Comment, *The Legislative Approach to Problems of Willful Child Abuse*, 54 *Calif. L. Rev.* 1805, 1807 (1966). *See also* G. Goodpaster and Angel, K., *Child Abuse and the California System*, 26 *Hast. L. J.* 1081, 1085 (1975) (child abuse usually occurs in the privacy of a home and often is not sufficiently serious to require intervention of third parties who might report it). Because of the need to bring child abuse cases out of the potentially secretive residential setting to the attention of appropriate government agencies, reporting provisions of child abuse laws are emphasized in the literature. *See* M. Paulsen, *The Legal Framework for Child Protection*, 66 Colum. L. Rev. 679, 710-716 (1966).

For the most part, this ferreting-out-of-information rationale for child abuse laws is less applicable in the public school setting. While there may be secluded areas in the public schools, they are generally more exposed to public view than a home or a residential institution. And, children are psychologically likely to be less dependent upon teachers than parents and would thus not have the same embarrassment amount reporting incidents of abuse by teachers to third parties even if the abuse occurred in some remote location in the school.

This functional incongruence prompted a canvass of case law to determine if teachers have generally been held subject to child abuse laws that cover conduct of persons responsible for the "care" of the child. We found no cases directly in point. Teachers have been held subject to California's child abuse statute, *Cal. Penal Code*, §237a, but this statute on its face applies, in relevant part, to "any person" who willfully causes or permits any child to suffer, or inflicts thereon unjustified physical pain or violance." *See People v. Curtiss*, 116 C.A.2d Supp. 771, 300 P.2d

801 (1931). The scope of this statute is plainly broader than Iowa's law. The only authority suggesting that teachers are within the scope of statutes limiting liability to persons responsible for the care or custody of the children is *Lovisi v. Commonwealth*, 188 S.E.2d 206, 212 Va. 848, *cert. denied* 407 U.S. 922 (1972). In *Lovisi*, a case involving alleged abuse by a stepfather of a stepdaughter, the court declared, in dictum, that child abuse statutes should be read broadly enough to include "teachers, athletic instructors, and babysitters." 188 S.E. at 208. However, even in *Lovisi*, such liability attached only if it could be shown that the accused had custody of the child at the time of the alleged abuse, 166 S.E. 2d at 208. Under the cases, such a demonstration occurs in a residential setting, *State v. Smith*, 485 S.W.2d 461 (Mo. 1972), (stepfather may be liable under child abuse statutes), *State v. Evans*, 270 S.W. 684 (Mo. 1925) (woman in whose home 12-year-old girl was placed while parents on vacation), *Cawley v. People*, 83 N.W. 464 (1881) (benevolent institution which provided care for needy children). *See generally Child Cruelty — One in "Custody," "Control,"* 73 ALR 3d 933.

While the case law is not definitive, we think that the best view is that while it may not be necessary for a person to have legal custody over a child to be within the scope of "care or custody" style child abuse laws, functionally equivalent control over the child must be exercised by the de facto custodian. This approach is supported by the American Bar Association, which has suggested in its Standards Relating to Abuse and Neglect, an abused child is one "who has suffered physical harm, inflicted nonaccidentally, upon him/her by his/her parent(s) or persons exercising essentially equivalent control over the child. *See Standards Relating to Abuse and Neglect*, Juvenile Justice Standards Project, Institute of Judicial Administration, American Bar Association (1977) at 11.

We doubt that the Legislature intended to establish a child investigation and reporting scheme that sweeps well beyond the case law and the recommended ABA standards. The emphasis of the sections on child abuse focus on the family. In the purpose and policy section of the child abuse reporting statute, it is noted that the Department of Social Services is to provide rehabilitative services "where appropriate and whenever possible to abused children and their families that will stabilize the home environment so that the family can remain intact without further danger to the child." §232.67, Code of Iowa, 1979. And the statute requires that any investigation by the Department of Social Services upon the filing of a written report include "an evaluation of the home environment and relationship of the child named in the report and any other children in the same house as the parents or other persons responsible for their care . . . ", §232.71(d). These sections suggest a legislative intent to focus on persons and institutions functionally equivalent to home and parents.

More fundamentally, a reading of the statute that included teachers within the scope of persons "responsible for the care for the child" could lead to absurd results. Among other things, child abuse is defined as the failure of "a person responsible for the care of a child" to provide "adequate food, shelter, clothing, or other care necessary for the child's health and welfare when financially able to do so or when offered financial or other reasonable means to do so", §232.68. If a teacher in a public school, or the school itself, is a person "responsible for the care for the child", a teacher or the school could be guilty of child abuse for

failure to provide "adequate food, shelter, or clothing when financially able." We think it clear that the statute did not intend to thrust such affirmative responsibilities upon school officials and subject them to investigation for nonperformance of duties normally incident to persons with at least de facto custody of a child.

We therefore conclude that conduct of teachers is not within the scope of the reporting and investigation provisions of Iowa's child abuse laws. A strong caveat, however, is in order. Any teacher or administrator who unreasonably strikes a child remains subject to the assault provisions of the Criminal Code, §§708, 709, Code of Iowa, 1979. And, where injury occurs and the educator is found "not to be acting in good faith and in a manner a reasonable person would have believed to be in and not opposed to the best interest of the (school district)", §613A.2, the educator may be held personally liable for damages. Finally, in addition to any disciplinary measures that may be taken by local officials, an educator who abuses a child may be subject to investigation by the Professional Teaching Practices Commission, *see* Chapter 272A, Code of Iowa, 1979, and 640 I.A.C. 4.9(272A), and revocation of certification by the State Board of Educational Examiners, §260.23, Code of Iowa, 1979.

We also note while teachers are not subject to *investigation* under Chapter 232, certificated school employees are required to *report* instances where they believe a person "responsibl for the care of the child", i.e., a parent or functional equivalent, is committing child abuse, §232.69. Thus, a certificated teacher or administrator is subject to the criminal and civil sanctions of §232.75 for knowingly and willfully failing to report cases where the individual "reasonably believes a child has suffered abuse."

Finally, you ask for commentary on the distinction between corporal punishment and child abuse. Corporal punishment is generally understood to involve spanking or perhaps use of a paddle for disciplinary purposes. Where an educator does not have a legitimate disciplinary purpose in administering corporal punishment, or where the punishment is excessive, the individual may be criminally and civilly liable as indicated in the preceding paragraph. School boards would be well advised to adopt stringent rules on corporal punishment to insure that their employees do not administer unjustified or excessive corporal punishment that exposes the employees to legal sanctions, does not promote discipline in the schools, and does not advance the well-being of the child.

It may well be that as a matter of policy, the investigative provisions of Iowa's child abuse laws should be expanded to include teachers in public schools. Our role, however, is limited to the construction of present statutes. Those who believe that teachers should be subject to investigation by the Department of Social Services when child abuse is alleged should address their arguments to the legislature.

July 10, 1979

LANDLORD-TENANT: Three-day notice. §§562.4, 562A.2, 562A.8, 562A.9 (4), 562A.27(2), 648.3 and 648.4, Code of Iowa (1979). The three-day written notice of section 562A.27(2) is a separate and distinct notice from the three-day notice to quit of sections 648.3 and 648.4. Because the three-day notice to quit of section 648.4 is applicable only to tenancies at will and the three-day written notice of section 562A.27(2) is

applicable only to tenancies for term, these notices are separate and distinct statutory requirements and do not take precedence over each other. (Johnson to Sherzan, State Representative, 7-10-79) #79-7-14

Representative Richard Sherzan: We are in receipt of your letter requesting the opinion of the Attorney General on the following two questions:

1. Is the three-day written notice of section 562A.27(2), Code of Iowa (1979), a three-day Notice to Quit as described in sections 648.3 and 648.4 of the Code, or is the three-day written notice of section 562A.27(2) a separate and distinct notice from the three-day Notice to Quit described in sections 648.3 and 648.4 of the Code?

2. If the three-day written notice of section 562A.27(2) is a separate and distinct notice from the three-day Notice to Quit as described in sections 648.3 and 648.4 of the Code, does the three-day written notice of section 562A.27(2) take precedence over the three-day Notice to Quit as described in section 648.4 of the Code?

I.

Chapter 648, Code of Iowa (1979) Forcible Entry or Detention of Real Property, has been effective in some form since 1851. It provides a summary statutory remedy which enables a person entitled to possession of real property to obtain possession from anyone illegally in possession of that property. The Supreme Court of Iowa has held in a number of cases that an action for forcible entry or detention of real property is not for the purpose of determining title, but to determine the fact of possession — whether the defendant at the time the suit is heard and determined is wrongfully in possession. *See Reed v. Gaylord* 216 N.W.2d 327 (Iowa 1974); *Denny v. Jacobson* 88 Iowa 627, 55 N.W.2d 568 (1952); *Rudolph v. Davis* 239 Iowa 372, 30 N.W.2d 484 (1948); *Cedar Rapids Cold Storage Co. v. Lesinger* 188 Iowa 1364, 177 N.W. 548 (1920); *Kelley v. Kelley* 187 Iowa 349, 174 N.W. 342 (1919). Chapter 646, Code of Iowa (1979), Recovery of Real Property, is the correct statutory mechanism for a litigant to use to determine the title to real property. The question you have presented deals particularly with the sections 648.3 and 648.4, Code of Iowa (1979):

648.3 Notice to quit. Before action can be brought in any except the first of the above classes, three-days' notice to quit must be given to the defendant in writing.

648.4 Notice terminating tenancy. When the tenancy is at will and the action is based on the ground of the nonpayment of rent when due, no notice of the termination of the tenancy other than the three-day notice need be given before beginning the action.

The written notice to quit of section 648.3 is a necessary condition precedent to the maintenance of an action for forcible entry or detainer and not the commencement of the action. *Van Emmerik v. Vuille* 249 Iowa 911, 88 N.W.2d 47 (1958); *Town of Lakota v. Gray* 240 Iowa 193, 35 N.W. 2d 841 (1949). The written notice requirement of section 648.4, Code of Iowa (1979) is specifically limited to tenancies at will based upon the nonpayment of rent when due and is also a necessary condition precedent to maintenance of an action for forcible entry or detainer.

Chapter 562A, Code of Iowa (1979), the Uniform Residential Landlord and Tenant Law, has been effective only since January 1, 1979. Section 562A.37 of the Code states that the chapter is applicable to rental agree-

ments entered into or extended or renewed after January 1, 1979. This chapter only applies in a residential setting. The underlying purposes and policies of the chapter are stated in section 562A.2 of the Code. They are to simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of landlord and tenant; to encourage landlord and tenant to maintain and improve the quality of housing; and to insure that the right to the receipt of rent is inseparable from the duty to maintain the premises. The three-day written notice of section 562A.27(2) of the Code upon which you base your question is as follows:

2. If rent is unpaid when due and the tenant fails to pay rent within three days after written notice by the landlord of nonpayment and the landlord's intention to terminate the rental agreement if rent is not paid within that period of time, the landlord may terminate the rental agreement.

Section 562A.27(2) of the Code, clearly is a remedy available to a landlord upon a tenant's failure to pay rent when due. This provision requires a written notice by the landlord indicating the nonpayment of rent and the landlord's intention to terminate the rental agreement if the rent is not paid within three days after such written notice. "Notice" is also a specifically defined term in section 562A.8 of the Code. Essentially, section 562A.27(2) functions as a demand for rent by the landlord prior to termination of the rental agreement for nonpayment of rent when due.

The question you have raised is essentially whether the written notice provided in section 562A.27(2) is a notice to quit as described in sections 648.3 and 648.4 or whether they are separate and distinct notices.

At first blush it might appear that the notices are similar. However, the two notices serve different ends and purposes as outlined above. The section 562A.27(2) notice is quite specific and requires that a landlord demand the rent prior to termination of the rental agreement. The section 648.3 and 648.4 notices are essentially conditions precedent to the commencement of an action for forcible entry or detainer. One of the underlying purposes of Chapter 562A as stated by the Legislature was to simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of landlord and tenant. Certainly the Legislature was aware of Chapter 648 and its provisions when it passed Chapter 562A because Chapter 648 had been law since 1851. The Legislature, if it had intended the notice of section 562A.27(2) to function as the notice to quit of sections 648.3 and 648.4, would have specifically stated such or amended sections 648.3 and 648.4 to reflect this intent. Instead, the Legislature chose to provide a specific remedy for landlords upon the nonpayment of rent.

Therefore, it is the opinion of this office that the three-day notice of section 562A.27(2) of the Code is a separate and distinct notice from the three-day Notice to Quit of sections 648.3 and 648.4 of the Code.

II.

As set forth above, section 648.4 applies only when the tenancy is at will and the action for forcible entry or detention of real property is based upon the nonpayment of rent when due. A tenancy at will is defined in Black's Law Dictionary, Revised Fourth Edition, to be one who

holds possession of premises by permission of owner or landlord, but without fixed term. A tenancy at will is not a defined term within the Code of Iowa, but section 562.4 states "any person in possession of real estate, with the assent of the owner, is presumed to be a tenant at will until the contrary is shown."

Section 562A.9(4) of the Code provides that:

4. Unless the rental agreement fixes a definite term, the tenancy shall be week-to-week in case of a roomer who pays weekly rent, and in all other cases month-to-month.

The type of tenancy created by this statutory section for residential leases is not a tenancy at will but a tenancy for a fixed term. In the absence of a fixed term in the rental agreement, section 562A.9(4) statutorily creates a tenancy for term, either weekly or monthly.

Therefore, in the opinion of this office, because the three-day notice to quit of section 648.4 of the Code is applicable only to tenancies at will and the three-day written notice of section 562A.27(2) of the Code is applicable only to tenancies for term, these notices are separate and distinct statutory requirements and do not take precedence over each other.

July 10, 1979

STATE OFFICERS AND DEPARTMENTS: Department of Public Safety; Criminal History Data. Sections 691.1(10), 692.2, 692.5, 692.19, Code of Iowa, 1979. An individual may not obtain a certified copy of his criminal history record or a copy certifying no record. (Boecker to Larson, Commissioner, Department of Public Safety, 7-10-79) #79-7-15 (L)

July 11, 1979

CONSTITUTIONAL LAW: Land Preservation — §§93A.1 and 93A.3, the Code, 1979. Section 93A.3(c) is constitutional. (Blumberg to Hoth, Des Moines County Attorney, 7-11-79) #79-7-16 (L)

July 11, 1979

STATE OFFICERS AND DEPARTMENTS: City Development Board — Annexations — Chapter 368, the Code, 1979. The provisions of §§368.11, 368.12, 368.14, 368.15, 368.16, 368.17, 368.18 and 368.19 do not apply to voluntary annexations in §368.7. (Blumberg to Nail, Chairperson, City Development Board, 7-11-79) #79-7-17 (L)

July 12, 1979

COUNTIES, PEACE OFFICERS, ADVANCE TRAVEL EXPENSES: Article VII, section 1, and Article III, section 39A of the Iowa Constitution; and §§91A.3(6), 79.13, 333.2, 333.2(18), and 332.35, Code of Iowa (1979). A county board of supervisors has the authority to authorize credit cards or advance cash to a sheriff or deputy sheriff to defray traveling expenses prior to the time that a sheriff or deputy actually incurs the expense. A county board of supervisors may pay advance mileage under a contract for use of a private automobile. (Cleland to Holden, State Senator, 7-12-79) #79-7-18

The Honorable Edgar H. Holden, State Senator: This letter is in response to your request for an Attorney General's Opinion. Specifically, you pose the following question:

Can a county board of supervisors authorize credit cards or advance cash to a sheriff or deputy sheriff to defray traveling expenses or mile-

age costs prior to the time that the sheriff or deputy actually incurs the expense?

In our opinion, a county board of supervisors can authorize credit cards or advance cash to a sheriff or deputy sheriff to defray traveling expenses. In addition, a board of supervisors has the authority to make a contract with a sheriff or deputy for the use of his or her private vehicle. This contract can provide for advance mileage payments. This opinion is based upon our analysis of Article VII, section 1, and Article III, section 39A (county home rule) of the Iowa Constitution; and §§91A.3(6), 79.13, 333.2, 333.2(18), and 332.35, Code of Iowa (1979).

ARTICLE VII, SECTION 1

On December 19, 1978, the Attorney General's office issued an opinion (Nolan to Benton, Superintendent of Public Instruction, 12-19-78), No. 78-12-11, that merged area schools could not make advance payments to employees to cover travel and other necessary expenses in conjunction with their employment. Specifically, that opinion expressed the view that advance travel payments were contrary to both Article VII, section 1, of the Iowa Constitution and §91A.3(6), Code of Iowa (1977). Before answering the question which you have posed, it is necessary to reconsider this prior opinion because, while we agree with the result,[1] that opinion incorrectly interprets both Article VII, section 1, of the Iowa Constitution and §91A.3(6), Code of Iowa (1977). Moreover, the resolution of your question depends, in part, on how we interpret these two provisions.

In our opinion, Article VII, section 1, of the Iowa Constitution does not prohibit advance travel expenses or the use of credit cards when the travel is in conjunction with the employee's employment. Article VII, section 1 provides, in relevant part, as follows:

> 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 Supreme Court interpreted section 1 of Article VII in *Grout v. Kendall*, 195 Iowa 467, 472-73, 192 N.W. 529, 531 (1923) in the following way:

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[1] It is our opinion that merged area schools cannot make travel advances. Section 279.29, Code of Iowa (1979) provides, *inter alia*, that "[t]he board shall audit all just claims against the corporation, and *no order* shall be drawn upon the treasury until the claim therefor has been *audited* and *allowed*." (Emphasis added). Section 279.30, Code of Iowa (1979) sets forth exceptions to this general rule. Advance travel payments does not appear among these exceptions. Under Code §279.29 a claim must be both *audited* and *allowed* before it can be paid, and this suggests, in our opinion, that the General Assembly did not intend to allow the merged area schools to pay advance travel claims. The purpose of the two words, "audited" and "allowed," appearing together appears to be that no claim can be paid until the board has taken final action on the claim. Logically, no final action can be taken on the claim until all of the specifics of the claim have been examined and verified. This cannot be done until after the expenditures have been made. There is no similar provision affecting county governments, and therefore, our answer is different with respect to counties.

This particular section of our Constitution was taken bodily from the Constitution of New York. As a part of the Constitution of New York, it was the result of past experience in the history not only of New York, but of other states as well, whereby aspiring new states had loaned their credit freely and extravagantly to corporate enterprises which had in them much seductive promise of public good. These enterprises included railways, canals, water powers, etc. The corporate body in each case was the primary debtor; the state became the underwriter; it loaned its credit always with the assurance and belief that the primary debtor would pay. Pursuant to these secondary liabilities, the state became overwhelmed with millions of dollars of indebtedness which never would have been undertaken as a primary indebtedness, and which never would have been permitted by public sentiment, if it had been known or believed that the secondary liability would become a primary one through the universal failure of the primary debtor. The ultimate cry of the surety is: I would not have become surety if I had known or believed that I should have to pay the debt. This is as true of states as of individuals. It was to remove this delusion of suretyship with its snare of temptation that this section of the Constitution was adopted. *It withheld from the constituted authorities of the state all power or function of suretyship.*" (Emphasis added).

Article VII, section 1, was also the subject of an early Attorney General's opinion. *See* 1922 O.A.G. 177. In that opinion, Article VII, section 1, was explained as follows:

It is generally recognized that the purpose for which this provision was placed in the constitution was to prevent the credit of the state from being extended *except for a public purpose*, or to fulfill and liquidate a moral or legal obligation incurred by the state. * * * It is fundamental that the credit of the state cannot be extended except for a public purpose, and it is likewise fundamental that taxes cannot be levied except for a public purpose. (Emphasis added).

A close analysis of Article VII, section 1, demonstrates that this provision does not prohibit payment of advance travel expenses or the use of credit cards to defray costs for work-related travel. The Iowa Supreme Court cases on Article VII, section 1, suggest the following four-point analysis:

1. Is the county or merged area school (hereinafter referred to in this section as the governmental body) using its own money? *See Sampson v. City of Cedar Falls*, 231 N.W.2d 609, 613 (Iowa 1975).

2. Is the governmental body acting as a surety for the debt of another? *See Grubb v. Iowa Housing Finance*, 255 N.W.2d 89, 98 (Iowa 1977); *Edge v. Brice*, 253 Iowa 710, 113 N.W.2d 755,758 (1962); *Grout v. Kendall*, 195 Iowa 467, 192 N.W. 529, 531 (1923).

3. Is the governmental body's obligation a primary one? *Richards v. City of Muscatine*, 237 N.W.2d 48, 62 (Iowa 1975); *Graham v. Worthington*, 259 Iowa 845, 146 N.W.2d 626, 639-41 (1966); *Edge v. Brice*, 253 Iowa 810, 113 N.W.2d 755, 758 (1962).

4. Is the expenditure or loan for a public purpose? *Edge v. Brice*, 253 Iowa 710, 113 N.W.2d 755, 758 (1962).

Each of these points will now be considered separately in the context of the advance travel expense problem.

The first element of the test needs some additional explanation. In *Sampson v. City of Cedar Falls*, 231 N.W.2d 609, 613 (Iowa 1975), the

Iowa Supreme Court was presented with the issue of whether joint ownership of electric facilities by cities, electric cooperatives, and investor-owned electric utility corporations violated Article VII, section 1. The Court held that Artcle VII, section 1, did not prohibit joint ownership because, *inter alia*, the city was using its own credit and spending its own money. With respect to advance travel expenses, the governmental body which authorizes the travel is obligated to pay the employee's travel expenses. Therefore, the governmental body is using its own credit and spending its own money.

A governmental body is not acting as a surety for the debt of another when it makes allowances for advance travel expenses. First, with advance travel payments, there generally is no preexisting debt of another. A person receiving the advance travel expense payment or the use of a credit card to defray traveling expenses is not a debtor. In fact, an individual traveling on government business is a potential creditor of the governmental body on whose behalf he or she is traveling. Secondly, to the extent that there is a debt, the governmental body authorizing the travel has the primary obligation of paying the travel expenses. (See discussion below). The important point to keep in mind about a surety is that the surety need not pay anything if the person with the primary liability satisfies the debt. In the travel expense situation, the governmental body is not relieved of liability when the person traveling pays his own expenses. Therefore, a governmental body is not acting as a surety when it makes allowances for advance travel expenses.

The primary obligation for paying for expenses connected with work-related travel falls on the employer authorizing the travel. *See* Section 91A.3(6), Code of Iowa (1979). Thus, by paying such expenses in advance or extending a credit card for the employee to use, a governmental body is doing no more than discharging its primary obligation to pay such expenses.

Finally, it is assumed that the travel is for a public purpose. If the travel is not for a public purpose, the employee has no right to either advance payments or reimbursements under Article VII, section 1. *See Edge v. Brice*, 253 Iowa 710, 113 N.W.2d 755, 758 (1962); 1938 O.A.G. 80. It should also be noted that even if advance travel payments are characterized as loans, they are not prohibited by Article VII, section 1, provided that the travel is for a public purpose. *See Grubb v. Iowa Housing Finance*, 255 N.W.2d 89, 98 (Iowa 1977); 1938 O.A.G. 80.

Therefore, Article VII, section 1, does not prohibit either a county or a merged area school from providing for advance travel expenses or credit cards to defray the costs of travel provided that the travel is authorized and for a public purpose. Moreover, the conclusion reached above is consistent with the practical needs of State and local governments.

IOWA WAGE PAYMENT COLLECTION LAW

Section 91A.3(6), Code of Iowa (1979) does not prohibit either a county, a merged area school, or any other employer from making advance travel payments to its employees. Section 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 added).

Section 91A.3(6) applies to both private and public employers. *See* Sections 91A.2(2) and 4.1(13), Code of Iowa (1979). Section 91A.2(2) defines an *employer* as "any person, as defined in chapter 4, who in this state employs for wages a natural person." Section 4.1(13) defines *person* as an "individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity." Thus, Code §91A.3(6) applies to both counties and merged area school districts.

While it is possible to interpret Code §91A.3(6) to mean that an employer may not make advance payments for expenses which have not yet been assumed by the employee, in our opinion, such an interpretation is unwarranted. In our opinion, Chapter 91A is protective in nature, i.e., it is a minimum bill of rights for all wage earners in this State, and should be interpreted as such. Moreover, such an interpretation would unnecessarily interfere with an employer's ability to authorize work-related travel for an employee who is unable to pay the reimbursible expenses out of his or her own pocket. In our opinion, the word "incurred" in Code §91A.3(6) should be interpreted to mean that an employer has no obligation to pay expenses to an employee for items on which there was not or will not be an actual or constructive expenditure. For example, assuming that an employer authorized a certain trip for an employee and that lodging was an authorized expense on the trip, the employer would not have to reimburse the employee for lodging, if while on the trip, lodging was provided without cost to the employee. Since the lodging expense was not incurred by the employee, the employer either would not have to reimburse the expense item or, if the employer had paid the expense item in advance, he or she could recover the payment from the employee. Thus, Code §91A.3(6) does not prohibit either counties or merged area schools from allowing advance travel payments.

It should be noted that even if the word "incurred" in Code §91A.3(6) is interpreted to refer to only those expenses for which the employee has become liable at the time the employee is reimbursed, it is our opinion that an employer could still make allowances for travel advances to cover expenses for which the employee had not yet incurred liability. As discussed above, Chapter 91A is protective in nature. In other words, Code §91A.3(6) specifies only what an employee has a right to demand. It does not limit the employer's right to be more liberal than the statute provides.

COUNTIES

With respect to the specific question you have posed, it is noted that sheriffs and deputies are sometimes required to travel, often over extended distances, in the performance of their duties. In most counties, if not all, a sheriff or his deputies must pay their own traveling expenses and then, upon his or her return, file a claim and wait for two weeks or longer for the county to reimburse them. This causes a considerable

hardship on the officer involved, especially if the officer must travel a long distance to perform his or her duty.

Prior to the amendment of Article III of the Iowa Constitution to add Section 39A (county home rule) thereto, the board of supervisors had only such powers expressly conferred on it "by statute or necessarily implied from the power so conferred." *Hilgers v. Woodbury County*, 200 Iowa 1318, 206 N.W. 660, 661 (Iowa 1925). *See also* 1940 O.A.G. 78. Since the power to issue credit cards or advance cash to defray traveling expenses was not expressly conferred on the county board of supervisors or necessarily implied from one of the powers so conferred in Chapter 332, Code of Iowa (1979), the board had no such power prior to the addition of §39A to the Iowa Constitution. *See* 1920 O.A.G. 618.

HOME RULE

Under the county home rule amendment, Iowa counties are "granted rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government . . . ." This amendment goes on to provide that "[t]he proposition or rule that a county . . . possesses and can exercise only those powers granted in express words is not a part of the law of this state." There are four basic limitations on county home rule authority:

First, counties have no power to levy any tax unless expressly authorized by the General Assembly. Second, in the event the power or authority of a county conflicts with that of a municipal corporation, a municipal corporation's power and authority prevails within its jurisdiction. Third, the home rule power exercised by a county cannot be "inconsistent with the laws of the General Assembly." Fourth, home rule power can only be exercised for local or county affairs and not state affairs.

(Miller and Hagen to Representatives Danker, Binneboese, Hullinger and Hansen, 4-6-79) No. 79-4-7.

The first and second limitations are self-explanatory. The allowance of advance travel expenses does not involve the levy of a tax. Furthermore, there is no municipal authority involved.

The third limitation needs some further explanation. The phrase "inconsistent with the laws of the General Assembly" has been analyzed as follows:

The phrase "inconsistent with the laws of the General Assembly" is employed in both the Municipal and County Home Rule Amendments. This limitation can be termed one of "preemption". That is to say that in any given area the state, by broad and comprehensive legislation, has intended to exclusively regulate the subject matter. Where "preemption" is applicable, any local government regulation regardless of content, is inconsistent with the pervasive state legislation. *See* Scheidler, Implementation of Constitutional Home Rule in Iowa, 22 D.L.R. 294 (1975).

* * *

The determination of whether there is indeed "inconsistency with the laws of the General Assembly" can only be resolved on a case by case basis. From the history of the Iowa court's interpretation and of the Municipal Home Rule Amendment, it would seem fair to conclude that the counties should liberally construe their powers except in the areas of taxation, exclusive state control, express state prohibition against county involvement, or in matters which are not local affairs.

(Miller and Hagen to Representatives Danker, Binneboese, Hullinger, and Hansen, 4-6-79) No. 79-4-7.

With regard to preemption, there is not such pervasive State legislation in the county finance area as to warrant the conclusion that the General Assembly did not intend that the counties have no control. In other words, there will be no damage to the General Assembly's design for county finance if some counties decide to make allowances for advance travel expenses through either credit cards or advance cash.

The use of credit cards or advance cash is not inconsistent with a State statute. Section 79.13, Code of Iowa (1979) provides that:

> The board of supervisors shall not approve any claim for mileage or other traveling expenses presented by any peace officer including the sheriff and his deputies unless the destinations, and number of miles covered in each trip are given, or, in the case of extended trips, unless railroad, hotel, and other traveling expenses, excepting meals, are verified by receipts.

In our opinion, there is nothing in the language of §79.13 which prevents the board of supervisors from issuing credit cards or making cash advances to cover travel expenses. Moreover, there is a similar provision in Chapter 8, Code of Iowa (1979). Code §8.14 provides as follows:

> The state comptroller before *approving* a claim shall determine:
>
> 1. That the creation of the claim is clearly authorized by law.
>
> 2. That the claim has been authorized by an officer or official body having legal authority to so authorize and that the fact of such authorization has been certified to said comptroller by such officer or official body.
>
> 3. That all legal requirements have been observed, including notice and opportunity for competition, if required by law.
>
> 4. That the claim is in proper form as the state comptroller may provide.
>
> 5. That the charges are reasonable, proper, and correct and no part of said claim has been paid. (Emphasis added).

This statute has not prevented the State from providing travel advances to state employees. On the contrary, §270-1.2(8) (1.2(3)), IAC 12-28-77 provides that State employees who are required to travel out-of-state may receive an advance not to exceed 80% of anticipated expenses if the "anticipated out-of-pocket expenses are in excess of $200.00."

Section 333.2, Code of Iowa (1979) provides that "the auditor shall not sign or issue any county warrant unless the board of supervisors by recorded vote or resolution shall have *authorized* the same . . . ." (Emphasis added). If the word "approve" in §79.13 is read to mean the same as the word "authorized" in §333.2, the county might be prevented from making a cash advance to cover travel expenses since the county treasurer is prohibited from disbursing money from the county treasury except "on warrants drawn and signed by the county auditor and sealed with the county seal . . . ." Section 334.1, Code of Iowa (1979).

Under §4.1(2), Code of Iowa (1979), "[w]ords and phrases shall be construed according to the context and approved usage of the language . . . ." "Approve" is defined in *Webster's Third New International Dictionary* 106 (1971) as "to judge and find . . . acceptable." There are, of

course, other definitions provided in the dictionary, but this one is the most appropriate considering the context in which the word is used in §79.13. Under this definition, the board of supervisors could "authorize" a cash advance prior to the trip or provide a credit card issued to the county to cover traveling expenses, and approve the claim, i.e., find the expenses acceptable, after the sheriff or deputy has returned from the trip. The county auditor could issue the warrant for the cash upon the board's authorization. However, the sheriff or deputy would still be liable for his or her expenses until such time as the board approved the expenses. If the board did not approve the expenses, the county could recover money it advanced or expenses the sheriff or deputy charged to the county from the sheriff or deputy who made the trip. In our opinion, this is a practical and reasonable interpretation of §79.13. The idea that the General Assembly intended that sheriffs and deputies *must* subsidize county governments, however temporarily, is explicitly rejected.

The fourth and final limitation has been explained as follows:

The fourth limitation involves a determination as to whether or not a county is engaged in a local affair. Of course, the legislature, in its discretion, may choose to regulate a particular local affair and thus prohibit inconsistent local legislation. However, there are possible proposed county actions which the Code does not expressly forbid or preempt but which may be outside of the scope of county power because they are of state rather than local concern. Identification of the dividing point on the spectrum of state and local concerns is extremely difficult.

* * *

In Scheidler's article, "Implementations of Constitutional Home Rule in Iowa", 22 D.L.R. 294 and 3306-7, the author suggests four criteria of analysis to determine whether a particular act on the part of the county is a local matter. First does, the subject matter involve an issue in which it is desirable to have state-wide uniformity. Second, does the proposed county legislation significantly affect persons living outside the county? Third, does the degree or physical nature of the problem addressed require cooperation of governments outside the county boundaries? Fourth, do the historical considerations involved traditionally relate to state, county or city affairs?

(Miller and Hagen to Representatives Danker, Binneboese, Hullinger and Hansen, 4-6-79) No. 79-4-7. While everything a county does affects the State to some extent, the issue of *when* a county pays travel expenses to its sheriff or deputy is primarily a local concern.

First, there is no need to have state-wide uniformity on the allowance of advance travel expenses. Second, the allowance of advance travel expenses does not significantly affect persons living outside the county. Third, the allowance of travel expenses does not require cooperation of governments outside the county. Finally, in our opinion, there are no historical considerations involved in this question which would prevent the allowance of advance travel expenses.

However, the fact that county supervisors have the power to make alternative arrangements to cover travel expenses does not mean that they are required to do so. The board of supervisors for each respective county must make this decision.

The opinion expressed above does not mean that a board of supervisors has the power to modify the express requirements of Code §79.13. Thus,

no claim for travel expenses can be approved "unless the destinations, and number of miles covered in each trip are given, or, in the case of extended trips, unless railroad, hotel, and other traveling expenses, excepting meals, are verified by receipts." Section 79.13, Code of Iowa (1979). In addition, the board must also comply with Code §§79.10, 79.11, and 332.35, Code of Iowa (1979).

More importantly, in our opinion, a board of supervisors cannot make a blanket authorization to cover travel expenses. The purpose of Code §333.2 is to require a board's authorization for each individual transaction before money is drawn from the county treasury except in those situations set forth in Code §§333.3 and 333.4. The home rule amendment did not alter this requirement. Therefore, a board must authorize advance travel expenses or use of a credit card in each individual case. In addition, when a sheriff or deputy must go beyond the boundaries of the State at public expense to execute a warrant, the trip, but not the expenditure, must be approved by a district court judge. Section 79.12, Code of Iowa (1979).

While we express no opinion on the desirability of providing for advance travel expenses, we do suggest that counties making such arrangements adopt specific rules controlling advance expenses. These rules should include, at least, the procedures for filing the initial request and procedures for obtaining the board's approval after the trip. *See* §270-1.2(8) (1.2(3)), IAC 12-28-77.

MILEAGE

With respect to advance payments for mileage, this question seems to be handled under existing State law. Section 332.35 provides as follows:

> 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.

Section 332.3(18), Code of Iowa (1979) provides, *inter alia*, that the board of supervisors shall have the power "[t]o own and operate automobiles used or needed by the county sheriff and used in the performance of the duties of that office [and] make such contracts with the employees of the sheriff's office who use automobiles in the performance of their duties in conjunction with the use of such automobiles as in their judgment shall be advantageous to the county." Section 337.13, Code of Iowa (1979) provides that "[i]n counties having a population of one hundred thousand or over, the board of supervisors may contract with the sheriff for the use of an automobile on a monthly basis in lieu of payment of mileage, in the service of criminal processes." Thus, the sheriff or deputy is either using a county vehicle or private vehicle under contract with the county. If a county vehicle is used, the county is not obligated to pay mileage. If a private vehicle is used, payment is controlled by the contract. Under Code §332.3(18), the county has the discretion to provide payment on any terms which in their judgment is advantageous to the county. In our opinion, this would include advance payment if the board of supervisors concluded that advance payment would be advantageous to the county.

CONCLUSION

A county board of supervisors has the authority under the county home rule amendment to authorize credit cards or advance cash to a sheriff or deputy sheriff to defray traveling expenses prior to the time that a sheriff or deputy actually incurs the expense. Moreover, a county board of supervisors may pay advance mileage under a contract for use of a private automobile.

July 16, 1979

STATE OFFICERS AND DEPARTMENTS: Commission on the Aging. 42 U.S.C. §3001 *et. seq.*; 42 U.S.C. §§3025(a)(1)(E), 3025(b)(1), 3025(b)(4); Chapters 7A, 17A, 249B, 1979 Code of Iowa, §§20-1.1(6) and 20-1.2(2)(f), Iowa Administrative Code. The Iowa Commission on the Aging has the responsibility to designate planning and service areas under the Older Americans Act. The Commission on the Aging may designate as a planning and service area any unit of general purpose local government with a population of 100,000 or more. No conflicts exist in state law to this authority granted within the Older Americans Act. Appel and McDonald to Glenn R. Bowles, Director, Commission on the Aging, 7-16-79) #79-7-19 (L)

July 16, 1979

DRIVER EDUCATION IN SUMMER SCHOOL: Responsibility of school districts for driver education, summer school and transportation of students. §§4.1, 4.1(36)(a) and (c); 257.25(6), 279.10, 279.11, 282.6, Chapter 285, §§285.1, 285.1(12), 285.10(9)(10), 285.11(1)(2)(6)(8), Chapter 286, Chapter 321, §§321.177, 321.178, Chapter 442, Chapter 670, Code of Iowa (1979). Chapters 248 and 274, Acts of the 61st G.A. (1965) Chapter 271, Acts of the 62nd G.A. (1967). School districts have discretionary power to operate summer school and to offer driver education in summer school in satisfaction of requirement. Transportation is required for eligible students during regular school year. Districts may but are not required to provide transportation for summer school students. (Hagen to Binneboese, Representative, 7-16-79) #79-7-20

Honorable Donald H. Binneboese, State Representative: You asked for an opinion of the Attorney General concerning the responsibilities of school districts in connection with driver education, summer school and the transportation of students. The questions you raise are as follows:

"1. What responsibility does a school district possess in connection with driver education classes during the summer months?

"2. Should the school board provide transportation for students enrolled in summer driver education courses?"

Your questions relate to a variety of mandatory duties and discretionary powers held by local districts pursuant to chapters of the Iowa Code pertaining to schools and school districts. The impact of mandatory language such as "shall offer" found in the driver education statute, §321.178, and the discretionary language such as "fees may be charged . . . for a summer school program" found in §282.6, Code of Iowa (1979), is crucial to your questions "shall" and "may" which recur throughout the statutes pertaining to the questions you propound. The word "shall" imposes a duty. §4.1(36)(a), Code of Iowa (1979). The word "may" confers a power. §4.1(26)(c), Code of Iowa 1979). However, §4.1(36) applies to statutes enacted *after* July 1, 1971. Therefore, it is necessary to follow the meaning of those words as construed by the courts because many of the provisions in the school code sections were adopted prior to 1971. Ordinarily the word "may" when used in a statute, is permissive

only and operates to confer discretion. *Wolf v. Lutheran Mut. L. Ins. Co.*, 236 Iowa 334, 340, 18 N.W.2d 804, 808, (1945). On the other hand, the word "shall", when addressed to a public official, is ordinarily mandatory, excluding the idea of permissiveness or discretion. *Schmidt v. Abbott*, 262 Iowa 886, 890, 156 N.W.2d 649, 651 (1968); *Hansen v. Henderson*, 244 Iowa 650, 655, 656 N.W.2d 59 (1953). A further rule with respect to the meaning of the terms, "shall" and "may" is important in this context. The Iowa Supreme Court, in construing the meaning of those terms said:

"Where both mandatory and directory verbs are used in the same statute, or in the same section, paragraph, or sentence of a statute, it is a fair inference that the legislature realized the difference in meaning and intended that the verbs should carry with them their ordinary meanings. Especially is this true where 'shall' and 'may' are used in close juxtaposition in a statutory provision, under circumstances that would indicate that a different treatment is intended for the predicates following them." [Citation omitted]

Iowa Nat. Ind. Loan Co. v. Iowa State Dept. or Rev., 224 N.W.2d 437, 442 Iowa (1974). Thus, in examining the responsibilities of the school district with respect to the subjects involved in your inquiry, the mandatory and discretionary obligations need to be kept separate and distinct.

Sections 279.10 and 279.11, Code of Iowa (1979) defining the school year are as follows:

"The school year shall begin on the first of July and *each school* regularly established *shall continue for at least thirty-six weeks of five school days each* and *may be maintained* during the entire calendar year.

"The board of directors *shall* determine the number of schools to be taught, divide the corporation into such wards or other divisions for school purposes as may be proper, determine the particular school which each child shall attend, and *designate* the period each school shall be held *beyond the time required by law.*" [Emphasis added]

Thus, school boards in Iowa satisfy the requirement for the mandated thirty-six week school year between the months of August and the following June. The law permits the district to operate the schools for additional periods and the excess period in which schools are in operation is commonly designated as summer school. 1966 O.A.G. 319. While the district *must* operate schools for a thirty-six week period, it *need not* operate summer school, although it *"may" choose* to do so.

Public schools "shall be free of tuition to all actual residents between the ages of five and twenty-one years . . .". §282.6, Code of Iowa (1979). However, "fees *may* be charged covering instructional costs for a summer school program. The board of education *may* in a hardship case, exempt a student from payment of the above fees". [Emphasis added]. The provision permitting but not requiring the school district to charge students for summer school instructional costs was inserted in 1965. Ch. 248, p. 397, Acts of the 61st G. A. (1965).

School districts are required to offer driver education classes. The original enactment stated "Every public school district in Iowa *shall offer or make available to all students* residing in the school district an approved course in driver education". Ch. 274, p. 421, 422, Acts of the 61st G.A. (1965). [Emphasis added]. The power of the Legislature to require that certain courses be offered or made available cannot be questioned. *Waddell v. Board of Directors of Aurelia Ind. School District*,

190 Iowa 400, 175 N.W.65 (1919). In an opinion issued by this office in 1966, it was stated that school districts could not satisfy the driver education requirement by offering driver education classes in the summer *only* but that it must be offered during the regular school year. 1966 O.A.G. 319.

In the next session of the General Assembly, the following language was added to the driver education provision in Ch. 271, p. 523, Acts of the 62nd G.A. (1967).

"An approved course offered during the summer months, on Saturdays, after regular school hours during the regular terms or partly in one term or summer vacation period and partly in the succeeding term or summer vacation period, as the case may be, *shall satisfy* the requirements of this section to the same extent as an approved course offered during the regular school hours of the school term."

Students are not required to take driver education as a part of the high school curriculum. It is only required to be offered. However, pursuant to §321.177, Code of Iowa (1979), drivers licenses are not issued to persons under age eighteen unless they have completed an approved driver education course. The minimum age for obtaining a drivers license, for those who have completed driver education, is sixteen. Thus, students who for some reason, economic or otherwise, are unable to attend summer school would be at a disadvantage if driver education were offered only in summer school, even though the approved summer school class would satisfy the requirement imposed on the school board. §321.178, Code of Iowa (1979).

School districts are required by §285.1, Code of Iowa (1979), to provide transportation, either directly or by reimbursement, for all resident pupils attending public school, kindergarten through twelfth grade, who live the requisite distance from school.

Ordinarily, school bus routes are established for the regular school year. In establishing bus routes, the district is bound by requirements that the bus routes: "utilize the normal seating capacity of each bus insofar as it is possible", §285.11(1); "shall be established only to give service to properly designated pupils", §285.11(8); and "each bus route shall serve only those pupils living in those areas where transportation by bus is the most economical method for providing adequate transportation facilities." §285.11(2) Code of Iowa (1979). The language of §285.1, Code of Iowa (1979) is mandatory, i.e., the school district "shall provide transportation" to those children who are entitled to it. The transportation of students is limited as follows in §285.11(6), Code of Iowa (1979):

"The use of school buses shall be restricted to transporting pupils to and from school and to and from extracurricular activities sponsored by the school when such extracurricular activity is under the direction of a qualified member of the faculty and a part of the regular school program and to transporting other persons to the extent permitted by section 285.1, subsection 1, and section 285.10, subsections 9 and 10."

School district expenditures for transportation of children to and from school are part of per pupil costs on which the state aid-to-school formula is based, but expenditures by districts for extra-curricular activities are not included in the state aid formula. §285.1(12) Code of Iowa (1979). Of course, driver education is not an extra-curricular activity but is a

school course which must be offered or made available by each Iowa school district to its resident pupils.

When the General Assembly amended Ch. 321 to permit school districts to meet the driver education responsibilities in periods other than during the regular school year or hours, it did not amend the transportation provisions or the section permitting school districts to charge students instructional costs for summer school programs. The pervasive scheme for the operation and financing of the Iowa public school system is based on a two-semester academic year. For example, the educational program required to be offered in Iowa schools prescribes units of an "academic year". *See* §257.25(6), Code of Iowa (1979). The general aid formula for allocating funds to each district pursuant to Ch. 268A is based on the regular one hundred eighty-day school year. School districts organize and administer school bus routes and receive state aid for transportation in the context of a two-semester school year. *See* Ch. 285, Code of Iowa (1979) and Ch. 670, I.A.C. No other elements of the "academic year" school system were altered when the General Assembly amended Ch. 321. If the Legislature had intended to change those sections of the law it could have done so. *State ex rel. Fenton v. Downing*, 261 Iowa 965, 973, 155 N.W.2d 517, 522 (1968). Under the guise of construction, we may not "extend, enlarge, or otherwise change the terms and meaning of a statute." *State v. Wedelstedt*, 213 N.W.2d 652, 656 Iowa (1973). *Kelly v. Brewer*, 239 N.W.2d 109 Iowa (1976). We believe there is nothing in the law requiring bus transportation during summer school.

On the other hand, the Iowa Supreme Court has held that "The statutes making it obligatory upon the school districts and their boards of directors to provide transportation for school children are remedial in their nature and have been enacted to effect a beneficent and salutary purpose, and they should not be given a narrow, technical construction, but should be liberally construed to carry out the legislative intention." *Harwood v. Dysart Cons. Sch. Dist.*, 237 Iowa 133, 139, 21 N.W.2d 334 (1946). Thus a school board could decide that it would be beneficial and we believe *could choose* to provide school bus transportation to summer school pupils but there is nothing in the law which appears *to require* it to do so.

In the light of the rules of statutory construction and of the mandatory and discretionary sections of the Iowa Code pertaining to schools, our conclusions are summarized as follows: 1) The mandatory provisions require a school district to conduct school for at least thirty-six weeks on a tuition-free basis and to provide transportation to the students who qualify for it. Therefore, if a school district offers driver education during the school year, students receive the instruction free and those who are entitled to it would be transported to school for that and other classes. 2) Under the discretionary provisions a district *may* meet the driver education requirement in the summer school sessions. The district is not required by law to provide bus transportation for summer school students. 3) Inasmuch as summer school is permitted, we believe a school district could provide bus transportation for students who qualify for bus transportation and who are enrolled in summer school classes, including driver education.

As a practical matter, budgetary constraints, including those in Chapters 24 and 442, might prevent a board from exercising its discretion to

provide transportation to students enrolled in summer school classes. The Legislature could decide that if driver education is offered *only* in the summer, bus transportation must be provided. We do not believe bus transportation is now required for summer school students by the Code of Iowa (1979).

It is well settled that "if changes in the law are desirable from a policy, administrative, or practical standpoint, it is for the Legislature to enact them." *Consolidated Freightways Corp. v. Nicholas*, 258 Iowa 115, 122, 137 N.W.2d 900, 905 (1965).

July 16, 1979

TAXATION: Scavenger Tax Sale For Ordinary Taxes and Special Assessments. §§384.69 and 446.18, Code of Iowa, 1979; §§446.19 and 569.8, Code of Iowa, 1979, as amended by Senate File 159, Acts of 68th G.A. (1979). At a scavenger tax sale, the county treasurer should attempt to sell property for all delinquent taxes and delinquent special assessments. A city may, but need not, bid at such sale to protect its interests. (Griger to Tofte, Representative, 7-16-79) #79-7-21

The Honorable Semor Tofte, State Representative: You have requested an opinion of the Attorney General concerning the effect of a scavenger tax sale upon future special assessment installments not delinquent at the time of such sale. Specifically, the situation you posed exists in the City of Decorah and the Winneshiek County Treasurer has advised the undersigned that the particular question set forth will arise at the scavenger tax sale to be held next year.

The City of Decorah has levied certain special assessments authorized by Chapter 384, Code of Iowa, 1979. In some instances, both the ordinary property taxes and some of the special assessment installments are delinquent and the properties upon which the taxes and assessments are liens have been offered at annual tax sale pursuant to §§384.69 and 446.7, Code of Iowa, 1979, by the county treasurer but remain unsold. Next year, the treasurer will offer the properties for sale at scavenger sale pursuant to §§384.69 and 446.18, Code of Iowa, 1979, and it is expected that the county will be required to bid pursuant to §446.19, Code of Iowa, 1979, as amended by S.F. 159, §16, Acts of 68th G.A. (1979). At the time of the scavenger sale, there will be future unpaid, but not delinquent, special assessment installments attributable to these properties. The county treasurer proposes to offer the properties for sale for the delinquent taxes and delinquent special assessment installments. The question you pose is whether the tax sale purchaser (the county) will hold its tax sale certificates free and clear of any existing liens for future special assessment installments unless the city bids at the sale for the property to protect its interest in these future special assessment installments.

Section 384.69 of the Code provides as follows:

"Property against which a special assessment has been levied for public improvements may be sold for any sum of principal or interest *due and delinquent, at any regular or adjourned tax sale in the same manner with the same forfeitures, penalties, right of redemption, certificates, and deeds, as for the nonpayment of ordinary taxes. The purchaser at a tax sale takes the property charged with the lien of the remaining unpaid installments and interest.* When bonds have been issued in anticipation of special assessments and interest for which property is to be sold, the

city may be a purchaser and is entitled to all rights of purchasers at tax sales. The proceeds subsequently realized from sales of property so purchased by the city must be credited to the funds of the city from which deficiencies on the improvement were paid, or if there were no deficiencies, to the general fund." (Emphasis supplied.)

Section 446.7 of the Code provides for annual tax sales for delinquent real property taxes "provided, however, that no property, against which the county holds a tax sale certificate, shall be offered or sold." Counties hold tax sale certificates due to scavenger tax sales.

Scavenger tax sales are authorized by §446.18 of the Code, which provides:

"Each treasurer shall, on the day of the regular tax sale each year or any adjournment thereof, offer and sell at public sale, to the highest bidder, all real estate which remains liable to sale for delinquent taxes, and shall have previously been advertised and offered for two years or more and remained unsold for want of bidders, general notice of such sale being given at the same time and in the same manner as that given of the regular sale."

Section 446.19 of the Code, as amended, provides:

"When property is offered at a tax sale under the provisions of section 446.18, and no bid is received, or if the bid received is less than the total amount of the delinquent general and special taxes, interest, penalties and costs, the county in which the real estate is located, through its board of supervisors, shall bid for the real estate a sum equal to the total amount of all *delinquent general taxes, special assessments, interest, penalties and costs charged against real estate.* No money shall be paid by the county or other tax-levying and tax-certifying body for the purchase, but each of the tax-levying and tax-certifying bodies having any interest in the general and special taxes for which the real estate is sold shall be charged with the full amount of all the delinquent general and special taxes due the levying and tax-certifying bodies, as its just share of the purchase price. *This section does not prohibit a governmental agency or political subdivision from bidding at the sale for property to protect its interests.*" (Emphasis supplied.)

Section 569.8, Code of Iowa, 1979, as amended by §18 of S.F. 159, sets forth the manner in which property acquired by a county by tax deed can be sold. One of the conditions of such sale is that the purchaser is given "free title as to past general taxes and special taxes which are past due on any special assessment already certified to the county."

Clearly, the aforementioned statutory provisions provide the mechanism by which delinquent real property taxes and delinquent special assessments are collectible by a county treasurer. Moreover, it is clear that the tax sale purchaser takes the property, pursuant to §384.69, subject to the lien of any remaining, but not yet delinquent, special assessment installments. It is also clear that the authority of the county treasurer extends to tax sales for *delinquent* taxes and *delinquent* special assessments, whether the sale be made under the provisions of §446.7 or §§446.18 and 446.19. Such rationale also appears to apply to sales made by the board of supervisors pursuant to §569.8, as amended, albeit the above quoted §569.8 provisions are not a model of clarity.

In *Bennett v. Greenwalt,* 1939, 226 Iowa 1113, 286 N.W. 722, Polk County held tax sale certificates pursuant to what is now §446.19 on certain properties which also contained special assessment liens. One of the issues was whether the provisions of §7244, Code of Iowa, 1935 (now §446.7) precluding tax sale of property for which a county held a

tax sale certificate foreclosed tax sale for delinquent special assessment installments. The Court held that tax sale for delinquent special assessments could be made while the county held tax sale certificates to the subject property and stated at 226 Iowa 1128:

"It is our judgment that the decree is erroneous in enjoining and restraining the defendant county treasurer, and all future incumbents of that office, from selling at tax sale, for delinquent special assessment liens against it, any property for which Polk County holds tax sale certificates of purchase. It is our judgment that the restriction in section 7244 against tax sale for delinquent taxes, of any property against which a county holds a tax sale certificate, refers only to sales for ordinary taxes, that is general and special taxes for government purposes, and not to special assessments according to benefits."

The Court noted that if such property subject to tax sale certificates procured by the county pursuant to §446.19 could not be sold for delinquent special assessments, the result would be an interpretation of the tax sale statutes which would repeal by implication the provisions of §384.69 and that it was "a well known canon of statutory construction that repeals of statutes in whole or in part, by implication, are not favored." 226 Iowa 1132.

In 1970 O.A.G. 452, the Attorney General took note of new statutory provisions which gave special assessment liens "equal precedence with ordinary taxes." *Id.* at p. 453. The Attorney General opined that a tax sale purchaser "could not take title to the property, free and clear of all future installments of existing special assessment liens." *Id.* at p. 455. This same conclusion was reached by the Attorney General in 1920 O.A.G. 370.

Finally, it is relevant to point out that §446.19, as amended, does not state that a government agency or political subdivision must bid at scavenger sale to protect its interests; the statute merely declares that its provisions do not preclude such bidding. Hence, such bidding for purposes of protection of the city's interests is obviously not mandatory.

From the above discussion, it is clear that the county treasurer should attempt to sell property for all delinquent taxes and delinquent special assessments at scavenger sale. A city may, but need not, bid at such sale to protect its interests. In the event of nonbidding by a city, the property against which the county holds a tax certificate will be subject to existing liens for future unpaid special assessment installments.

July 17, 1979

STATE OFFICERS AND DEPARTMENTS: Campaign Finance. §56.13, Code of Iowa, 1979. Rules requiring Iowa committees to affirmatively determine if out-of-state committees have filed with the Campaign Finance Disclosure Commission and forbidding in-state committees to accept contributions from out-of-state committees where proper statements are not on file is outside the scope of the Commission's statutory authority. (Appel to Administrative Rules Committee, 7-17-79) #79-7-22

Administrative Rules Committee: We are in receipt of your request for an opinion on a proposed rule of the Iowa Campaign Finance Disclosure Commission on out-of-state contributions. The proposed rule is as follows:

190-4.16(56) Out-of-state contributions. Before an Iowa committee accepts a contribution from a committee outside of Iowa, the Iowa committee must contact the commission to determine if the out-of-state committee has submitted a statement of organization and appropriate disclosure reports with the commission. Iowa committees may not accept contributions from out-of-state committees who have not filed a statement of organization and appropriate disclosure reports with the commission.

The Commission states that this rule has been promulgated pursuant to §56.13, Code of Iowa, 1979, which states:

56.13 Action of committee imputed to candidate. Action by any person or political committee on behalf of a candidate, if known and approved by the candidate, shall be deemed action by the candidate. It shall be presumed that a candidate approves such action if he had knowledge thereof and failed to file a statement of disavowal with the commissioner or commission and take corrective action within seventy-two hours thereof.

Any person who makes expenditures or incurs in debtedness, other than incidental expenses incurred in performing volunteer work, in support or opposition of a candidate for public office shall notify the appropriate committee and provide necessary information for disclosure reports.

However, this section shall not be construed to require duplicate reporting of anything reported under this chapter, by a political committee, or of any action by any person which does not constitute a contribution.

Specifically, you ask whether the Campaign Disclosure Act is a penal statute which is to be narrowly construed and whether the proposed rule is beyond the statutory authority of the Commission since it places restrictions on the acceptance of campaign contributions that do not expressly appear in the Code.

Before moving directly to your questions, a brief overview of the structure of the Campaign Finance Disclosure Act may be useful. The Act defines candidate's committees as a committee designated by the candidate "to receive contributions, expend funds, or incur indebtedness in excess of one hundred dollars in any calendar year on behalf of the candidate," §56.2(13). A political committee is defined as a 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 a candidate for public office or ballot issue, §56.2(6). The statute makes no distinction between in-state and out-of-state committees.

Each political committee is required to appoint a treasurer, file an organizational statement with the committee, and submit periodic disclosure reports to the Commission, §§56.3, 56.5, 56.6. The Act requires only disclosure of contributions; it does not establish restrictions on amounts of contributions or on expenditures. Any person who willfully violates any provision of the chapter, may be guilty of a serious misdemeanor, §56.16.

The proposed rule is designed to help enforce the provisions of the Campaign Finance Disclosure Act with respect to out-of-state political committees which contribute to in-state committees. For instance, a Washington-based political action committee can contribute funds to an Iowa candidate's committee, even though it has not made appropriate

filings and disclosures with the Commission. Where the out-of-state committee has not made appropriate disclosures, the Commission cannot cross check the disclosures of the out-of-state committees with those of the listed recipients. The proposed rule requires that before an in-state committee accepts such funds, it must check with the Campaign Finance Disclosure Commission to determine if the out-of-state committee has filed appropriately, and if not, the in-state committee may not accept the contribution from the out-of-state committee until proper filing is completed.

The problem has limited dimension since most out-of-state committee contributions to Iowa committees are for candidates running for federal office. Out-of-state committees who receive or expend more than $1,000 for federal candidates and contribute to federal candidate committees in Iowa are not subject to the Iowa Campaign Finance Disclosure Act but must make full disclosure with the Federal Election Commission in Washington, 2 U.S.C. §421(d). Thus, the proposed rule is aimed only at situations where an Iowa committee other than that operating on behalf of a federal candidate receives a contribution from an out-of-state committee. Such occurrences are comparatively infrequent since out-of-state political committees, while vitally interested in who casts votes on Iowa's behalf in the Congress on issues of nationwide significance, are generally less interested in influencing elections with only statewide implications. Moreover, many of the out-of-state committees who might contribute to an Iowa committee also contribute $1,000 to candidates for federal office in Iowa and elsewhere and are subject to federal reporting requirements, 2 U.S.C. §431(d). Thus, a person interested in learning about the organization and sources of funds of an out-of-state committee reported to have contributed to an Iowa committee can generally obtain such information from election officials in Washington.

We do not question the proposition that out-of-state committees who contribute to Iowa committees are required to file an organizational statement and disclosure reports with the Commission. Nonetheless, even if the proposed rule does not expand criminal liability under Chapter 56, we do not believe the Commission has acted within the scope of its statutory authority in promulgating the proposed rule.

The Commission purports to have adopted the rule pursuant to §56.13 of the Code, *supra*. The purpose of §56.13 is to require a candidate to either disavow the actions of a person or political committee campaigning on his or her behalf about which he or she has knowledge or be held responsible for the actions of the person or committee. Thus, a political candidate who knows of a false disclosure made by a person or committee acting on his or her behalf must step forward and take corrective action or be held responsible. Section 56.13 thereby prevents a candidate from escaping criminal liability by arguing that the candidate did not actively make the false report. Knowledge alone is sufficient to establish a violation.

The Committee's rule, however, goes well beyond the "washing hands" problem. It thrusts upon *Iowa committees* (not candidates) the affirmative duty to investigate whether the out-of-state committee has submitted a statement of organization and appropriate disclosure forms, and may not accept contributions unless it has. The rule does not serve to further

the purpose of insuring that a *candidate* is responsible for *actions* which he or she has knowledge of and fails to disavow. Rather, the rule establishes new committee responsibilities and limits the sources of potential contributions. The proposed rule does not seek to implement §56.13, but to extend the responsibilities of in-state committees under the Campaign Finance Disclosure Act.

We see no legislative authorization for the Commission to impose additional responsibilities upon in-state committees beyond those specifically authorized in the Act. While the Commission may promulgate rules to carry out the provisions of the Act, §56.10(4), there is no provision which places affirmative duties upon in-state committees with respect to out-of-state contributions, and no provision which suggests that the Commission has the power to limit the sources of funds received by in-state committees. All the Act requires is full, truthful, and timely disclosures by the committees.

Given the difficulty of discovering violations and invoking the criminal sanctions of §56.16 against out-of-state committees, legal requirements similar to that outlined in the proposed rule may well be desirable. Because of the importance of complete campaign finance disclosures, the Department of Justice is prepared to support the legislation needed to provide the Commission with the authority to promulgate the proposed rule. Whether such a policy judgment should be translated into law, however, rests in the sound discretion of the Legislature, not with the Commission.

July 17, 1979

MUNICIPALITIES: Conflict of Interests — Chapter 71, §§362.5, 372.5, 400.15, and 403.16, the Code, 1979. Mere familial relationship does not create a conflict of interests. (Blumberg to Larsen, State Representative, 7-17-79) #79-7-23

The Honorable Sonja Larsen, State Representative: We have your opinion request of March 21, 1979. Pursuant to your facts, a city council member in a city with the commission form of government is the Safety Commissioner. His son was appointed to the police department and was subsequently promoted to Sergeant. At that time, the Council approved the promotion on a 3-2 vote, with the father casting the deciding vote. Currently the son is up for promotion to captain. There is concern because the son was not on the top of the promotion list. You ask whether this is a violation of Chapter 71, the Code, 1979. Additionally, we have determined from conversations with the city attorney, that the normal procedure for promotion is to receive recommendations from the chief and other members of the department. In this case that was done, and the recommendation was for the son.

Chapter 71 provides:

71.1 *Employments prohibited.* It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of the state or by virtue of the ordinance of any city in the state, to appoint as deputy, clerk, or helper in said office or position to be paid from the public funds, any person related by consanguinity or affinity, within the third degree, to the person elected, appointed, or making said appointment, unless such appointment shall first be approved by the officer, board, council, or commission whose duty it is to approve the bond of the principal; provided this provision shall not apply in

cases where such person appointed receives compensation at the rate of six hundred dollars per year or less, nor shall it apply to persons teaching in public schools, nor shall it apply to the employment of clerks of members of the general assembly.

71.2 *Payment prohibited.* No person so unlawfully appointed or employed shall be paid or receive any compensation from the public money and such appointment shall be null and void and any person or persons so paying the same or any part thereof, together with his bondsmen, shall be liable for any and all moneys so paid.

Because the commission is not appointing his son as "deputy, clerk or helper," this is not an instance of nepotism prohibited by §71.1.

Although you only asked for an opinion regarding nepotism, we feel that a discussion on a possible conflict of interests is necessary to render a complete opinion on the issue. Section 362.5 of the Code is the general statutory prohibition on conflicts of interest regarding municipal officers and employees. That section only concerns financial conflicts. Other conflict of interests provisions exist throughout Title XV of the Code regarding specific situations not applicable here. *See e.g.*, §403.16. Case law on conflicts of interest also encompasses primarily those of a financial nature. *See Wilson v. Iowa City*, 165 N.W. 2d 813 (Iowa 1969); *Town of Hartley v. Floete Lbr. Co.*, 185 Iowa 861, 171 N.W. 183 (1919); *Peet v. Leinbaugh*, 180 Iowa 937, 164 N.W. 127 (1917); *James v. City of Hamburg*, 174 Iowa 301, 156 N.W. 394 (1916); *Bay v. Davidson*, 133 Iowa 688, 111 N.W. 25 (1907); and, *Weitz v. Independent Dist. of Des Moines*, 78 Iowa 37, 42 N.W. 577 (1889).

In *Wilson*, however, there was a discussion of conflicts of interests extending beyond those of a financial nature. That case concerned §403.16, which prohibited any interest in property included in or proposed for urban renewal plans. One of the council members worked for an employer that was interested in purchasing some of the urban renewal property. His employment was such that he was in a position of influence. Accordingly, the court held that §403.16 was to be interpreted that the legislative intent was to prohibit any personal interest on the part of public officials in the whole project, even though the statute appeared to only deal with financial interests.

In Note, *Conflict of Interests: State Government Employees*, 47 Va. L. Rev. 1034, 1044 (1968) it is stated:

The two criteria determining a conflict of interest are actions inconsistent with the good of the public and derivation of private benefit. . . . To fall within the prohibition this private benefit must generally represent a present, personal, and pecuniary interest to the officer.

An interest which disqualifies an officer must be certain, demonstrable, capable of precise proof, pecuniary or proprietary, direct and personal. If collateral, remote, or consequential, proof that the interest influenced the decision is necessary. *See Moody v. Shuffleton*, 257 Pac. 564, 566 (Cal. 1927); *Appeal of Yenerall*, 165 Pa. Super. 144, 67 A.2d 565, 566 (1949).

In the law review article cited above, at page 1048, is the following statement:

The type of "personal" interest which a public official may not have is one that the courts have approached from two viewpoints. Some courts

regard the term as synonymous with pecuniary or financial, while others interpret it in the sense of kinship. Generally, more than mere friendship or kinship is required, although the relationships of husband, wife and minor child are sufficient in most states to create prohibited interest.

Some courts have held, as is stated in the above quote, that a familial relationship is enough to create a conflict of interest.

In *Low v. Town of Madison*, 135 Conn. 1, 60 A.2d 774 (1948), it was held that a member of town zoning commission could not vote on his wife's application for a change of zoning. There, at a special hearing before the commission, the husband acted as an agent for his wife in presenting facts to the commission, and then assumed his role as commissioner in voting. *Githens v. Butler County*, 350 Mo. 295, 165 S.W.2d 650 (1942), concerned a judge who authorized the sale of property to his wife. The court, in holding that a conflict of interests existed, reasoned that a husband's duty to support his wife and his entitlement to her property rights (dower) were pecuniary in nature. A similar result was reached in *Haislip v. White*, 124 W.Va. 633, 22 S.E.2d 361 (1942). There, two school board members voted to hire their wives in other than a teaching capacity. The court reasoned that the marital relationships resulting in common interests in the contracts of each constituted a sufficient conflict of interests. In *Woodward v. City of Wakefield*, 236 Mich. 417, 210 N.W. 322 (1926), a city commissioner acted as an agent for his wife on a proposed contract before the commission, and then voted in favor of the contract. Such acts constituted a conflict of interests. Finally, in *Rankin v. Board of Education of Egg Harbor Tp.*, 135 N.J.L. 299, 51 A.2d 194 (1947), the school board had entered into a contract with the sister-in-law of the chairman. Bids were let for the contract and the sister-in-law was not the lowest bidder. The proposals were rejected and new bids were let. Again, she was not the lowest bidder. The board then set forth new specifications with which only she could comply and bids were again let. This time the board awarded her the contract. The court held that a conflict of interests existed in light of the outrageous conduct of the board.

In each one of these cases the courts found a pecuniary interest, either direct or indirect, as with the spouses, or conduct so outrageous, that the contracts were voided. Here, however, we are not faced with those types of problems. No contract such as was involved in the above cases is evident here. The matter is one of promotion from one position to another within the department. There is nothing that we can find in Iowa law which holds that more than one member of a family cannot work for the same governmental body. The statute on nepotism, cited above, does not even prohibit such employment.

Several cases exist which hold that a familial relationship does not create, in and of itself, a conflict. We have so held in previous opinions. *See* 1972 O.A.G. 338 and 1966 O.A.G. 38.

In *Cunningham v. Union High School Dist. No. "0"*, 131 Wash. 41, 228 Pac. 855 (1924), the school board let contracts to sons of two of the directors. It was contended that the contracts were void because of an interest on the part of the director-fathers. The court found that no beneficial interest existed on the part of the fathers merely because the contracts were let to their sons. It was held in *Cason v. City of Lebanon*, 153 Ind. 567, 55 N.W. 768 (1899), that the mere fact that the city

engineer was the father-in-law of a member of a firm with which the city had contracted was not sufficient to create a conflict of interest. A similar result was reached in *Porter v. Moore*, 200 Ky. 95, 252 S.W. 97 (1923), where the secretary of the board in question was the brother of a successful bidder on a contract with the board. *See also Moody v. Shuffleton*, 257 Pac. 564 (Cal. 1927), where a member of a board of supervisors was the father of the person contracting with the board; and, *Appeal of Yenerall*, 165 Pa. Super. 144, 67 A.2d 965 (1949), where the daughter of a supervisor contracted with the board. In *Board of Education of Zalcski School Dist. v. Boal*, 104 Ohio St. 482, 135 N.E. 540 (1922), a statute prohibited a member of the board from participating in the awarding of a contract to a relative, specifically, father, mother, brother or sister. The Court reasoned that the statute could not be extended to prohibit a contract with a wife or child.

In *Lewick v. Glazier*, 116 Mich. 493, 74 N.W. 717 (1898), the fact that a village trustee was the father of a contractor with the village did not create a conflict of interests. It was held in *Thompson v. District Board of Moorland Tp.*, 252 Mich. 629, 233 N.W. 439 (1930), that a conflict of interests did not exist when the wife of a board member was hired as a teacher. Likewise, in *Edward E. Gillen Co. v. City of Milwaukee*, 174 Wis. 36—2, 183 N.W. 679 (1921), the fact that a city commissioner was the father of an individual who was an officer in a company contracting with the city did not create a conflict of interests in the absence of any evidence of a financial interest in the company by the father. See also, *City of Valdosta v. Harris*, 156 Ga. 490, 119 S.E. 625 (1923); *Armstrong v. Zoning Board of Appeals*, 158 Conn. 158, 257 A.2d 799 (1969).

What can be gleaned from the majority of these cases is that generally, mere familial relationship is insufficient to constitute a conflict of interests. Where the Courts have held such conflicts to exist they have either found an actual financial or beneficial interest or conduct which was outrageous or unjustly favorable to the family member in the award of the contract.

As stated above, the facts in question here are not analogous to those cases wherein a conflict of interests was established. It surely cannot be said that the father has a financial or beneficial interest in the employment of his adult son. Pursuant to §372.5, a city governed by the commission form of government has its council members elected to administer four out of the five city departments of which public safety is one. Section 400.15 provides that in the commission form of government, the superintendents of the respective departments shall make all appointments and promotions with the approval of the city council. Thus, the superintendent of public safety would make all appointments and promotions for the police department. Such is a statutory duty which the office holder cannot shirk, nor can anyone else assume that responsibility. To hold, under these facts, that a conflict of interests exists which would void any such action now and in the future would severely hamper the administration of a city and its employees. There may be such facts, as indicated in some of the above cases, which would require a court to void a similar action. However, under the set of facts here, no such situation exists.

Accordingly, it is our opinion that a mere familial relationship does not create a conflict of interests, and the promotion of the son by the father-council member would be proper.

July 20, 1979

INSURANCE BENEFITS FOR GOVERNMENT EMPLOYEES: Counties may provide insurance coverage for dependents of employees and such coverage is a mandatory subject of the collective bargaining process. The limitation on funding of insurance in §509A.3, Code of Iowa, 1979, applies only to employees and officers not covered by Chapter 20, Public Employment Relations Act, when costs of an insurance plan are shared by the employer and employee. Article XI, §3, Constitution of Iowa, Chapter 20, §20.9, Chapter 23, §§24.37, 279.12, 449.9(2), Chapter 509, Chapter 509A, §§509A.1, 509A.2, 509A.3, 509A.5, 509A.8, 514.16, Code of Iowa, 1979, Ch. 1095, Acts of the 65th G. A. (1974). (Hagen to Tompkins, Cerro Gordo County Attorney, 7-20-79) #79-7-24

Mr. Richard Tompkins, Cerro Gordo County Attorney: You asked for an opinion of the Attorney General concerning family benefits under county employee group insurance programs and whether such benefits are a proper subject for negotiation pursuant to the public employer collective bargaining law. The specific questions you propound are as follows:

1. Under Chapter 509A, can the board of supervisors of the county agree to pay a part or all of the family rate for hospital or other insurance benefits or are they restricted to the single rate for the employee?

2. Under the County Home Rule Amendment of the Constitution of Iowa, can the board of supervisors act as a legislative body and determine that the family rate for hospital and other insurance benefits may be paid by the county?

3. Is family coverage insurance a proper subject for labor contract negotiations?

4. If family coverage may be provided and is a proper subject for labor negotiations, are there any restrictions as to how it may be implemented?

The substance of the answers to your first three questions was contained in a recent decision of the Iowa Supreme Court, *Charles City Comm. School Dist. vs. P.E.R.B.*, 275 N.W.2d 766 (Iowa 1979). The issue of whether family or dependent health insurance was a proper subject for negotiation by Iowa governmental bodies was before the Court in that case. The duty of Iowa public employers to enter into collective bargaining was created by Chapter 1095, Acts of the 65th G. A., 1974, codified as Chapter 20, Code of Iowa (1979). Section 20.9 provides in part as follows:

Scope of negotiations. The public employer and the employee organization shall meet at reasonable times, including meetings reasonably in advance of the public employer's budget-making process, to negotiate in good faith with respect to wages, hours, vacations, insurance, holidays, leaves of absence, shift differentials, overtime compensation, supplemental pay, seniority, transfer procedures, job classifications, health and safety matters, evaluation procedures, procedures for staff reduction, in-service training and other matters mutually agreed upon. [Emphasis added].

In construing the meaning of the term "insurance" as found in §20.9, the Court relied on §279.12, which predated Chapter 20 and concluded that health and life insurance are included in the meaning of "insurance" in §20.9, 275 N.W.2d at 773.

The court dealt with health insurance for dependents of public employees as a separate question and decided that "the distinction between public employees and their dependents in provision of health insurance would be spurious since the practical effect of dependent coverage is of direct and immediate benefit for the employee himself." *Charles City Comm. School Dist. v. P.E.R.B., supra*, at 773.

Insurance programs for county employees are authorized in Chapter 509A which provides in §509A.1 that "The governmental body of the state, *county*, . . . *may* establish *plans* for and procure *group insurance*, health or medical service for the employees of the state, county, school district or tax-supported institutions." [Emphasis supplied]. Chapter 509, entitled Group Insurance, describes and defines group policies which may be issued by insurance companies doing business in Iowa and includes the following statement:

Group policies may include dependents of the employee, including the spouse. [Emphasis added].

See §§509.1(1)(e); 509.1(4)(e); 509.1(5)(e); and 509.1(6)(e), Code of Iowa, 1979.

Previous opinions issued by the Iowa Attorney General had construed the term "employee" in §509A.1 narrowly, with the effect that dependent coverage had not been allowed. *See* 1976 O.A.G. 602; 1974 O.A.G. 370. The Court in *Charles City Comm. Sch. Dist. v. P.E.R.B., supra.*, at 773 rejected the construction in those opinions and said "We do not believe §509A.1 can restrict the scope of P.E.R.A. [Public Employment Relations Act]."

There are three categories of subjects of bargaining found in §20.9 according to the Supreme Court and Justice McGivern wrote:

. . . we conclude the insurance proposal by the employees that medical and health insurance coverage be provided for dependents and family members of employees *is a mandatory subject of bargaining under §20.9.* [Emphasis added].

275 N.W.2d 774. Of course the obligation to negotiate in good faith does not compel either party to agree to a proposal or make a concession. *See* §20.9, last sentence, 1st para., Code of Iowa, 1979.

In question 4 above you inquired as to what, if any, restrictions are imposed on implementation of insurance programs for county employees. Section 20.9, Code of Iowa, 1979, states that meetings in connection with the negotiation process must take place "reasonably in advance of the public employer's budget-making process." That section of the collective bargaining Act permits the governmental body to include funding requirements reached through the negotiation process in its budget allocations and estimates.

The Iowa Constitution limits local spending in §3 of Article XI. The principal regulations of the county budgetary process are found in

Chapter 24, Code of Iowa, 1979. Section 24.37 contains the tax levy limitation imposed on county governments, incorporating by reference other limitations in other Code sections. Section 444.9(2) contains the limitation on annual tax levies for *ordinary revenues* which includes expenditures for personnel, employees and officers in the various offices, and departments of county government.

Funding of group insurance programs adopted by governmental bodies is regulated by Chapter 509A and §514.16. Section 509A.2, Code of Iowa, 1979, is as follows:

Sources of funds. The funds for such *plans* shall be created *solely* from the contributions of employees, *or* from contributions wholly *or* in part by the governing body. [Emphasis added].

Thus, the cost of insurance programs may be borne wholly by the employee, or wholly by the governing body, or it may be shared by the employer and employee. The funds for insurance plans are under the control of the governing body. §509A.5, Code of Iowa, 1979. The board of supervisors administers insurance plans for county government and is authorized to "establish rules for the operation thereof." §509A.8, Code of Iowa, 1979. If all or part of the cost of an insurance plan is to be borne by the employee. §514.16, Code of Iowa, 1979, authorizes deductions from the salary or wage of the employee. Participation in insurance plans is optional for each employee. §509A.4, Code of Iowa, 1979.

The major ambiguities in the scheme set forth in the various Code sections are found in §509A.3 which is as follows:

Assessment of employees. All employees participating in any such *plan* the fund of which is created under the provisions of section 509A.2 shall be assessed and required to pay *an amount to be fixed by the governing body* not to exceed *the two percent* which shall be contributed by the public body according to the *plan* adopted, and the amount so assessed shall be deducted and retained out of the wages or salaries of such employees.

Any employee may authorize deductions from his wages or salary in payment for *plans* authorized in this division in the manner provided in section 514.16. [Emphasis supplied].

To the extent that the amount which is required to fund insurance programs is no longer "fixed by the governing body" but is arrived at through collective bargaining, we believe that §509A.3 does not apply to employees covered by Chapter 20, Code of Iowa, 1979. [For discussion of applicability of §509A.3 to unorganized workers, see below].

School districts in Iowa have not been granted Home Rule as have municipalities and counties. School districts continue to be subject to the Dillon Rule that officials have only such powers as are expressly conferred by statute, or necessarily implied from powers so conferred. *Merriam v. Moody's Executors*, 25 Iowa 163, 170 (1868); *Valentine v. Ind. School Dist. of Casey*, 191 Iowa 1100, 183 N.W. 434 (1921). Inasmuch as the Iowa Supreme Court reached its decision with respect to health insurance benefits for dependents of school district employees, an analysis of the applicability of the County Home Rule constitutional amendment is unnecessary in response to your questions which relate to benefits for employees who are represented by employee organizations pursuant to Chapter 20, Code of Iowa, 1979.

In summary, counties may provide insurance coverage for dependents of county employees and such coverage is a mandated subject for negotiation pursuant to Chapter 20, Code of Iowa, 1979. We are of the opinion that the total cost of such insurance benefits and whether the county bears the cost or shares the cost with employees are negotiable aspects of the bargaining process.

INSURANCE COVERAGE FOR EMPLOYEES NOT COVERED BY CHAPTER 20, CODE OF IOWA, 1979.

There are many employees of the counties of the state that have not become members of an employee organization and therefore are not covered by the provisions of Chapter 20, Code of Iowa, 1979. The governance of the terms of employment of unorganized county employees and those who are exempt from Chapter 20 is regulated under other sections of the Code. The implications of the County Home Rule Amendment are relevant to the responsibilities of the counties in relation to unorganized and exempt employees and officers.

This office issued an opinion on April 6, 1979, on the general impact of the County Home Rule Amendment. That opinion declared that the Home Rule Amendment gives counties immediate authority to handle their own affairs. The Home Rule Amendment contains four basic limiting conditions. They are: 1) Counties have no power to levy taxes unless authorized by statute; 2) In the event the power or authority of a county conflicts with that of a municipal corporation within the county, the municipality's power and authority prevails within its jurisdiction; 3) The Home Rule power exercised by a county cannot be "inconsistent with the laws of the General Assembly; 4) Home Rule power can only be exercised with respect to local or county affairs.

Counties are authorized to tax for personnel expenditures and therefore the first limitation is met. The second limitation is not applicable in this situation. There seems to be no problem in connection with the third limitation in that Chapter 509A, Code of Iowa, 1979, provides in detail for insurance programs for county employees as discussed above. Finally, insurance programs for the benefit of county employees are well within the parameters of local or county affairs.

Because the Supreme Court in *Charles City Comm. School Dist. v. P.E.R.B.*, 275 N.W.2d 766, 773 (Iowa 1979) held that a distinction between public employees and their dependents in provision of insurance "would be spurious" we believe county boards of supervisors may provide insurance coverage for dependents of employees and officials who are not associated with collective bargaining organizations.

APPLICABILITY OF §509A.3

As indicated above, §509A.3, Code of Iowa, 1979, is very unclear. *See* §§509A.2 and 509A.3 above. For example, the language of §509A.3 does not reveal of what the two percent is a portion. An opinion issued by this office, 1966 O.A.G. 22, 26, interpreted the language of then §365A.3, Code of Iowa, 1962, to mean two percent of the individuals employee's earnings.

The legislative history of Chapter 509A, Code of Iowa, 1979, especially §§509A.2 and 509A.3, is lengthy and complex.[1] The entire chapter was originally a part of Title XV, entitled City and Town Government and applied only to cities having a population of 125,000 or more. In its early form, §509A.2 provided for insurance plan costs to be shared by the city and the employee and contained two numbered paragraphs. Section 365A.3, Code of Iowa, 1950, contained the funding limit and contained the language in the first paragraph of §509A.3, Code of Iowa, 1979, above. The original second section was amended to permit payment of health insurance premiums solely by the employee and eventually contained three numbered paragraphs. Section three was amended to refer to paragraphs one and two in section two which referred to cost-sharing arrangements. The entire chapter was shifted twice — first to become a section entitled Group Insurance for Government Employees, in Chapter 509, as §§509.15-26, Code of Iowa (1966) and then to become Chapter 509A, Code of Iowa (1971). In 1972, the General Assembly revised §509A.2 into its present form of a single sentence and §509A.3 was unchanged. The Legislature, in the omnibus corrections chapter in 1975, *see Footnote*, removed the reference in §509A.3 to the no-longer-numbered but separate provisions of §509A.2, but made no attempt to clarify the resulting ambiguity which remained. We believe the legislative history of the Chapter and of §§509A.1, 2, and 3 demonstrates that §509A.3 is meant to apply *only* when the cost of a plan is shared between employer and employee.

There is an additional ambiguity in that the distinction between a "plan" and "plans" is unclear. No definition is provided for those terms in Chapter 509A, Code of Iowa, 1979, or in previous codifications cited in the footnote or by reference to other Code sections. Throughout the legislative history of Chapter 509A, *see Footnote* above, it has contained references to "plan" and "plans". Where both the singular and plural of a term are included in the same Code section, *see e.g.*, §509A.3 above, the Legislature must have intended a distinction. For example, §509A.5, Code of Iowa, 1979, contains "the fund for *each* plan . . ." [Emphasis supplied].

We conclude that the overall scheme of Chapter 509A, Code of Iowa, 1979, presumes the possibility of a number of "plans", each of which would be subject to the two percent limitation on the contribution by the employer and the employee. Thus, in implementation of insurance programs, the effect of the limitations of §509A.3, Code of Iowa, 1979, would depend upon how many separate insurance "plans" were procured by the governing body. For example, there could be a surgical plan, an accident plan, a permanent disability income plan, and so on. Because §509A.8, Code of Iowa, 1979, permits governing bodies to promulgate

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[1] *See* Ch. 159, §§1-10, Acts, 53rd G.A. (1949); Ch. 365A entitled Group Insurance in Certain Cities, Code of Iowa, 1950; Ch. 185, Acts of the 57th G.A. (1953); §§365A.1, 2 and 3, Code of Iowa, 1954; 1958 O.A.G. 32; Ch. 232, Acts of the 60th G.A. (1963), §§509.15 to 506.25, Code of Iowa (1966); Ch. 509A, Code of Iowa (1971); Ch. 1088, Acts of the 64th G.A. (1972); Ch. 509A, Code of Iowa (1973); §§509A.1, 2 and 3, Code of Iowa (1975); Ch. 67, Acts of the 66th G.A. (1975); Ch. 509A, Code of Iowa (1977) and (1979).

rules in connection with insurance plans, we believe what constitutes a "plan" could be defined by rule because it is not defined in the statute. The County Home Rule Amendment provided further support for the express power to make rules.

In summary, we construe §509A.3 to apply *only* to circumstances in which the cost of a "plan" is shared. Where costs are shared, the percentage limitation of §509A.3, Code of Iowa, 1979, applies to "each plan" of insurance as defined and procured by the governing body.

Finally, we believe the Legislature could provide more guidance than presently exists in Chapter 509A and Chapter 20 as to its intentions concerning limitations on expenditures by governmental bodies for insurance programs for employees.

July 20, 1979

SALE OF SCHOOLHOUSE: Use of funds derived from sale of realty by school district to city within its jurisdiction. §§23.2, 23.18, 278.1(2), 278.2, 297.7, 297.22, 297.22(4), 297.25, 297.41, Code of Iowa, 1979. Sections 278.1(2) and 297.41 authorize separate methods by which school districts may dispose of property and allocate funds derived from disposition of property. (Hagen to Schnekloth, State Representative, 7-20-79) #79-7-25

Honorable Hugo Schnekloth, State Representative: You have asked for an opinion of the Attorney General concerning the meaning of statutes relating to the sale of property by a school district to a city within its jurisdiction. The factual situation which gave rise to your inquiry is summarized as follows:

Arrangements have been made by the Clinton Community School District to sell the Baldwin School which it owns to the City of Clinton pursuant to the provisions of §297.22, Code of Iowa, 1979. The City of Clinton is purchasing the property under the Community Development Block Grant Program as a site for a future elderly housing facility. The property to be transferred is located within the jurisdiction of both the school district and the city.

Because of the language of §278.1(2) and §279.41, Code of Iowa, 1979, you ask the following questions:

1. What kinds of sales of schoolhouses and schoolhouse sites does §279.41, Code of Iowa, 1979 except from voter authorization under §278.1(2)? Does §279.41 apply only to acquisitions by another public body through eminent domain proceedings or substitutes therefor?

2. Does sale of the property to the City of Clinton under the facts outlined above constitute a sale or other disposition within the scope of §279.41, Code of Iowa, 1979 or is a vote authorizing the sale required under §278.1(2), Code of Iowa, 1979?

The sale is being accomplished pursuant to §297.22(4), Fourth Unnumbered Paragraph, Code of Iowa, 1979, which provides in pertinent part as follows:

The *board of directors* of any school corporation *may* sell, lease, exchange, give or grant and accept any interest in real property *to*, with or from *any county, municipal corporation, school district or township if the real property is within the jurisdiction of both the grantor and grantee.* The provisions of sections 297.15 to 297.20, sections 297.23 and 297.24, and the property value limitations and appraisal requirements of this section shall not apply to any such transaction between the aforesaid local units of government. [Emphasis supplied].

It is our view that the transaction described in your letter and summarized above certainly falls within that Code section.

You suggested the possibility of a conflict between the terms of §278.1 (2) and §279.41, Code of Iowa, 1979. We do not believe a conflict between the two Code sections exists. Rather, they authorize *separate methods* for disposition of realty and separate decisional processes with respect to the use of the funds received therefrom. Section 279.41, Code of Iowa, 1979, provides as follows:

Schoolhouses and sites sold—funds. *Any fund received* from the *condemnation, sale, or other disposition for public purposes of schoolhouses, school sites or both* schoolhouses and school sites may be deposited in the schoolhouse fund and may *without a vote of the electorate be used for the purchase* of school sites or the *erection* or *repair* of schoolhouses *or both* as ordered by the board of directors of such school district, provided, however, that the board shall comply with section 297.7. [Emphasis supplied].

In response to your first question, part one and two, we believe that §279.41, Code of Iowa, 1979 applies to acquisitions by a school district through the use of eminent domain procedures but it also applies to sales such as those authorized by §297.22(4), paragraph 4, as set forth above. According to §279.41, the governmental unit acquiring property from the school district must use it for a "public purpose", but we know of no provision in Iowa law authorizing governmental units to acquire property for other than public purpose or benefit. The essential requirement of §279.41 is that funds received from a transaction such as that in Clinton "may without a vote of the electorate be used for the purchase of school sites or the erection or repair of a schoolhouse or both . . ."

Chapter 278, Code of Iowa, 1979, entitled Powers of Electors, provides in §278.1(2) that the voters of the district at the regular (school) election shall have power to:

Direct the *sale,* lease, or other disposition of *any schoolhouse* or site or other property belonging to the corporation, and *the application to be made of the proceeds* thereof, *provided,* however, that *nothing* herein *shall be construed to prevent* the sale, lease, exchange, gift or grant and acceptance of any interest in real or other property *by the board* of directors *without an election to the extent authorized in section 297.22.* [Emphasis supplied].

As we understand that section, it is a much broader and more flexible power which resides in the electors of the school district than that held by the board of directors. The policy behind the distinction is the fundamental democratic principle that the electors are entitled to hold more power. The following section, §278.2, Code of Iowa, 1979, permits the board to submit questions to the voters in its own discretion and requires submission of questions upon petition by a requisite number of voters. The power held by the board of directors pursuant to §279.22 and §279.41 is much more restricted. There is no relevant legislative history or judicial authority but as we read the language of §§278.1 and 278.2, Code of Iowa, 1979, the *voters* could authorize the expenditure of funds derived from disposition of school property for *any* school purpose authorized by law and not just for school site or schoolhouse purposes. Thus, in a period of declining enrollments and school closings, the voters could decide to sell school property and allocate the funds to the operation of the school system.

We find statutory support for our view that separate methods exist for disposition of school property and for the use of funds derived therefrom in §297.25, Code of Iowa, 1979, which provides as follows:

Rule of construction. Sections 297.22 to 297.24, inclusive, *shall be construed as independent* of the *power* vested in the *electors* by section 278.1, and as *additional thereto.* [Emphasis supplied].

Finally, we take note that it is only section one of §297.7, Code of Iowa, 1979, that applies to the transaction described in your inquiry. That section requires bidding procedures and hearings on contracts to spend in excess of $5,000 pursuant to §23.2 and §23.18, Code of Iowa, 1979, and consultation with the Department of Public Instruction's building consultant.

In summary, it is our opinion that the answers to your questions are as follows:

1. Section 279.41, Code of Iowa, 1979, permits sale of school district realty to other governmental units within its jurisdiction pursuant to §297.22 and the funds derived from such a sale are allocated to the district's schoolhouse fund.

2. Unless the school district board contemplates use of the funds derived from the transaction for purposes other than those authorized to be financed by the schoolhouse fund, a vote is not required.

July 23, 1979

COURTS: Records, preservation and destruction thereof. §§255.1, 255.4, 606.22, Code of Iowa, 1979. Section 255.4 of the Code provides that the records maintained by the clerk of court, pursuant to Chapter 255 of the Code, may be destroyed by the clerk of court, pursuant to Chapter 255 of the Code, may be destroyed by the clerk of court, after five years, without reproduction of those records by the clerk of court. (Heintz to Frisk, Harrison County Attorney, 7-23-79) #79-7-26(L)

July 23, 1979

COUNTIES AND COUNTY OFFICERS: A county board of supervisors may sell the county farm which is no longer needed, invest the proceeds, and allocate the interest or earnings from such investment to the county Institutions and Poor Funds. Article III [Section 39A], Iowa Constitution; §§24.22, 252.31, 252.35, 252.43, Chapter 253, §§331.18, 332.3(6), 332.3(13), 444.12, 452.10, 453.1, 453.7, Code of Iowa, 1979. (Hyde to Schwengels, State Senator, 7-23-79) #79-7-27

Honorable Forrest V. Schwengels, State Senator: You have requested an opinion of this office as to whether a county board of supervisors can sell the county farm, which is no longer needed, invest the principle in a long-term program to be used for future construction, and pay the interest into the county Institution and Poor Funds.

County boards of supervisors are empowered by §332.3(13), Code of Iowa, 1979, "[w]hen any real estate, buildings, or other property are no longer needed for the purposes for which the same were acquired by the county, to convert the same to other county purposes or to sell or lease the same . . .". Prior to the enactment of this section in 1924, as §5130.13, Code of Iowa, 1924, there was no express statutory authority for a board of supervisors to sell any property without approval by the electorate. Early opinions of this office interpreted this lack of authority to preclude the sale of county property, including the county farm, even where the purpose of the sale was to acquire other property to be used in the same manner, or where county farm land was desired for schoolhouse purposes. 1912 O.A.G. 797; 1918 O.A.G. 452.

Section 5130.13 authorized sale of county property "at a fair valuation." In 1974, the amendment of now §332.3(13), Code of Iowa, 1979, deleted the "fair valuation" limitation and imposed requirements of sale at public auction after specified notice, or then by sealed bid. Thus, express statutory authority exists for sale of county property, such as the county farm, when the sale is approved by a majority of the whole board of supervisors, §331.18, and carried out in the manner prescribed by §332.3(13).

With the 1978 adoption of the County Home Rule Amendment, Article III [Section 39A] of the Iowa Constitution, however, counties need no longer seek express statutory authority for each exercise of governmental power in the determination of local affairs, where such exercise is not inconsistent with state law. *See* 1979 O.A.G. (Hagen to Danker et al., April 6, 1979). Section 332.3(6) grants to the board of supervisors the authority to transact all county business unless a contrary provision is made.

There appears to be no statutory prohibition preventing the board of supervisors from selling the county farm. Chapter 253, Code of Iowa, 1979, "County Care Facilities", contains no requirement that a county establish or maintain a county care facility or county farm, and provides express authority for a county to lease a facility and contract with private parties to provide care. Section 253.1, which expressly authorizes the county to establish a county farm, is couched in permissive terms:

> The board of supervisors of each county may order the establishment of a county care facility in such county whenever it is deemed advisable . . .

Since the county is not required to maintain a county farm, and there is no statutory provision precluding the sale of a facility already in existence and no longer required, the board of supervisors may decide to sell it pursuant to its powers under §332.3(13) and County Home Rule.

Your question indicates further that the board of supervisors plans to invest the proceeds from the sale of the county farm and pay the income into the county Institutions and Poor Funds. Since there is no statutory provision directing the board of supervisors to create a specific fund or account using the proceeds from the sale of county property, such as the county farm, it appears the board should properly direct the sale proceeds into the county general fund.[1]

Under the express authority of §§452.10 and 453.1, the county treasurer is required to invest any public funds not currently needed for operating expenses in time certificates of deposits in certain approved banks or in notes or other evidences of indebtedness which are obligations of or guaranteed by the federal government. The statutory provisions limit only where public funds can be invested, and place no restrictions on the amount to be invested or the terms thereof.

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[1] Pursuant to its powers under County Home Rule, the board of supervisors could create a specific fund, earmarking the sale proceeds for a specific purpose, i.e., future construction of another county facility. Records for such fund must be kept separate, *see* §§334.8 and 445.59, and the interest earned from investment would be credited to the specific fund, §453.7, and would not be available for other purposes.

Section 453.7 provides that interest or earnings on investments and time deposits made in accordance with the provisions of §§452.10 and 453.1 shall be credited to the general fund of the governmental body making the investment or deposit. Funds from the county general fund are then available for payment into specific county funds, as authorized by §24.22, such as the Institutions Fund and the Poor Fund.

The authority of the county board of supervisors to invest, pay, transfer and designate county funds is a local affair within the powers conferred by the County Home Rule Amendment. Further, the specific Code sections which establish the Institutions and Poor Funds for a county authorize payment into these funds from the county general fund. Section 444.12, which creates funding by tax levy for the Institutions Fund, states in part:

> Should any county fail to levy a tax sufficient to meet the expenses which the county is required to pay, or which the board of supervisors chooses to pay, from the county mental health and institutions funds pursuant to this section, the deficiency shall be met by transfer of the funds from the county general fund to the county mental health and institutions fund.

Sections 252.31 and 252.35 designate funds for relief of the poor to be paid out of the county treasury. Section 252.43 indicates that:

> [t]he expense of supporting the poor shall be paid out of the county treasury in the same manner as other disbursements for county purposes . . . [2]

The county general fund is the only fund from which payments designated to come from the "county treasury" may be allowed. 1940 O.A.G. 46. Pursuant to its specific authority enumerated above and county home rule power, the county board of supervisors may allocate investment income from the county general fund into the Institutions and Poor Funds.

In conclusion, it is our opinion that there is constitutional and statutory authority for the county board of supervisors to sell a county farm which is no longer needed. The sale must be conducted under the procedure set down in §332.3(13). The proceeds of such a sale may be paid into the county general fund and invested. The interest or income earned from investment will be paid into the county general fund, and may be allocated to the county Institutions and Poor Funds.

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[2] A board of supervisors is authorized to levy a poor tax in case the ordinary revenue of the county is insufficient for support of the poor, §252.43, and there are limitations on transfer of funds to the poor fund once that levy has been made. *See* §24.22. Where payments into the poor fund are annually allocated by the board of supervisors from ordinary county revenue, there would be no "transfer" from any other fund and this limitation would not apply.

July 25, 1979

STATE OFFICERS AND DEPARTMENTS: Compatibility of offices §§29C.9 and 29C.10, The Code, 1979. The positions of Chief of Police and Coordinator of the joint city-county disaster services and emergency planning administration are compatible. (Blumberg to Bruhn, Acting Director, Office of Disaster Services, 7-25-79) #79-7-28 (L)

July 25, 1979

STATE OFFICERS AND EMPLOYEES: Airline discount coupon ownership. §8.13(2), Iowa Code (1979). Where the State pays for the airline travel of its officers or employees, including legislators, discount coupons received by the officer or employee from the airline as a result of the travel are the property of the State. (Haskins to Halvorsen, State Representative, 7-25-79) #79-7-29 (L)

July 26, 1979

MOTOR VEHICLES: Exceeding speed limits — authorized emergency vehicles. Sections 321.230, 321.1(26), 321.231, 321.285, Code of Iowa (1979). A police officer responding to an emergency call may lawfully exceed the speed limit only when making use of an approved audible or visual signaling device. (Miller to Jochum, State Representative, 7-26-79) #79-7-30 (L)

July 27, 1979

STATE OFFICERS AND DEPARTMENTS: Audiologists — §§147.151, 154A.1 and 154A.19, The Code 1979. Licensed audiologists cannot dispense hearing aids without the additional license to dispense hearing aids required by Chapter 154A. They may, however, determine the need for and the use of hearing aids, and may loan them without remuneration. (Mueller to Ver Hoef, Chairperson, Board of Speech Pathology and Audiology, 7-27-79) #79-7-31 (L)

August 2, 1979

CONSTITUTIONAL LAW: General Assembly; State Representative, Qualification for Office; Residence Requirement; Vacancy in Office; Art. III, §4, Const. of Iowa; §69.2, The Code 1979. When qualifications for office are defined and fixed in the constitution, they are not subject to legislative alteration, addition, or modification. A state representative who met the minimal constitutional residency requirements under Article III, §4 at the time of his or her election is not disqualified from office even if the representative changes residence. (Miller to Halvorson, State Representative, 8-2-78) #79-8-1

Honorable Roger A. Halvorson, State Representative: We are in receipt of your July 13th request for an opinion concerning residency requirements of elected officials. You note that a recent news article indicated that a legislator had purchased a home and was operating a business outside his district. This set of circumstances prompted you to ask the following questions:

1. Is there a residency requirement after an elected official has qualified for a certain district?

2. Is the filing of intention such as "Homestead Exemption" an indication of one's intention (of residency)?

The first question you posed was considered by Attorney General Richard Turner in an opinion published in 1974, *see* 1974 O.A.G. 459. The factual situation presented in that opinion is far more extreme than those outlined in your opinion request. Representative De Jong had moved

from Marion County to a home in Des Moines, had registered his car in Polk County, and was registered to vote in Polk County. In addition, De Jong had filed an affidavit of candidacy for State Senator from a district comprising a part of Polk County. The opinion noted that since there was no question that Representative De Jong officially resided in Polk, the issue was squarely joined as to whether moving his residence from one representative district to another is constructive resignation which creates a vacancy in office. *See* 1974 O.A.G. at 460.

The opinion analyzes the relationship between constitutional and statutory provisions relating to public offices. Article III, Section IV, Constitution of Iowa, provides:

> No person shall be a member of the House of Representatives who shall not have attained the age of twenty-one years, be a citizen of the United States, and shall have been an inhabitant of this state one year next preceding his election, and at any time of his election shall have had an actual residence of sixty days in the county, or district he may have been chosen to represent.

In addition to these express constitutional requirements, however, Section 69.2, The Code 1979, states:

> What constitutes vacancy. Every civil office shall be vacant upon the happening of either of the following events:
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> * * *
>
> (3) The incumbent ceasing to be a resident of the state, district, county, township, city, town, or ward by or for which he was elected . . .

Thus, while the Constitution only requires that a state representative be a resident of the state for one year and an actual resident of the district to which he is elected for sixty days, §69.2, if applicable, additionally provides that the incumbent must continue to be a resident of the district or the office is automatically vacated. The legal question raised in the 1974 opinion was whether the legislature could impose additional qualifications upon state representatives by statute beyond those established in the Constitution of Iowa.

The lengthy 1974 opinion overturned two previous cryptic Attorney General's opinions, 1906 O.A.G. 355 and 1964 O.A.G., and concluded that additional qualifications for state representatives beyond those outlined in Article III, §4 could not be imposed by statute. Thus, the Attorney General held that the terms of Section 69.2 did not apply to state representatives or to any other office where qualifications were constitutionally prescribed. We have reviewed the conclusion of the 1974 opinion and find ample support for it in analogous federal law, state court decisions, and in Iowa's Constitution itself.

The most celebrated decision dealing with the exclusivity of constitutional qualifications to constitutional office is *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed. 491 (1969). In that case, a committee of the U. S. House of Representatives reported to the House that Adam Clayton Powell, Jr., though fully qualified to hold office under Art. I, §2 of the U. S. Constitution, had asserted unwarranted privilege and immunities from the processes of the courts of New York, had wrongfully diverted House funds for the use of others and himself, and had made

false reports on expenditures of foreign currency to a House Committee. Based on this report, the full House passed a resolution excluding Powell and directing that the Speaker notify the Governor of New York that the seat was vacant. After careful examination of constitutional history, however, the court concluded that "in judging the qualifications of its members, Congress is limited to the standing qualifications prescribed in the Constitution," 395 U.S. at 550. The *Powell* case thus squarely stands for the proposition that constitutional qualifications for office are exclusive and cannot be altered or added to in any fashion short of constitutional amendement.[1]

While there are no Iowa cases directly in point, state cases applying the *Powell* principle to qualifications of state constitutional officers are legion. As was stated in the recent case of *Labor's Educational and Political Club—Independent v. Danforth*, 561 S.W.2d 339 (Mo. 1977):

> It is quite generally considered that where the Constitution lays down specific eligibility requirements for a particular constitutional office the constitutional specification in that regard is exclusive, and the legislature (except where expressly authorized to do so) has no power to require additional or different qualifications for such constitutional office.

Similar language may be found in numerous other cases. *See Lucas v. Woodward*, 243 S.E.2d 28, 31 240 Ga. 770 (1978). *Flegal v. Dixon*, 372 A2d 406, 407 (Pa. 1977), *Luna v. Blanton*, 478 S.W.2d 76, certified question answered and conformed to, 476 S.W.2d 384 (Tex. 1972), *Opinion of the Justices*, 290 A2d 645, 646 (Del. Supr. 1972), *Cusack v. Howlett*, 254 N.E.2d 506, 511, 44 Ill. 2d 233 (1969), *Nichols v. State ex rel. Bolon*, 177 So. 2d 467, 469 (Fla. 1965). *See also* cases cited in 34 A.L.R. 2d 155, §6.

Most of the above cases deal with judicial or county officers. However, the principle enunciated in these cases is plainly broad enough to cover legislators and has been so applied. For instance, in *People v. Election Commissioners*, 77 N.E. 321 (1906), 221 Ill. 9, the court struck down a statute which provided that only one candidate for senate could be nominated from each political party in any county within the district. The court noted that the only constitutional requirement, as to residence, was that candidates reside for two years within a senatorial district. The court at 77 N.E. 324 observed:

> The act adds a new qualification and imposes a new restriction upon the candidates and the voters, by requiring that the candidates shall come from particular counties of the district. It is not within the power of the legislature to add to the qualifications fixed by the constitution, or to impose the additional restrictions, and that provision of the act must be considered void.

Cf. Powell v. McCormack, supra.

In addition to the federal and state case law, the conclusion that constitutional qualifications are conclusive is supported by textual analysis of the constitutional document. As the 1974 Attorney General's

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[1] The court recognized that *Powell* could be *expelled* under Art. I, §5, after he was seated, but the House *excluded* Powell, i.e., adjudged him unqualified to hold office, and refused to allow him to take his seat in the first instance.

opinion observes, other provisions of the Iowa Constitution expressly authorize additional statutory qualifications. For instance, Article V, §18 provides that the qualifications of judges of the Supreme and District Courts of the state are fixed only in part by the Constitution, and that candidates for judicial office "shall have such other qualifications as may be described by law." But Article III, §4 contains no such language. It is significant that the Constitution in Article V expressly authorizes statutory additions to qualifications, but does not do so under Article III, §4.

Given the overwhelming judicial consensus and the language of other Iowa constitutional provisions expressly allowing for additional statutory requirements, we conclude that an Iowa court would hold that there can be no additional residency requirements for a state representative beyond those expressly stated in Article IV, §4 of the Iowa Constitution. Because we find no residency requirement beyond Article III, §4, ownership of a home outside the legislator's district, even if a homestead exemption claim were filed on it, would have no effect upon the legislator's qualification for office.

August 3, 1979

STATE OFFICERS AND DEPARTMENTS: Commission on the Aging. 42 U.S.C. §3001 **et. seq.**; 42 U.S.C. §§3025(a)(1)(C) and 3026(a); 45 CFR §§1321.13(a)(7), 1321.34, and 1321.51(a); §§25A.2(a) and 249B.4 (2), 1979 Code of Iowa; §§20-1.2(2)(c), 20-1.2(2)(e), 20-1.2(2)(i), 20-1.2(2)(j), and 20-1.8(3), Iowa Administrative Code; 1978 OAG Blumberg to Bowles (February 2); 1979 OAG, McDonald to Bowles (April 3). Area agencies on aging are subject to the direct control and supervision of the Commission on the Aging with respect to program planning and execution of the area plans. The Commission on the Aging also exercises indirect supervision of the administration of the area agencies through the Commission's role in the planning process, and through its evaluation of the execution of the area plans. The Commission on the Aging should not attempt to control day-by-day administration of the area agencies. Although area agencies on aging should not be regarded as "state agencies" per se, the area agencies will often be bound by laws prescribing restrictions for state agencies. This result occurs by virtue of the fact that the Commission on the Aging is a "state agency" and must heed laws that bind state agencies while it coordinates the activities of the area agencies. (McDonald to Bowles, Iowa Commission on the Aging, 8-3-79) #79-8-2 (L)

August 3, 1979

CRIMINAL LAW, TRESPASS, CONSERVATION: Section 716.7, Code of Iowa (1979). An individual has implied permission to enter private property under §716.7(2)(a) when he or she can reasonably infer from the owner's conduct that the owner has no objection to the individual's entry upon the property. If the alleged trespasser does not enter for one of the proscribed purposes under §716.7, there is no violation of §716.7 until he or she refuses to leave after being requested to do so. No-trespassing signs are sufficient under §716.7(2)(b) when the alleged trespasser is actually aware of the signs. "[A]nything animate or inanimate" as used in §716.7(2)(d) can refer to property belonging to the trespasser, the owner of the land, or to a third party. An individual may enter private property to retrieve his or her dog. Also, an individual may enter private property to retrieve wild game which he or she has mortally wounded or maimed if it inadvertently falls over the property line. (Cleland to Brabham, Conservation Commission, 8-3-79) #79-8-3

William C. Brabham, Acting Director, Conservation Commission: This letter is in response to your request for an Attorney General's opinion

with regard to §716.7, Code of Iowa (1979). Specifically, you pose the following questions for our consideration:

1. What constitutes "implied consent" to enter upon or in property under §716.7(2)(a), Code of Iowa (1979)?

2. If an individual enters unposted private property without permission, is he in violation at that time, or is he in violation only after refusing to leave when requested?

3. If private property is posted against trespass and an individual enters without permission, is the posting sufficient notice so that he can be charged with trespass?

4. What would be considered adequate posting?

5. Does the phrase "anything animate or inanimate" as used in §716.7(2)(d), Code of Iowa (1979), refer only to property of the owner or does it also include game which is property of the State?

6. Does §716.7(3), Code of Iowa (1979), include the retrieval of a dog or game which inadvertently falls over a property line?

In response to your first question, Section 716.7(2)(a) sets forth one manner in which a person can commit the crime of trespass. As defined in this section, trespass does not include entry upon or in property when any one of the following is true: (1) the entry was justified, (2) the entry was made with the "implied . . . permission of the owner . . .;" or (3) the entry was made with the "actual permission of the owner . . . ." Thus, §716.7(2)(a) expressly provides that permission to enter upon property may be either "implied" or "actual."

Section 4.1(2), Code of Iowa (1979) provides that "[w]ords 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." Thus, statutory language is construed according to its normal meaning except when that language has acquired a peculiar and appropriate meaning in law. The word "implied" is defined as follows in *Black's Law Dictionary* 888 (Rev. 4th ed. 1968):

"This word is used in law as contrasted with 'express;' i.e., where the intention in regard to the subject -matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties."

Therefore, in our opinion, the word "implied" as used in §716.7(2)(a) refers to those situations where the "owner, lessee, or person in lawful possession" of the property does, or fails to do, something not amounting to explicit or direct permission from which the person who enters upon the property can reasonably infer that he or she has permission to do so. Thus, whether a person charged with trespass had implied permission to enter upon the property is normally a factual question to be determined on a case-by-case basis. The following language in *Watson v. Dilts*, 124 Iowa 344, 100 N.W. 50, 51 (1904), is illustrative:

"That a broader and lodger may have an implied license to receive friends upon the premises for proper purposes, and to have a physician enter in case of illness, we do not doubt. But there can be no implied right to enter for immoral purposes, and, if the entry of the appellee was in fact for such purpose, it would constitute a trespass, if without the consent of the owner; but, on the other hand, if he went to the house

for the sole purpose of treating the teacher in a strictly professional capacity, he ought not to be held a trespasser. . . . [I]f he went to the upper room for the purpose of having sexual intercourse with the teacher, her act in admitting him and his entry were both without license, and he was a trespasser. An implied license to enter the premises of another contemplates an entry only in the usual way, and at a reasonable time. An entry at midnight for the sole purpose of paying a social visit is hardly the proper thing in rural communities.

Another example is found in *Commonwealth v. Richardson*, Mass. , 48 N.E.2d 678 (1943). In this case, the defendants, Jehovah's Witnesses, were convicted of criminal trespass for entering an apartment house. The apartment house was constructed with a vestibule with bells connected to the individual apartments. The court held, *inter alia*, that in "supplying the means of seeking access to the tenants by way of the bells which could be rung in the vestibule, an implied license was granted to the defendants and all others engaged in lawful pursuits to make use of them for the purpose of seeking an interview with the tenants." 48 N.E.2d at 682.

The following hypothetical situation may help to clarify the "implied permission" concept. Suppose that on a certain country road all the farms except one along the road are posted against trespassing. In addition, suppose that the alleged trespasser has seen other people hunting on this particular farm. It is our opinion that under these circumstances, the alleged trespasser does not have implied permission to hunt on this farm. It is simply not reasonable for the alleged trespasser to assume that he or she has permission to hunt on the farm from the fact that other people hunt on the farm. The other hunters could be friends or relatives of the owner, or the owner himself. In addition, the owner or lessee could have given the other hunters express permission to hunt. Moreover, there is nothing in this situation that gives the alleged trespasser a reasonable basis to believe that the owner even knows that the other hunters are on his property. As for the absence of a no-trespassing sign, since the owner is under no legal obligation to post his property to keep hunters off his or her property, it is not reasonable to beileve that the absence of a no-trespassing sign gives the alleged trespasser implied permission to hunt on the property. Section 716.7(2)(a), Code of Iowa (1979). In short, under the definition of "implied permission," as set forth above, the failure of the owner to post his property against trespass is of no consequence since the law does not require posting to prevent unauthorized hunting on private property. The law provides that entry without permission with the intent to remove something from the property is trespass. Section 716.7(2)(a), Code of Iowa (1979). Therefore, notwithstanding the fact that other owners in the area have posted their property, no reasonable inference can be made in this situation from the owner's failure to post his property against trespassing.

There are some situations in which, in our opinion, a hunter could reasonably believe that he or she had implied permission to hunt on a particular farm. For example, suppose that a person has hunted on a particular farm for five years, and that when the individual first started hunting on this farm he or she always got the owner's express permission to hunt on the farm. However, during the past year, the hunter has hunted on the farm without asking the owner for permission. During this period, the owner saw the hunter several times while the hunter

was hunting on the farm and the owner has never said anything to the hunter about being on the farm. In this situation, it is reasonable for the hunter to believe that he or she has implied permission to hunt on the farm.

A hunter might also reasonably believe that he or she has implied permission to hunt on a particular farm in the following situation. Two hunters stop at a particular farm to get permission to hunt on the farm. However, only one of the hunters talks to the owner about hunting. This hunter specifically asks the owner whether he or she can hunt on the farm, but the owner clearly knows that the hunter who asks him for permission to hunt is not alone. The owner gives the hunter permission, but fails to say anything about the other person. In our opinion, as long as the owner knows that the two hunters are together, the other hunter, i.e., the one who did not obtain actual permission to hunt, has implied permission to hunt on the farm.

The "implied permission" concept also appears in §716.7(d). The preceding discussion of the term "implied permission" also applies to §716.7 (d). See Section 702.1, Code of Iowa (1979).

Your second question revolves around the issue of *when* the trespass violation occurs. If the person who enters unposted property has not been "notified or requested to abstain from entering," there is no violation of §716.7 unless that person falls within either §716.7(2)(a), (c), or (d). Section 716.7(2)(a) requires that the person intend to "commit a public offense or to use, remove therefrom, alter, damage, harass, or place thereon or therein anything animate or inanimate." Section 716.7(2)(c) requires that the person enter for the "purpose or with the effect of unduly interfering with the lawful use of the property by others." Section 716.7(2)(d) requires that the person, while on or in the property, wrongfully use, remove therefrom, alter, damage, harass, or place thereon or therein anything animate or inanimate without permission. Therefore, if the would-be trespasser does not fall within any of the three sections enumerated above, there is no violation of §716.6 until after he or she has been asked to leave and refuses to do so.

Under §716.7(2)(a), an individual who, without permission to do so, enters upon private property to hunt wild game commits a trespass. Logically, a person who hunts wild game intends to shoot or otherwise capture his or her prey. Therefore, he or she has the required intent under §716.7(2)(a), i.e., he or she intends to alter something on the property or remove something therefrom. However, the allegation that an individual entered upon the property to hunt is a factual one which the State must prove beyond a reasonable doubt. For example, in *State v. Zier*, Linn County District Court, No. CRF 4899 (April 24, 1979), the defendant was tried and convicted of trespass in magistrate's court. The defendant appealed to the district court and the district court reversed the magistrate's decision. The State contended that the defendant and his two companions had been hunting without licenses and without permission on Robert Zingula's farm. There was no dispute as to the fact that the defendant had been hunting, but he claimed that he was hunting along the roadside, not on Zingula's farm. The defendant also claimed that he crossed Zingula's farm only to return to his truck. The district

court held that the State had not proved that the defendant was on Zingula's farm for the purpose of hunting.

Section 716.7(2)(d) differs from §716.7(2)(a). Under §716.7(2)(a), the trespass is committed when the individual enters upon the private property with the requisite intent and without permission. Under §716.7(2)(d), the alleged trespasser has not committed a trespass until he or she does one of the proscribed acts in §716.7(2)(d). For example, in the hunting situation, an individual violates §716.7(2)(a) when he or she enters upon private property with the intent to hunt on that property without permission. This section does not require that the hunter actually shoot something while on the property. Under §716.7(2)(d), the individual need not enter upon the property with the intent to hunt. All that is required under §716.7(2)(d) is that the individual do one of the proscribed acts in this section while on the property. This would include shooting wild game found on the property. (See discussion of animate and inanimate things below).

In response to your third question, §716.7(2)(b) provides, *inter alia*, that a person is guilty of trespass when he or she enters property "after being notified . . . to abstain from entering . . . ." Under this section, it is the person who enters the property who must be notified, not the general public. Absent sufficient justification for the entry, if the posting has notified the person not to enter the property, and the person enters anyway, there has been a trespass under §716.7. Thus, under this set of circumstances, there will normally be a factual question as to whether the person was aware of the no-trespassing sign. This question must be answered on a case-by-case basis depending upon the circumstances of each case. For example, if the State can show that there were no-trespassing signs in a particular area where the accused entered the property, the jury could find that the accused had notice not to enter the property even though the accused claims not to have seen the signs.

In response to your fourth question, it is not the number or size of the no-trespassing signs that is important under §716.7(2)(b). (See the preceding discussion on your third question.) Of course, the more no-trespassing signs and the larger the signs that are posted, the less likely the possibility that the alleged trespasser did not see a sign. There is no magic number in this situation. Each case must be determined on its own facts.

It should also be noted that there is a difference between a "no-hunting" sign and a "no-trespassing" sign. The former prohibits hunting and the latter prohibits trespassing. In other words, the no-hunting sign does not prohibit entry for purposes other than hunting. A no-trespassing sign prohibits entry for any unjustified purpose.

In response to your fifth question, the words "anything animate or inanimate" as used in §716.7(2)(d) are not specifically modified in the statute so as to designate who must be the owner of the "thing." Therefore, in our opinion, for the purposes of this section, the question of who owns the property is immaterial. Thus, the "animate or inanimate" thing could belong to the owner of the property, or to a third party such as the State, or even to the accused trespasser. However, if it does belong to the accused, §716.7(3) may operate to exempt the accused from the operation of §716.7.

In response to your sixth question, §716.7(3) excludes entry for the purpose of "retrieving personal property" from the definition of trespass. The retrieval of a dog or game which inadvertently falls over a property line is covered under this section to the extent that they constitute personal property.

Of course, the person retrieving the property must take the most "direct and accessible route to and from the property to be retrieved, [quit] the property as quickly as is possible, and . . . not unduly interfere with the lawful use of the property." Section 716.7(3), Code of Iowa (1979).

Section 702.14, Code of Iowa (1979) defines "property" as "anything of value, whether publicly or privately owned." This section goes on to provide that the term "property" includes both tangible and intangible property and real and personal property. Under §4.1(2), Code of Iowa (1979) words and phrases are to be given their normal meaning. "Value" is defined in Webster's Third New International Dictionary 2531 (1971) as "monetary worth." There are, of course, other definitions provided in the dictionary, but this one is the most appropriate considering the context in which the word is used in §702.14. See §4.1(2), Code of Iowa (1979). Thus, if a dog has any monetary worth, it is property for purposes of §702.14, and hence, personal property for the purposes of §716.7. "Property" is specially defined in §716.7(1) as "any land, dwelling, building, conveyance, vehicle, or other temporary or permanent structure whether publicly or privately owned." However, this definition does not change the result. The obvious purpose of this definition is to make it clear what kind of property can be trespassed upon. Therefore, the owner of a dog may retrieve his or her dog from private property without violating §716.7 so long as the other conditions of §716.7(3) are satisfied.

In our opinion, §351.25, Code of Iowa (1979) is not applicable to §716.7. Section 351.25 provides that unlicensed dogs over six months of age are not property. Thus, if this section was applicable to §716.7(3), a person could not enter private property to retrieve his or her dog if that dog was unlicensed and over six months of age without running the risk of being convicted for trespass. The legislature provided a definition of "property" within the criminal code and that definition should apply when that term appears in a criminal statute such as §716.7. Moreover,

> "[s]tatutes defining crimes are to be strictly construed and not to be held to include charges plainly without the fair scope and intendment of the language of the statute, though within its reason and policy, and in the event of doubts they are to be resolved in favor of the accused."

State v. Nelson, 178 N.W.2d 434, 437 (Iowa 1970).

Wild game is the property of the State. Section 109.2, Code of Iowa (1979). Wild game "becomes the subject of private ownership when reclaimed by the art and industry of man." *State v. Repp*, 104 Iowa 305, 73 N.W. 829, 829 (1898) (*dictum*). Thus, game becomes private property when it is "reclaimed," and thereafter a person may retrieve it when it inadvertently falls over a property line. The issue is when is game "reclaimed" for the purposes of considering it private property. In the classic case of *Pierson v. Post*, 3 Caines 175 (N.Y. 1805) (appearing in

C. Donahue, Jr., T. Kauper and P. Martin, *Property* 1 (1974))), it was held that a wild animal is not reduced to private property unless the claimed owner either actually takes the animal into possession or mortally wounds or maims the animal. When an individual has mortally wounded or maimed an animal, ownership is conditioned upon continuous pursuit of the animal. The rule in *Pierson v. Post* is consistent with the *dictum* in *State v. Repp.* A person who has mortally wounded or maimed an animal has "reclaimed" that animal for purposes of determining ownership of the animal. Thus, in our opinion, a person who mortally wounds or maims a wild animal is entitled under §716.7(3) to retrieve that animal from private property so long as that person satisfies the other requirements of the section.

In summary, an individual has implied permission to enter private property under §716.7(2)(a) when he or she can reasonably infer from the conduct of the person who has the right to permit entry that that person does not object to the individual's entry upon the property. Mere entry upon unposted private property does not violate §716.7, Code of Iowa (1979). If the alleged trespasser does not enter for one of the proscribed purposes under §716.7, there is no violation of §716.7 until such time as he or she refuses to leave after being requested to do so. When private property is posted with no-trespassing signs, that posting is sufficient under §716.7(2)(b) when the signs actually notify the alleged trespasser not to enter the property, i.e., when the alleged trespasser is aware of the signs. The terms "anything animate or inanimate," as used in §716.7(2)(d), Code of Iowa (1979) can refer to the alleged trespasser's property, the land owner's property, or property belonging to a third party such as the State. An individual may enter private property to retrieve a dog which strays onto private property. Also, an individual may enter private property to retrieve wild game which he or she has mortally wounded or maimed if it inadvertently falls over the property line.

August 6, 1979

STATE OFFICERS AND DEPARTMENTS: "Acting" Commissioner of Social Services. Iowa Const. art. II, §10, art. III, §§24, 31, art. IV, §9; The Code 1977, §§8.38, 280.3, 69.10, 217.5; 1977 Iowa Acts, ch. 2, §2 (39). The governor has implied authority, derived from the constitutional duty to see that the laws are faithfully executed, to designate an "acting" state officer during the period in which a search for a permanent successor is being conducted. This limited authority may be invoked only for a reasonable time and may not be employed to avoid a statutory requirement that a permanent appointment be made and be confirmed by the Senate. An acting state officer is not subject to salary limitations framed in terms of de jure officers. (Miller, Schantz and Haskins to Bill Hutchins, State Senator, 8-6-79) #79-8-4

The Honorable Bill Hutchins, State Senator: We have received from you the following letter:

"I'm writing in regard to a question which has been raised several times by legislators and also in the press. As I understand, Governor Ray appointed Victor Preisser to the position of Commissioner of Social Services in December of 1977. Mr. Preisser assumed the duties of the "acting" Commissioner of Social Services on January 1, 1978. From this time until July 6, 1978, there existed a 28E agreement between the Dept. of Transportation and the Dept. of Social Services. Under this agreement Mr. Preisser was officially on loan from DOT to DSS. DSS in turn

reimbursed DOT the cost of Mr. Preisser's salary. On July 6, 1978, the agreement terminated, yet Mr. Preisser has continued at DSS under the title 'acting' Commissioner until the present time. According to my information, as of October 11, 1978, Mr. Preisser was receiving a salary of $42,500 while the maximum salary set for the Commissioner of Social Services by the legislature is $37,400. I believe this situation raises several questions.

"1) Is there a legal basis for the establishment of a position of 'acting' Commissioner of Social Services when in fact the position of Commissioner has been vacant for over one year. According to the Secretary of the Senate's office, no appointment has ever been reported. Further, does the fact that Mr. Preisser was not confirmed during the first session of the 67th General Assembly violate the appointment process stated in Chapter 217.6 [sic] of the Code.

"2) Under what authority is Mr. Preisser receiving a salary $5,100 over that set by the Legislature. Chapter 7.16 of the Iowa Code appears to authorize the person appointed by the Governor to receive a salary lesser than that provided by the appropriation bill but no mention is made of the ability to receive a greater salary. One other section which might apply is Chapter 8.38 of the Code and also sections 24 and 31 of Article III of the Constitution of Iowa.

I would ask you to review these sections I have mentioned and any other constitutional or statutory authority pertinent to the question raised and issue your legal opinion."[1]

I.

Your request raises difficult questions of first impression concerning the appointment of state officers in Iowa. At the outset it should be noted that the Iowa Constitution, unlike that of some states, does not provide detailed procedures for the appointment of non-elected state officials, it apparently being contemplated that such matters would be governed by statute.

With respect to the office of commissioner of social services, §217.5, The Code 1979, provides as follows:

There shall be a commissioner of social services who shall be the chief administrative officer for the department of social services. *He shall be appointed by the governor with the approval and confirmation of two-thirds of the senate* and shall serve at the pleasure of the governor. The governor shall fill a vacancy in this office in the same manner as the original appointment. If the vacancy occurs while the general assembly is not in session, such appointment shall be reported to the senate within thirty days of its convening at its next regular session for confirmation. Such commissioner shall be selected primarily for his administrative ability.

He shall not be selected on the basis of his political affiliation and shall not engage in political activity while he holds this position. (Emphasis added).

The emphasized portions of this statute unambiguously require 1) the appointment of a commissioner; 2) by the governor; 3) with confirmation by a two-thirds vote of the senate. A vacancy is to be filled in the same manner as an original appointment. The legislature has specifically

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[1] In certain respects, the questions you posed may have been mooted by the resignation of Mr. Preisser. However, you have renewed the request, noting that the practice of appointing "acting" state officials has not been limited to this instance.

provided for "interim appointments" (*i.e.* appointments valid during a period the general assembly is not in session) by permitting delayed confirmation.[2] During that interim period, a person officially appointed by the governor as "commissioner" plainly could exercise the full de jure powers of the office.

Under the provisions of §217.5, then, confirmation by the senate of a gubernatorial appointment to the office of commissioner is mandatory. In our opinion, there is little doubt that the legislature may constitutionally require senate confirmation of the appointment to an office created by the general assembly. *See Leek v. Theis*. 539 P.2d 304 (Kan. 1975).

Nor is the requirement of senate confirmation obviated by the power to fill a vacancy granted the governor by Iowa Const. art. IV, §10, which provides:

When any office shall, from any cause, become vacant, *and no mode is provided by the Constitution and laws for filling such vacancy*, the Governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the General Assembly, or at the next election by the people. (Emphasis added).

Article IV, §10, empowers the governor to fill a vacancy only when no mode for filling the vacancy is provided by constitution or statute. *See City of Nevada v. Slemmons*, 244 Iowa 1068, 1073, 59 N.W.2d, 793, 796 (1953). Here, §217.5 provides a mode of filling a vacancy in the office of commissioner and the provisions of art. IV, §10 do not come into play.

Because the statutory requirements[3] for appointment to the office of commissioner were not followed in the case of Mr. Preisser, it is clear that he was never the de jure commissioner of social services.

II.

As your request notes, Mr. Preisser was "acting" commissioner of social services from January to July, 1978, under a "loan of employee" agreement between the Department of Social Services and the Department of Transportation pursuant to the authority provided by Chapter 28D, The Code 1977.[4] Without addressing the question of whether Chap-

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[2] By providing for an "interim" appointment, the legislature has by implication indicated that a vacancy in the office should be filled as soon as reasonably possible.

[3] On July 19, 1978, an oath of office for Victor Preisser relating to the office of "Acting Commissioner, Department of Social Services," was filed with the Secretary of State. *See* §§64.23, 69.10, The Code 1977. However, we are informed by the Secretary of the Senate that Mr. Preisser's name was not forwarded to the Senate for confirmation within 30 days of the beginning of the 1979 session. Thus, the mandatory provisions of §217.5 for appointment as "commissioner" were not invoked.

[4] Section 28D.3, The Code 1977, stated:
"1. Any department, agency, or instrumentality of the state, county, city, municipality, land-grant college, or college or university operated by the state or any local government is authorized to participate in a program of interchange of employees with departments, agencies, or

ter 28D may be utilized in the context of a state officer, as opposed to an employee, we mention this agreement simply to note that, in our opinion, the existence of Chapter 28D neither adds to nor detracts from any authority the governor may have to appoint an "acting" commissioner of social services.

III.

We come then to the heart of your request, whether the governor has any legal authority to designate a person to serve as "acting commissioner" without confirmation by the senate of the person so designated.

The constitution and statutes of this state contain no express references to the concept of an "acting" state officer as that term is employed in this situation.[5] In our opinion, however, the governor has implied authority on a limited basis to designate an "acting" commissioner of social services.

Article IV, §9, Iowa Constitution, specifying the powers and duties of the executive department, provides: "He shall take care that the laws are faithfully executed." For the most part, a governor can perform this duty only through his or her agents in the various departments of the executive branch. As the legislature has frequently recognized, the duty to see that the laws are faithfully executed can often be fulfilled only if the governor may insist upon the accountability of the agents who implement the legal responsibilities of a department on a day-to-day basis. The Department of Social Services, for example, is responsible for disbursing annually millions of dollars in transfer payments. An elaborate and highly technical body of statutes and regulations determines eligibility for such payments. In the absence of a person performing at least some of the duties statutorily imposed upon the commissioner of social services, there would be no reasonable assurance that these laws could be faithfully executed. In addition, we note that in the absence of limited authority to appoint an "acting" officer, great pressure would be generated to appoint a permanent officer in haste, with the result that thorough affirmative action searches designed to locate the best qualified person would be compromised. Thus, at least in the absence of statutory provisions providing an alternative mechanism for fulfilling this consti-

instrumentalities of the federal government, another state or locality, or other agencies, municipalities, or instrumentalities of this state as a sending or receiving agency.

2. The period of individual assignment or detail under an interchange program shall not exceed twenty-four months, except that an employee may be assigned for an additional twenty-four-month period upon the agreement of the employee and both the sending and receiving agencies. No employee shall be assigned or detailed without his expressed consent or by using undue coercion to obtain said consent. Details relating to any matter covered in this chapter may be the subject of an agreement between the sending and receiving agencies. Elected officials shall not be assigned from a sending agency nor detailed to a receiving agency."

[5] The term "acting" as used in this opinion should be distinguished from the term "interim." As previously noted, an interim appointment would be made subject to statutory authority and the person appointed would exercise the full de jure powers of the office unless and until the senate acted to reject the appointment.

tutional duty, we believe that the governor has at least some implied authority to designate an "acting" commissioner. *Accord, Opinion of the Justices*, 312 A.2d 702 (N.H. 1973).

IV.

Although the governor has some authority, implied from his obligation to see that the laws are faithfully executed, to appoint "acting" state officers, in our view this authority is quite limited in nature. In particular, this authority must be exercised consistently with the governor's statutory obligation to make a permanent appointment subject to senate confirmation. In short, we believe the governor has authority to make appointments of acting officers as "caretakers" only for a period reasonably necessary to locate a person to be nominated for a permanent appointment. Because the implied authority to appoint acting state officers is based on necessity and because a statutory mechanism for providing a permanent appointment is provided, the authority dissipates with the necessity, *i.e.* at the point when a permanent appointment reasonably may be made.

This question has arisen rarely in other jurisdictions, but what authority exists supports our interpretation. In *Opinion of the Justices*, 316 A.2d 174 (N.H. 1974), the Supreme Court of New Hampshire provided an advisory opinion on the question of the length of time available to the governor to make an appointment mandated by the legislature. They opined that in the absence of a statutory provision specifying a particular limitation, the law would imply the limitation of a "reasonable time:"

> The determination of a reasonable time wtihin which that obligation shall be fulfilled is to be made by them in the light of the need for continuity in the office in question, and the responsibilities of the appointing authorities "for the faithful execution of laws" (N.H. Const. pt. II, art. 41) and "for ordering and directing the affairs of the state". *Id.* pt. II, art. 62.
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> Since the impasse between the commission and the Governor and Council has existed for a period of three months their responsibilities suggest that the end of a reasonable time for making an appointment is near at hand. *See* No. 6810 Opinion of the Justices, N.H., 312 A.2d 702 (December 7, 1973); RSA 4:3.
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> 316 A.2d at 176.

In *State ex rel. Brotherton v. Moore*, 230 S.E.2d 638 (W.Va. 1976), a mandamus proceeding brought by citizens and taxpayers to compel the governor to fill a vacancy that had existed for nearly two years in the office of superintendent of an industrial home for girls, the West Virginia Supreme Court concluded that the vacancy had existed for an "unreasonable" length of time and ordered the governor to submit a nomination to the next meeting of the senate.

And, in a somewhat different context, the New York courts have held that "provisional" appointments to civil service positions are merely "stopgap" measures. Such appointments may not be used to evade the merit requirements of the state constitution; nor may an agency use successive provisional appointments to circumvent the civil service laws. *Hannon v. Bartlett*, 405 N.Y.S.2d 513 (App. Div. 1978). *See also, Matter*

of Riggi v. Blessing, 195 N.Y.S.2d 971 (App. Div. 1959), *aff'd*, 223 N.Y.S.2d 871 (1961).

In our opinion, the Iowa courts would take a similar approach to the question of the length of time a person may serve as an "acting" official.[*] In determining what is reasonable, a court would likely consider a variety of factors such as the importance of the position, the qualifications of the position and the scope of the search, local or national. Although what is a "reasonable time" depends upon the circumstances of a particular situation, in our opinion it is highly unlikely that a court would uphold an appointment as "acting" commissioner for the fifteen-month period Mr. Preisser was so designated.

Because of the context in which your question arises, we should add a word about salary considerations. If the salary provided for a position is low compared to salaries provided for similar positions within state government or in other jurisdictions, a court might consider this as some justification for a more protracted search. However, except possibly in the extreme case where the salary is set so low that no competent candidate can be located, a disagreement between the executive and legislative branches concerning desirable salary levels would not excuse an executive failure to appoint if a qualified person is shown to be available at the salry provided. A statement by Justice Uhlenhopp, concurring in *Webster County Board of Supervisors v. Flattery*, 268 N.W.2d 869, 879-80 (Iowa 1978), discussing the possibility that another branch of government might attempt to destroy the judiciary by slashing its salaries, is quite apposite here:

> The cases which actually arise, however, are not of that kind. State and local appropriating authorities normally provide at least essential facilities, equipment, salaries, and personnel for the courts. Cases from other jurisdictions demonstrate that the conflict arises when the appropriating authorities and the judges disagree on how much the judicial branch shall have — how much in salaries, equipment, facilities, personnel. The judges contend that they could be more efficient, do a better job, and dispose of additional work if they had more funds than the appropriating authorities are willing to raise by taxes or take from other public agencies — such as funds for more court reporters. (*Rappaport v. Payne*, 138 Cal. App. 772, 35 P.2d 183), for higher probation officer salaries (*Deddens v. Cochise County*, 113 Ariz. 75, 546 P.2d 811), for better furnishings for chambers (*State v. Davis*, 26 Nev. 373, 68 P. 689), or for cooler facilities by use of air conditioners (*State v. County Court of Kenosha County*, 11 Wis.2d 560, 105 N.W.2d-876).

If the courts can function but the dispute is over the extent of the salaries, equipment, facilities, and personnel which are to be provided, I come down on the side of the appropriating authorities. A main purpose of having a general assembly and corresponding local bodies is to provide officials to make the choices on how much shall be spent for what and to divide up revenues among public agencies accordingly — and also to levy taxes as necessary. If the judges inject themselves into this budgetary process they enter the legislative arena. Their role in the process is to

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[*] We do not, however, express an opinion as to whether the Iowa courts would regard mandamus as a remedy available to compel a chief executive to perform his or her duty. The different views on the propriety of such relief are discussed in *State ex rel. Brotherton v. Moore*, 230 S.E.2d 638, 641-43. Nor do we express a view as to whether other remedies, such as a quo warranto action directed at the "acting" officer, might be employed to raise the question.

present their needs to appropriating authorities as the executive branch does, not to overrule appropriating authorities. *If judges can overrule appropriating authorities in the name of greater efficiency or better operation, why cannot the governor do likewise?*

In sum, the ultimate decision on how much and in what way public funds are to be spent is for the people, and they voice their views through their elected officials in the legislative branch at the state and local levels. I would thus prohibit judges from spending or committing public funds not legislatively authorized except in the narrow area in which, through default by the appropriating officials, a court cannot perform its functions. (Emphasis added).

In short, so long as the legislature provides a salary range that is sufficient to obtain a competent person, the governor is obligated to make a permanent appointment subject to senate confirmation. If it were demonstrated factually that a person was designated an acting officer for the purpose of evading salary limitations, rather than for the purpose of serving as a "caretaker" while the search for a permanent appointment at a salary within statutory limitations was conducted, we believe a court would hold such a designation beyond the authority vested in the governor by the law of Iowa.

V.

Your second question is whether there is legal authority for an "acting" state officer to receive a salary in excess of that authorized by the legislature for a person duly appointed and confirmed to the permanent position.

The salary limitation to which you refer was established by 1977 Iowa Acts, ch. 2, §2 (39), which provides in pertinent part:

Sec. 2. The following annual salary ranges shall be in effect for the fiscal year beginning July 1, 1977, and ending June 30, 1978, for the positions specified and for each fiscal year after the fiscal year ending June 30, 1978, the salary range shall be the same as the range specified for the fiscal year beginning July 1, 1977, unless otherwise specified by the general assembly. The governor shall specify the salary to be paid to the salary ranges indicated from funds appropriated by the general assembly for such purposes:

. . .

39. DEPARTMENT OF SOCIAL SERVICES.

Salary of the Commissioner of social services $24,000 to $37,400.

This limitation, in terms, applies to the "Commissioner of Social Services." As set forth above, an "acting" commissioner is not the de jure commissioner. The spirit of the limitation would suggest that the governor should set the salary of an "acting" commissioner within the authorized range, but, strictly construed, the limitation does not apply to an "acting" commissioner. Although the question is not free from doubt, we believe a court would strictly construe the limitation because of the constitutionally-based rationale, set forth above, for designation of an acting state officer.

If we are correct in concluding that Mr. Preisser's salary as acting commissioner was not subject to the limit set by the legislature on the salary of the commissioner, then §8.38, The Code 1977, prohibiting the expenditure of money in excess of the appropriation provided; Iowa Const. art. III, §24, barring the drawing of money from the treasury

other than in consequence of lawful appropriations; and Iowa Const. art. III, §31, proscribing, *inter alia*, "extra" compensation to a public officer are not violated.

VI.

In summary, it is our opinion that the governor has implied authority, derived from the constitutional duty to see that the laws are faithfully executed, to designate an "acting" state officer during the period in which a search for a permanent successor is being conducted. This limited authority may be invoked only for a reasonable time and may not be employed to avoid a statutory requirement that a permanent appointment be made and confirmed by the senate. An acting state officer is not subject to salary limitations framed in terms of de jure officers.

August 13, 1979

STATE OFFICERS AND DEPARTMENTS: Appointment of Officers. §§2.32, 69.1, The Code 1979. Failure of Senate to act on reappointment of present office holder does not bar holding over in office under §69.1, The Code, until a new successor is selected and qualified. Where a nominee does not presently hold an office for a fixed term for which he or she has been reappointed, failure to consider a nomination is a rejection under §2.32 if Senate rules do not expressly provide for carrying over of pending appointees to the next session of the General Assembly. A rejected nominee's name may be resubmitted to the Senate for confirmation, but such a nominee is subject to the proscriptions of §2.32 unless he or she is holding over in office under §69.1. (Appel to Hultman, State Senator, 8-13-79) #79-8-5

The Honorable Calvin O. Hultman, State Senator: We are in receipt of your request for an opinion concerning the process for confirmation of appointees under §2.32, Code of Iowa, 1979. Your questions are related to activity on the last day of the First Session of the 68th General Assembly, May 11, 1979. On that day, the appointments of Dr. Ronald O. Masters and Larry Z. Lindemann to the Board of Chiropractic Examiners were considered by the Senate. A motion to confirm the appointment of Dr. Lindemann failed to receive the required two-thirds vote. With respect to Dr. Masters, the Senate by voice vote approved a favorable report of its investigative committee but deferred final action on the nomination. Shortly thereafter, the General Assembly adjourned sine die. *See* Senate Journal, 68th General Assembly, at 1744-46.

Given this fact situation, you ask the following questions:

1. Does Senate deferral of a final vote on an appointee until the next regular session of the General Assembly, following the adoption of a favorable committee vote, constitute a refusal of the appointment under §2.32, Code of Iowa 1979?

2. Is an appointee who fails to receive a favorable two-thirds vote eligible to be appointed by the Governor to the same position in the following regular session, subject to Senate approval?

The relevant Code provisions are §§69.1 and 2.32, The Code 1979. Section 69.1 states:

Except when otherwise provided, every officer elected or appointed for a fixed term shall hold office until his successor is elected and qualified, unless he resigns, or is removed or suspended, as provided by law.

Section 2.32 provides:

When the nomination of a public officer is required to be confirmed by the senate, the nomination shall not be considered by the senate until it shall have been referred to a committee of five senators who shall, if possible, represent different political parties. The committee shall be appointed by the president of the senate, without motion, and shall report to the senate. The consideration of the nomination by the senate shall not be made on the same legislative day on which the nomination is so referred, unless it be the last day of the session. When a nomination has been so considered by the senate and approval has been refused, the nominee shall not be eligible for an interim appointment to any position requiring confirmation by the senate, prior to the convening of the next regular session of the general assembly.

I.

In order to answer your first question, it is necessary to distinguish between a person who holds office under an interim appointment and a person who holds over in an office because of failure of a successor to be selected and qualified. An interim appointment is made when a non-office holder is appointed to a position and temporarily holds that office until the Senate is able to act on the nomination. The purpose of interim appointments is to insure that an appointee is not prevented from expeditiously assuming office simply because the legislature is not in session. Once the General Assembly reconvenes, the Senate then confirms or rejects the appointee. Section 2.32, however, limits interim appointments to persons who have not been expressly rejected by the Senate for the positions to which they have been nominated. This section thus balances the need for smooth and timely transitions with the desirable checks and balances inherent in the regular confirmation process.

In contrast, holding over occurs when an incumbent officeholder continues in office beyond his or her term until a successor has been chosen and qualified. Holding over is designed to insure that no hiatus occurs between the expiration of an officeholder's term and the selection of a successor. Otherwise, state government could be impaired by the lack of officers empowered to conduct the government's business when unforeseen complications arise in the confirmation process. Holding over is less threatening to the established selection process than interim appointments because the temporary officeholder was at least at one time properly selected and qualified for the office held.

There are two independent legal bases in Iowa authorizing incumbent officeholders to hold over pending qualification of successor. A statutory basis may be found in §69.1, The Code 1979. This section states, in relevant part, that every officer "elected or appointed" for a fixed term shall hold office "until his successor is elected and qualified, unless he resigns or is removed or suspended, as provided by law."

It could be argued that §69.1 applies only to offices which are elective in the first instance since the statute declares that the incumbent holds over until his successor is "*elected* and qualified." The statute does not read "elected *or appointed* and qualified." This limited reading of §69.1 was rejected by implication in a recent opinion of the Attorney General. *See* 1976 Op. Att'y. Gen. 220. Among other issues, this opinion addressed the question of whether §69.1 applied to appointive positions on the Natural Resources Council. The opinion held that two incumbents were entitled to hold over under §69.1 until their successors were legally qualified to take office even though one of the renominations was ex-

pressly rejected by the Senate. *See also* 1964 Op. Att'y. Gen. 388 (incumbent in Highway Commission holds over until successor requalified).

We are reluctant to overturn the Attorney General's established interpretation of §69.1. But even if the statute is given a more narrow reading than the 1976 opinion adopts, we believe an Iowa court would find that appointed officials may hold over in office pending selection of a successor under common law authority. The common law abhors vacancies in office because of the potential paralysis of government functions that could result. *State ex rel. Wardner v. Gainer*, 167 S.E.2d 290 (W.Va. 1979). *Grooms v. La Vale Zoning Board*, 340 A.2d 385, 27 Md. App. 266 (1974). Therefore, it has generally been held that an officeholder for a fixed term may hold over at least as a de facto officer until his or her successor qualifies for office, notwithstanding the lack of express statutory authorization. *See Hartford Accident and Indemnity Com. v. City of Tulare*, 186 P.2d 121, 123 (cal. 1947), *Grooms v. LaVale Zoning Board*, 340 A.2d 385, 391 (Md. 1975), *Opinion of the Justices*, 175 N.E. 644, 646 (Mass. 1931).

Applying the above law to the factual context you present, it is apparent that even if the failure of the Senate to act on an appointment were a rejection under §2.32, this provisions prohibition of interim officeholding would not apply where the officer is holding over under §69.1 of the Code or under the common law. Since Dr. Masters, and, for that matter, Dr. Lindemann, are both incumbent officeholders, we hold that neither Senate inaction nor rejection of their respective appointments bars them from holding over in office until their successors are selected and qualified.

It should be stressed, however, that a person may not hold over in office indefinitely, but only for a reasonable time until a successor can be selected and qualified. *Stash v. Weber*, 199 N.W.2d 391, 395 (Neb. 1972). The Senate role in the appointment process cannot, therefore, be indefinitely defeated by failure of the executive to submit a nominee to the Senate. In addition to political remedies, where the executive is intransigent, an action in mandamus may lie to compel an appointment, *State ex rel. Brotherton v. Moore*, 230 S.E.2d 638 (W.Va. 1976).

If the nominees were not current officeholders, the result might be different. A previous opinion of the Attorney General held that a failure to confirm was rejection under §2.32 where Senate rules did not expressly provide for carrying over of pending nominations to the next session of the General Assembly. *See* 1976 Op. Att'y. Gen. 532, *partially overruling sub silentio* 1976 Op. Att'y. Gen. 220. *See State v. Johnson*, 8 Ohio Cir. Ct. N.S. 535, 28 Ohio Cir. Ct. 793 (1906). This approach insures that supermajoritarian confirmation requirements cannot be temporarily defeated by deft parliamentary maneuvers designed to postpone consideration when necessary political support is lacking. There is, however, no substantial body of judicial authority on the question of whether a legislative body's failure to consider a nomination is tantamount to rejection. Legislative clarification may therefore be desirable.

II.

Your second question is whether an appointee who fails to receive a favorable two-thirds vote is eligible to be appointed by the Governor

or the same position in the following regular session, subject to Senate approval. We have found no statutory provision which bars rejected nominees from being renominated for the positions for which approval has been previously withheld. And, we have discovered no case law suggesting a rejected appointee's name may not be resubmitted for confirmation. At least one case suggests, by implication, that a rejected appointee may be reappointed, subject to legislative approval, *Reynolds v. Smith*, 126 N.W.2d 215, 222, 22 Wisc. 516 (1964) (rejected recess appointee reappointed after adjournment of legislature became de jure officer until Senate acted). It may, of course, be questioned whether such resubmission is sound politics, but that is a problem for the executive branch to resolve.

III.

In sum, we hold that where incumbent office holders for a fixed term hold over pending selection and qualification of their successors, the proscriptions of §2.32, even if the officeholder's nomination for reappointment has been rejected by the Senate, are inapplicable. We further hold that a rejected appointee may be renominated for the same position in the second regular session of a General Assembly notwithstanding a previous rejection. Whether such a nomination will be confirmed, of course, is a question for the Senate to decide.

August 13, 1979

CONSTITUTIONAL LAW: Federal Supremacy Clause, Impairment of Contracts — U.S. Constitution, Art. I, §10, cl. 1; Art. VI, cl. 2; Iowa Constitution, Art. I, §21; House File 736, 68th G.A., 1979 Sess.; Petroleum Marketing Practices Act, 15 U.S.C. §2801-2806. House File 736, allowing franchisees to purchase motor fuel from suppliers other than franchisor despite contract terms to contrary, could unconstitutionally impair the obligation of contracts, depending on resolution of certain factual questions. Opinion recommends re-drafting to narrowly focus its provisions. Remedies for improper termination are inconsistent with the federal Petroleum Marketing Practices Act. (Osenbaugh to Lind, State Representative, 8-13-79) #79-8-6

The Honorable Thomas A. Lind, State Representative: You have requested the opinion of this office as to the constitutionality of H.F. 736, which is headed "An Act to permit distributors and dealers to purchase fuel from other than the franchisor when motor fuel or special fuel is not available from the franchisor, and providing penalties for violations." As its title indicates, the bill allows a franchisee of motor fuel to purchase fuel from other sources when it is unable to acquire fuel from its supplier notwithstanding any franchise provision to the contrary. Since the Act prohibits enforcement of such contract provisions by termination or other retaliatory action, it is necessary to determine whether it is inconsistent with federal law governing termination of motor fuel franchises or whether it impairs the obligation of contracts in violation of the Iowa Constitution, Art. I, §21, and the United States Constitution, Art. I, §10, cl. 1.

House File 736 would be unconstitutional to the extent that the federal Petroleum Marketing Practices Act (PL 95-297), 15 U.S.C. 2801, which regulates the termination or nonrenewal of petroleum franchises, applies to the conduct covered by the bill. The United States Constitution makes federal laws supreme. Article VI, Clause 2. In order to determine the

validity of H.F. 736, it is necessary to construe section 106(a) of the Petroleum Marketing Practices Act as follows:

To the extent that any provision of this title applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this title. [15 U.S.C. §2806(a)]

Since this title of the federal Act applies only to franchises or franchise renewals entered into after its date of enactment, sec. 102(b)(1), the question is whether section 106(a) precludes the application of H.F. 736 to franchise agreements executed after June 19, 1978.

The United States Supreme Court in *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-526, 51 L.Ed.2d 604, 613-614, 97 S.Ct. 1305 (1977), discussed the principles to be applied in determining whether Congress has pre-empted the field so as to preclude State regulation:

The first inquiry is whether Congress, pursuant to its power to regulate commerce, U. S. Const., Art. 1, §8, has prohibited state regulation of the particular aspects of commerce involved in this case. Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." This assumption provides assurance that "the federal-state balance," will not be disturbed unintentionally by Congress or unnecessarily by the courts. But when Congress has "unmistakably . . . ordained," that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.

Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U. S. Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [Citations omitted]

Section 106(a) precludes any State law which differs from the Act "with respect to termination . . . or to the nonrenewal of any such franchise relationship . . . " However, section 106(a) does not expressly exclude State regulations of other aspects of the franchise relationship. Unlike the federal Act, H.F. 736 is not primarily concerned with providing a remedy to franchisees for unjust termination. The bill's primary focus is on sole-source purchase requirements. The prohibition against termination is merely a means to insure franchisor compliance with the bill's terms. The federal Act is not designed to regulate motor fuel franchises as such. It establishes no regulatory or enforcement scheme but instead is concerned only with providing a dealer remedy for unfair termination practices. H.F. 736 clearly does not conflict with the purposes of the Federal Act but is instead directed to a separate problem.

Section 102(b) of the Petroleum Marketing Practices Act, 15 U.S.C. §2802(b), states in relevant part:

(b)(1) Any franchisor may terminate any franchise . . . or may fail to renew any franchise relationship if —

(A) the notification requirements are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship . . .

While the Act details certain acts by the franchisee which would justify termination under another subsection (section 102(c)), the Act in no way prescribes franchise terms except those directly related to termination or nonrenewal. It is doubtful that section 102(b)(2)(A), quoted above, would be construed to preclude all State regulations which affect or limit the provisions of motor fuel franchise agreements. This position is supported by the legislative history. The "Explanation of the Major Provisions of the Bill", in House Report No. 95-161 (p. 32) and in Senate Report No. 95-732 (p. 41) states, "To the extent that the provisions of title I do not apply to an aspect of the franchise relationship, State laws dealing with such aspects of the relationship are not preempted." The Senate Report further states, at p. 42, "The preemption provisions of the legislation are limited to provisions of State law dealing with termination or nonrenewal of franchise relationships."

We would conclude that H.F. 736 is not preempted by the Petroleum Practices Marketing Act except for the provisions regarding remedies for retaliatory action. H.F. 736, section 2(4), makes "realiatory action arising from purchases made in accordance with this section" a violation of chapter 553 of the Code. Sections 553.12-16, Iowa Code, provide remedies, both civil and criminal, which differ from those set forth in section 105 of the Petroleum Marketing Practices Act. To the extent to which H.F. 736 grants a franchisee different remedies for an improper termination under its terms than those provided in the federal Act, H.F. 736 may constitute a "provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination . . . " which is prohibited "unless such provision of such law or regulation is the same as the applicable provision of this title." Section 106(a).

House file 736 may also be challenged as impairing the obligation of contract in violation of the Iowa Constitution, Art. I, §21, and the United States Constitution, Art. I, §10, cl. 1, since the Act would apply to existing as well as future contracts for distribution of motor fuel under a trademark. Section 1(1). Section 2 authorizes the purchase of fuel from a source other than the franchisor under specified circumstances notwithstanding any provision to the contrary in the franchise agreement. It further prohibits the franchisor from terminating the franchise or taking other "retaliatory action" as a result of such purchase. House File 736 therefore would vary the terms of some existing contracts.

Since a franchisor's primary inducement for entering into the franchise agreement may well be the expectation of profits from the franchisee's agreement to purchase its products solely, a statute which precludes operation of such contract provision could severely impair the obligation of contract if not carefully limited in its application. House File 736 does require the franchisee to first request supply from its franchisor. Section 2(1)(a) requires:

> At least forty-eight hours prior to entering into an agreement to purchase motor fuel from another source, the franchisee has requested delivery of motor fuel from the franchisor and the requested motor fuel has not been delivered, or prior to entering into an agreement the franchisor has stated to the franchisee that the requested motor fuel will not be delivered. The request to the franchisor for delivery shall be for a type of fuel normally provided by the franchisor to the franchisee and for a quantity of fuel not exceeding the average amount sold by the franchisee in one week, based upon average weekly sales in the three months preceding the request, except that this provision shall not restrict a franchisee from purchasing gasohol from a source other than the franchisor or limit the quantity to be purchased when the franchisor does not normally supply the franchisee with gasohol.

Whether this requirement is sufficiently narrowly tailored to avoid unnecessary impairment of the franchisee's obligation to purchase from its franchisor depends on questions of fact not resolved in the bill. One question of fact is whether the 48-hour period for requesting delivery from the franchisor is sufficient to insure that the franchisor would not lose sales of fuels it could have provided in a reasonable time. While the amount of fuel requested can be no more than the average weekly amount sold by the franchisee, there is no limit on the number of requests a franchisee could make. It is possible that a franchisee could request a weekly supply shortly after it has obtained a full week's supply and therefore preclude the franchisor from selling fuels to the franchisee in the following week. The extent to which House File 736 may impinge upon the franchisor's right to provide the franchisee's fuel needs may hinge on the fact question whether the 48-hour delivery period reasonably assures that a franchisee may acquire fuel from other sources only when its franchisor cannot meet its needs. Furthermore, while the bill is proposed in a time of fuel shortage, it is not limited to a fuel shortage or emergency situation.

We think House File 736 raises serious constitutional questions which might result in judicial invalidation, depending on the factual demonstration made. Whether public exigency justifies an impairment of contract obligations is open to judicial inquiry; the legislative declaration of need is not conclusive. *First Trust Joint Stock Land Bank v. Arp*, 225 Iowa 1331, 1334-35, 283 N.W. 441 (1939).

A police power statute is not invalid merely because it varies existing contract rights. " . . . [T]he reservation of the reasonable exercise of the protective power of the States is read into all contracts . . . " *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 444 (1938). The factors to be used in determining whether a police power statute affecting private contracts violates the federal contract clause have been recently discussed in *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 57 L.Ed. 2d 727, 98 S.Ct. 2716 (1978), in which the Court found unconstitutional a Minnesota statute imposing a charge upon termination of a pension

fund where the fund was insufficient to provide full benefits to certain employees.

Despite the customary deference courts give to state laws directed to social and economic problems, "[l]egislation 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*, 431 U.S. 1, 22, 52 L.Ed.2d 92, 97 S.Ct. 1505 (1977)] 438 U.S. at 244, 57 L.Ed.2d at 736, 98 S.Ct. at 2722.

In applying this test, the Court scrutinized the severity of the impairment on contract obligations, the public need justifying the impairment, and the reasonableness of the law. The Court also analyzed *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1938), which upheld Minnesota's mortgage moratorium law enacted during the Depression, to determine what factors justified such severe limitation on contract remedies. Those significant factors were (1) the legislative declaration of an emergency, (2) protection of "a basic societal interest, not a favored group", (3) appropriately tailored relief, (4) reasonable conditions, and (5) limitation of the legislation to the duration of the emergency. 438 U.S. at 242. 57 L.Ed.2d at 735, 98 S.Ct. at 2721-22.

Since the contract clause in the Iowa Constitution, Art. I, §21, is derived from that in the United States Constitution, Art. I, §10, it should be construed similarly to the federal contract clause. *Des Moines Joint Stock Land Bank v. Nordholm*, 217 Iowa 1319, 1335, 253 N.W. 701 (1934); *see also, In Interest of Johnson*, 257 N.W.2d 47, 49 (Iowa 1977).

Whether the statute varies the obligations of fuel franchise agreements upon reasonable conditions and in a manner appropriate to its undulying purpose depends on whether it is narrowly tailored to avoid unnecessary restrictions on the franchisor's contract rights. Resolution of this question hinges on the factual issues raised above.

If the legislation were narrowly tailored to allow purchases where the franchisor was clearly unable to provide the agreed quantity and such purchases would not prevent the franchisee from acquiring supplies the franchisor could provide in a reasonable period of time, the severity of the impairment on the franchisor's contract rights would be greatly reduced. A narrowly tailored statute would also insure that any resulting impairment was necessary to the purposes of the statute and was not merely a means by which franchisees could avoid contract obligations. The legislation would also be less susceptible to constitutional attack if it were limited in duration and were directly tied to the fuel shortage.

We would therefore recommend that the bill be redrafted to insure that the contract impairment is permitted only where reasonably necessary to assure the legislative purpose — "the orderly flow of an adequate supply of motor fuel."

It should be noted that Congress declined to apply the Petroleum Marketing Practices Act to Franchises in existence at the time of its enactment for fear that the added limitations upon termination rights would amount to a taking of property (contract rights) without payment of just compensation. Senate Report No. 95-732, p. 31-32. In our view a statute tailored to withstand contract clause scrutiny (as suggested

above) would not violate the due process clause. As the United States Supreme Court stated in *New Motor Vehicle Board v. Orrin W. Fox Co.*, U.S. , 58 L.Ed.2d 361, 372, 99 S.Ct. 403, 409 (1978), in upholding California's Automobile Franchise Act which allowed a terminated franchisee to bar any new dealership in the retail area without a hearing, "General Motors [the franchisor] had no interest in franchising that was immune from state regulation." States may validly regulate the retail marketing of gas in the absence of conflicting federal law. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128, 57 L.Ed.2d 91, 101, 98 S.Ct. 2204 (1978). In the area of economic regulation, "[l]egislative bodies have broad scope to experiment with economic problems . . . " *New Motor Vehicle Board, supra*, 58 L.Ed.2d at 374, 99 S.Ct. at 4, quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

In conclusion, it is our opinion that section 2(4) of H.F. 736 provides remedies for violating terminations which conflict with federal law and therefore violates the Supremacy Clause of the United States Constitution. H.F. 736, as written, could unconstitutionally impair the obligation of certain existing contracts depending on certain factual determinations. It is further our opinion that the legislative purpose could constitutionally be achieved by a narrowly tailored statute.

August 13, 1979

TAXATION: Suspension of Property Taxes: Section 425.16 et seq., as amended by S.F. 495, Acts of 68th G.A., first session (1979); §§427.9 and 427.11, Code of Iowa, 1979. The commissioner of social services has a mandatory obligation under §427.9 to notify the board of supervisors of the name and property of a person eligible for property tax suspension and the board must order such suspension. Such notification by the commissioner is not prohibited by federal statutes or regulations. An additional homestead tax credit claimant whose homestead is eligible for tax suspension under §427.9 and who desires to claim the tax credit must forgo the suspension and pay the taxes due and attributable to the homestead in the 1979-1980 fiscal year. (Griger to Norland, State Representative, 8-13-79) #79-8-7

The Honorable Lowell E. Norland, State Representative: You have requested an opinion of the Attorney General concerning suspension of property taxes provided for in §427.9, Code of Iowa, 1979, in your recent letter, as follows:

"1. Does section 427.9 of the Code require that the collection of taxes owed by persons described in that section be suspended?

"2. Is the Department of Social Services required to provide the names of those persons eligible for suspension of tax collection to the county boards of supervisor? If so, may the Department of Social Services require persons defined in section 427.9 of the Code to apply for the suspension of taxes in lieu of the Department's statutory duty to inform the board of supervisors of the persons' eligibility for suspension of tax collection?

"3. The 1979 General Assembly changed the property tax relief provision for the elderly and disabled (§425.16 et seq.) from a reimbursement for property taxes paid to a credit on property taxes due. In light of this change, may an individual who has property taxes suspended under section 427.9 of the Code claim a credit against the amount of property taxes suspended, thereby reducing the amount of taxes the individual owes and will eventually have to pay 6% interest on?"

Your first and second questions are closely related and will be considered herein together.

Section 427.9 of the Code provides as follows:

"Suspension of taxes. Whenever a person is a recipient of federal supplementary security income or state supplementary assistance, as defined in section 249.1, or is a resident of a health care facility, as defined by section 135C.1, which is receiving payment from the department of social services for his care, such person shall be deemed to be unable to contribute to the public revenue. The commissioner of social services shall thereupon notify the board of supervisors, of the county in which such assisted person owns property, of the aforesaid fact, giving a statement of property, real and personal, owned, possessed, or upon which said person is paying taxes as a purchaser under contract. It shall then be the duty of the board of supervisors so notified, without the filing of a petition and statement as specified in section 427.8, to order the county treasurer to suspend the collection of all the taxes assessed against said property and remaining unpaid by such person or contractually payable by him, for such time as such person shall remain the owner or contractually prospective owner of such property, and during the period such person receives assistance as described in this section."

The Iowa Supreme Court, in construing the above quoted statute when its provisions were applicable to those persons receiving old-age assistance, held that the duty of the board of supervisors to order the suspension of taxes was mandatory, not discretionary. *Thompson v. Chambers*, 1941, 229 Iowa 1265, 296 N.W. 380. In this case, the Court stated at 229 Iowa 1260-70:

"It seems to us to be important that the statute, section 6950.1, provides that upon receipt of notice from the old-age assistance commission, such as was furnished in this case, 'it shall then be the duty of the board of supervisors * * * to order the county treasurer to suspend the collection of all the taxes assessed against said property and remaining unpaid by such person.' The direction to the board is mandatory—it has no discretion in the matter. Section 6950, however, provides that in acting upon a petition for suspension filed by the taxpayer himself, the board 'may' order the suspension of taxes. It seems to us that if the board, in the present case, had failed or refused to order the taxes in question suspended, it could have been compelled to do so."

Section 6950, alluded to by the Court, constitutes §427.8, Code of Iowa, 1979.

Given the fact that the board of supervisors has a mandatory duty to order the suspension of taxes, it seems equally clear that §427.9 imposes a mandatory duty upon the commissioner of social services to notify the board of a person described in this statute, together with a description of such person's property. Indeed, the Attorney General has opined that the commissioner's statutory predecessor, the state board of social welfare, had this mandatory notification duty. 1944 O.A.G. 17.

Therefore, with reference to your first and second questions, §427.9 requires that property taxes assessed against property of an eligible person be suspended and the commissioner of social services and appropriate board of supervisors have a mandatory obligation to perform their statutory duties for purposes of perfecting such tax suspension. Section 427.9 does not vest in the commissioner any statutory authority to require an eligible person to petition the board of supervisors for suspension of taxes.

However, given the mandatory notification duties imposed upon the commissioner in §427.9, the department of social services has directed

our attention to various federal statutes and regulations and has expressed a legitimate concern whether, pursuant to these provisions, the commissioner may be precluded from giving notice to the board of supervisors for tax suspension purposes.

Section 427.9 makes eligible for tax suspension a person who is a recipient of federal supplementary security income as defined in §249.1, Code of Iowa, 1979. This latter statute provides:

"1. 'Federal supplemental security income' means cash payments made to individuals by the United States government under Title XVI of the Social Security Act as amended by United States public law 92-603, or any other amendments thereto."

On November 22, 1976, the United States secretary of the department of health, education and welfare and the State of Iowa entered into an agreement pertaining to the administration of the federal supplemental security income program. Article VII of that agreement states:

"The Secretary and the State shall adopt policies and procedures to ensure that information contained in their respective records and obtained from each other or from others in carrying out their functions under this agreement shall be used by them and disclosed solely as provided in section 1106 of the Act and the regulations promulgated thereunder."

Section 1102 of the Social Security Act (42 U.S.C. §1302) authorizes the secretary to promulgate regulations "not inconsistent with this Act, as may be necessary to the efficient administration" of the secretary's functions which he or she has under the Act. Section 1106 (42 U.S.C. §1306) in relevant part provides:

"No disclosure . . . of any file, record, report, or other paper, or any information, obtained at any time by the Secretary or by any officer or employee of the Department of Health, Education, and Welfare in the course of discharging the duties of the Secretary under this Act, and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the Secretary or from any officer or employee of the Department of Health, Education, and Welfare, shall be made except as the Secretary may by regulations prescribe . . . Any person who shall violate any provision of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both."

The secretary has, pursuant to §1106 of the Social Security Act, promulgated regulations concerning the disclosure of information which the department of social services receives from the department of health, education, and welfare concerning the administration of the federal supplemental security income program. Regulation §205.50 states that the "Publication of lists or names of applicants and recipients will be prohibited." *See* 45 CFR 205.50(a)(1)(iii), p. 26. However, there is an exception to this prohibition in 45 CFR 205.50(e), pp. 27-28, which provides:

"(e) Exception. In respect to a state plan under title I, IV-A, X, XIV, or XVI of the Social Security Act, exception to the requirements of paragraph (a)(1)(iii) of this section may be made by reason of the enactment or enforcement of state legislation, prescribing any conditions under which public access may be had to records of the disbursement of funds or payments under such titles within the state, if such legislation

prohibits the use of any list or names obtained through such access to such records for commercial or political purposes."

Section 217.30, Code of Iowa, 1979, pertains to the confidentiality of information in the possession of the department of social services. Section 217.30(4)(d) provides:

"It shall be unlawful for any person to solicit, disclose, receive, use, or to authorize or knowingly permit, participate in, or acquiesce in the use of any information obtained from any such report or record for commercial or political purposes."

Violation of §230.17(4)(d) constitutes a serious misdemeanor. *See* §230.17(7).

In essence, the state and federal government have an agreement pertaining to the federal supplemental security income program which prohibits disclosure of information by the department of social services except as provided in 42 U.S.C. §1306 and the regulations thereunder. Regulations adopted by the secretary allow disclosure of information which the board of supervisors would need to order a tax suspension under §427.9 as long as state legislation prohibits the use of "any list or names" for commercial or political purposes. Iowa has enacted such legislation in §217.30(4)(d). Therefore, this office is of the opinion that the commissioner's duty to notify the board of supervisors that a person is a recipient of federal supplementary security income and to give a statement to the board of the recipient's property, all as set forth in §427.9, is not foreclosed by the aforementioned federal statutes and regulations.

Your final question is whether persons whose taxes have been suspended can file a claim with the county treasurer for the additional homestead tax credit created by S.F. 495, Acts of 68th G.A., first session (1979).

Section 425.16 et seq, Code of Iowa, 1979, provided for an annual property tax reimbursement paid directly to eligible claimants. The amount of reimbursement was equivalent to either all or a portion of the property taxes paid by the claimant upon the claimant's homestead or a portion of the rent paid by such claimant for the right of occupancy of the homestead. *See* §§425.17 and 425.23, Code of Iowa, 1979. In the event that a person's property taxes upon his or her homestead was suspended during the base year, such person was not entitled to the reimbursement because no property taxes would have been paid by the claimant. Senate File 495, inter alia, substituted a direct reimbursement for property taxes paid with a tax credit against the taxes due on the homestead. Therefore, eligible claimants, as defined in §425.17(3), as amended by §3 of S.F. 495, may annually claim, for property taxes due in the 1979-1980 fiscal year, a tax credit against the tax due on the claimant's homestead. Senate File 495 did not change the concept of direct reimbursement for renters.

The interpretation of the additional homestead tax credit law must be made in light of the familiar rule of statutory construction that tax exemption statutes are to be strictly construed and those claiming exemption must show that they are entitled to it. Indeed, in construing the regular homestead tax credit law, contained in Chapter 425, Code of

Iowa, the Iowa Supreme Court stated in *Ahrweiler v. Board of Supervisors*, 1939, 226 Iowa 229, 231, 283 N.W. 889, 890:

"Chapter 195 of the Acts of the 47th General Assembly, known as Homestead Tax Exemption Act, became effective March 25, 1937. The provisions of this chapter relating to the matters in controversy are not free from ambiguity and obscurity, consequently the decision must rest upon the proper construction thereof. This is an act providing for credits against certain property taxes and, as its name indicates, is a tax exemption act. Therefore, in its construction and interpretation the court should follow the rules enunciated by the decisions in such cases. It is a well-established principle that tax exemption statutes should be strictly construed and that those claiming exemptions must show themselves entitled thereto within the purview of the act."

In 1938 O.A.G. 288, the Attorney General considered the question of whether the regular homestead tax credit could be claimed by a person whose taxes had been suspended pursuant to §427.9. The Attorney General opined that the regular homestead tax credit was obtainable by such person "if the owner and property have qualified under the Homestead Exemption Act, the same as on any other property." *Id.* at 288. Likewise, in order to claim the additional homestead tax credit, the claimant and property must qualify pursuant to the provisions of chapter 425, Code of Iowa, 1979, as amended by S.F. 495.

Section 3 of S.F. 495 amends, inter alia, §425.17(9), Code of Iowa, 1979, to define "Property taxes due" in relevant part:

"'Property taxes due' means property taxes including any special assessment, but exclusive of delinquent interests and charges for services, due on a claimant's homestead in this state, but includes only property taxes for which the claimant is liable *and which will actually be paid by the claimant.*" (Emphasis supplied.)

In the construction of the additional homestead tax credit provisions of S.F. 495, the definition of terms made use of by the legislature is controlling. *Eysink v. Board of Sup'rs of Jasper County*, 1941, 229 Iowa 1240, 296 N.W. 376.

Section 4 of S.F. 495 which amends §425.18, Code of Iowa, 1979, continues the previous prerequisite for obtaining reimbursement for property taxes paid that the right to file a claim is personal to the claimant and does not survive the claimant's death, although the claim may be filed by the claimant's legal guardian, spouse or attorney.

Section 12 of S.F. 495 amends §425.26(8), Code of Iowa, 1979, and requires that every claimant shall give to the department of revenue reasonable proof of:

"A statement that *the property taxes due* and used for purposes of this division have been or *will be paid by the claimant*, and that there are no delinquent property taxes on the homestead." (Emphasis supplied.)

Once taxes have been suspended pursuant to §427.9, their collectibility depends upon the provisions of §427.11, Code of Iowa, 1979. 1974 O.A.G. 690; 1970 O.A.G. 340; 1938 O.A.G. 288. That statute provides:

"In the event that the petitioner shall sell any real estate upon which the tax has been suspended in the manner above provided, or in case any property, or any part thereof, upon which said tax has been suspended, shall pass by devise, bequest, or inheritance to any person other than

the surviving spouse or minor child of such infirm person, the taxes, without any accrued penalty, that have been thus suspended shall all become due and payable, with six percent interest per annum from the date of such suspension, except that no interest on taxes shall be charged against the property or estate of a person receiving or having received monthly or quarterly payments of old-age assistance, and shall be enforceable against the property or part thereof which does not pass to such spouse or minor child. The petitioner, or any other person, shall have the right to pay the suspended taxes at any time."

Section 427.11 requires suspended taxes to be payable upon the sale of the property or upon the death of the recipient of the assistance and aid set forth in §427.9 except where the property is inherited by the surviving spouse or minor child of such infirm person. 1974 O.A.G. 339, 340. When the property upon which taxes are suspended passes from such surviving spouse or minor child, the suspension ceases. *Id.* at 340. Also, the recipient or any other person has the right, if he or she so elects, to pay the suspended taxes at any time.

The above quoted statutory provisions of S.F. 495 seem clearly to disclose that the legislature intended to allow the additional homestead tax credit against taxes due on the claimant's homestead in the event that the claimant or authorized person filed the claim while the claimant was alive and in the event that the claimant will actually pay the taxes attributed to the homestead. Indeed, the claimant is required to furnish the department of revenue with reasonable proof that he or she did or will pay the property taxes due on the homestead.

By contrast, once property taxes are suspended, there is no requirement that the person receiving the suspension actually pay suspended taxes upon the homestead, while the suspension continues, although pursuant to §427.11 such a person may elect to do so. Consequently, the requirement in S.F. 495 that the claimant actually pay the property taxes upon the homestead and the condition of suspension created in §427.9 are incompatible. Therefore, in order for an additional homestead tax credit claimant whose homestead is eligible for tax suspension to obtain the credit, the claimant must forgo the suspension and pay the taxes due and attributable to the homestead in the 1979-1980 fiscal year.

August 15, 1979

COUNTY PUBLIC HOSPITALS: Public disclosure of salaries: §347.13, Code of Iowa, 1979. The individual employee's name and salary are a public record when such salary is paid in whole or in part from a tax levy. The provisions of chapter 68A control citizens right to inspect salary records. (Bennett to Tieden, State Senator, 8-15-79) #79-8-8

Senator Dale L. Tieden: Reference is made to your request for an opinion concerning the disclosure of the salaries of employees of a public hospital.

The question which you presented is as follows:

"Whether the salaries of each of the individual employees of a public hospital must be available to the public upon request?"

Chapter 347 of the Code of Iowa, 1979, deals generally with county public hospitals. Section 347.13 of that chapter delineates the powers and duties of public hospital's boards of trustees. Among the obligations imposed upon the trustees are the following:

"There shall be published quarterly in each of the official newspapers of the county as selected by the board of supervisors pursuant to section 349.1 the schedule of bills allowed and there shall be published annually in such newspapers the schedule of salaries paid by job classification and category, but not by listing names of individual employees. The names, addresses, salaries, and job classification of all employees paid in whole or in part from a tax levy shall be a public record and open to inspection at reasonable times as designated by the board of trustees." 347.13(14) Code of Iowa, 1979.

As set out in the above section of the chapter the trustees are required to publish certain expenses incurred in the operation of the hospital. In addition to the schedule of bills allowed the trustees are obligated to annually make public the listing of salaries by job classification but with no mention of the names of the individual employees.

However, there are circumstances when the names of the individual employees must be of public record. Section 347.13 (14) contains a provision for disclosure of individuals' names when any part of their salaries are paid in whole or in part from a tax levy. The only employees whose names are exempt from disclosure are those whose salaries in no part are paid through tax receipts. Conversely, if any part of a persons salary is attributable to tax dollars then that person's name becomes a public record.

While Section 347.13(14) does require quarterly publication of salaries by job classification and category only, those names of employees who are paid in part or in whole from a tax levy must be open for public inspection.

Once the records have been designated as "public," chapter 68A of the Code outlines the procedure for their examination. Section 68A.2 gives any interested citizen the right to make photographs or photographic copies of the records while they are in the possession of the lawful custodian. Section 68A.3 states that the examination and copying of the records "shall be done under the supervision of the lawful custodian of the records or his authorized deputy." The lawful custodian of the payroll records in this case would be the board of trustees of the hospital. In situations where the lawful custodian does not have customary office hours per week, section 68A.3 of the Code provides that the right of inspection may be exercised at any time "from nine o'clock a.m. to noon and from one o'clock p.m. to four o'clock p.m. Monday through Friday, excluding legal holidays, unless the citizen exercising such right and the lawful custodian agree on a different time."

In answer to the question posed in your opinion request, because such salaries would be considered a public record the disclosure provisions of Chapter 68A of the Code would apply and any inspection of such records must comply with the procedures of that chapter.

August 10, 1979

CONSTITUTIONAL LAW: Rulemaking and Amendment Powers of Each House of the Legislature. Article III, Section 9, Article III, Section 15, Constitution of Iowa. A reapportionment plan passed under a proposed statutory procedure would not be subject to invalidation on the ground that the rules of each house of the legislature were not followed in enacting the plan. A proposed law-making process that reserves a residual right of each house to amend legislation does not offend

Article III, Section 15 of the Iowa Constitution. Mere passage of a statute does not impermissibly bind future legislatures. (Appel to Harbor, State Representative, 8-10-79) #79-8-9

The Honorable William Harbor, State Representative: We are in receipt of your request for an opinion regarding the constitutionality of a proposed statutory procedure for reapportionment, H. F. 707. Under this proposal, the Legislative Service Bureau is directed to prepare a draft reapportionment plan for submission to both houses of the General Assembly. Initially, neither house may amend the plan, but must either approve or reject it. If the plan is rejected, the Legislative Service Bureau prepares a second plan which is also unamendable in either house. If that version is also unacceptable, the Legislative Service Bureau is required to draw a third plan. Unlike the previous two proposals, however, this measure may be amended from the floor under the normal rules of procedure of each house.

The proposed legislation raises three delicate issues of constitutional dimension. The first question is whether H. F. 707 violates Article III, Section 9, of the Iowa Constitution, which states that "Each house shall . . . determine its rules of proceedings . . .". The second question is whether the proposed procedure violates Article III, Section 15 of the Iowa Constitution which states, in relevant part, that "Bills may be amended, altered, or rejected by the other . . .". The final question is whether H. F. 707 impermissibly undermines the plenary power of the succeeding General Assembly by purporting to irrevocably bind it to the terms of the statute.

I.

The purpose of a constitutional provision mandating adoption of rules by each house of the legislature is obvious. "The bad mode of deliberating," by the National Assembly, it has been said, was one of the chief causes leading to the French Revolution, *see* R. Luce, *Legislative Procedure*, at 2. The constitutional provision is designed to insure that legislative business is conducted in an orderly manner. Otherwise, the democratic principle of elected officials voting on the record on clear, identifiable issues is thwarted and the majority will of the members of the legislature may be defeated by procedural irregularities.

Article III, §15 does not expressly state that proceedings must be structured by rules in each house and not by statute. It could, however, be argued that to allow proceedings to be controlled by statute is contrary to the checks and balances inherent in a bicameral legislature. And, the interjection of the executive approval or veto that results from statutory structuring of legislative procedure could be seen as contrary to separation of power principles.

What little authority there is, however, suggests that legislative procedure may be controlled by statute. In *Heishell v. City of Baltimore*, 4 A. 116, 118-19 (Md. 1886), it is said in dictum that:

> When the Constitution of the United States gave to *each house* of congress, and the Constitution of the State of Maryland the right to *each house* of the general assembly, to determine its rule of proceeding, it was never held for a moment that such a right included the power to change any existing statute or common law.

The clear implication of the above provision is that proceedings may be controlled by statute, or by common law.

In at least one case, however, the majority takes a different view. In *Coggin v. Davey*, 211 S.E.2d 708 (Ga. 1975), the Georgia Supreme Court considered the question of whether the Georgia Sunshine law applied to the state legislature. The majority stated that since the rules of the houses of the legislature conflicted with the Sunshine Law, the rules prevailed. A concurring opinion, however, pointed out that the rules override-the-statute analysis was dictum in light of the opinion's previous conclusion that as a matter of statutory construction, the Sunshine Act did not apply to the legislature.

Past sessions of the General Assembly have enacted a host of statutes addressing various aspects of legislative operations. Most do not amount to rules of proceedings in the sense that they do not structure the legislative process while the General Assembly is in session. For instance, there are provisions for temporary organization and qualification of members, *see* §§2.3 and 2.5, The Code 1979, for the supervision of legislative agencies that assist the General Assembly, §2.42 (Legislative Council oversight of Legislative Service Bureau), and for the transaction of business while the legislature is not in session, §2.16 (prefiling of bills).

A few, however, can arguably be said to affect the manner in which bills are considered and passed when the legislature is in session. Section 2.15, for instance, gives standing committees in each house certain express powers, including the ability to introduce bills and resolutions. Similarly, §2.16 requires that prefiled bills be assigned to regular standing committees in each house. But by and large, the provisions of Chapter 2, The Code 1979, defer to rulemaking power of each house.

Given the lack of clear judicial authority and the limited legislative tradition, it is difficult to predict how an Iowa court would react to the statutory rule-making provisions in H. F. 707. The basic constitutional policy underlying Article III, §10 — that of insuring orderly law-making — is not impaired, however, by statutory rule-making. We think Iowa courts would be reluctant to invalidate a statute of the General Assembly where the underlying constitutional policy is not disturbed and where there is no clear judicial or legislative precedent.

In any case, we see no basis for an attack on a reapportionment plan that might be passed according to the procedures outlined in H. F. 707 even if rules of each house are thereby violated. Courts generally decline to consider attacks on the validity of statutes on the ground that legislative rules of proceedings are not followed, *Miller v. Oelwein*, 136 N.W. 1045, 155 Ia. 706 (1912); *State ex rel. Lynch v. Conta*, 239 N.W.2d 313, 335 (Wisc. 1976).

II.

The second constitutional question is whether the amendment limitation feature of H. F. 707 violated Article III, Section 15 of the Iowa Constitution, which provides that bills "may" be amended by either house. We have been able to discover no case law interpreting this or similar provisions in any state.

We conclude, however, that H. F. 707 does not impermissibly impair the ability of each house to amend proposed legislation. H. F. 707 provides that each house may reject a proposal of the Legislative Service Bureau and transmit to LSB "information which the Senate or House may direct regarding reasons why the plan was not approved." If two versions of LSB are rejected, the third proposal is subject to amendment in each house according to normal rules of procedure. Thus, a determined majority in either house, should it desire, is able to insist on its right to amend the proposed reapportionment plan by rejecting the first two LSB proposals. Where a residual power of amendment is preserved and can be realistically exercised by each house, we do not believe Article III, §15 is violated.

III.

The final legal question is whether H. F. 707 impermissibly binds future legislatures. It is established that one legislature may not irrevocably bind another. For instance, in *Frost v. State*, 172 N.W.2d 575 (1969), the Iowa Supreme Court held invalid legislation that attempted to prohibit diminution or impairment of the duties, powers and existence of the State Highway Commission for the life of revenue bonds. The court noted that the provision would "illegally restrict any future general assembly in enacting legislation relating to the Commission, its activities, or its personnel during the life of the bonds," 172 N.W.2d at 583.

But the mere passage of legislation, however, which has the force of law until modified or rescinded by the General Assembly through the legislative process, has been held not within the scope of the rule. In *Green v. City of Cascade*, 231 N.W.2d 82 (1975), the Iowa Supreme Court refused to invalidate the Home Rule Act on the ground that it irrevocably bound the legislature. The court noted that in fact each succeeding legislature, far from being bound by the previous act, had made important changes in the Act, 231 N.W. 2d at 888.

The *Frost* and *Green* holdings are not contradictory. Each general assembly is vested with plenary legislative power subject only to constitutional limitations. A general assembly cannot by statute attempt to implement its own policies and simultaneously purport to preempt reconsideration by future legislatures. Such curtailment of the plenary legislative power of each general assembly would undermine the electoral process and prevent changes in perceptions of public good from being translated into law. But the rule that each general assembly has plenary power is not offended where legislation is passed that can be altered by the next general assembly. A contrary rule, consistently applied, would prevent enactment of any laws for a time period longer than a general assembly sits.

Nothing in H. F. 707 attempts to irrevocably bind future general assemblies. If the bill becomes law, it may be modified, altered, or rescinded by the 69th General Assembly. We therefore conclude that H. F. 707 does not violate the Frost rule.

August 14, 1979

MOTOR VEHICLES: HIGHWAYS: MAXIMUM TRUCK LENGTH. §§307.10(5), 321.457, 321.463, 321E.1, 321E.29, The Code 1979. Section 321E.29 does not empower the Department of Transportation to increase the maximum length of trucks. (Paff to Hutchins, State Senator, 8-14-79) #79-8-10

The Honorable C. W. "Bill" Hutchins, State Senator: By letter of June 14, 1979, you request an opinion regarding the authority vested in the Iowa Department of Transportation by §321.29, The Code 1979. Specifically, does that section of the Code permit the Department to authorize in special or emergency situations trucks with divisible loads in excess of the general length limitations, §321.457, The Code 1979. The answer, in our opinion, is no.

Initially, §321E.29 states in pertinent part:

Vehicles or a combination of vehicles with divisible loads may be moved on the highways of this state pursuant to a special permit issued for special or emergency situations by the department or local authorities subject to the discretion and judgment provided for in section 321E.1. *The combined gross weight or gross weight on any one axle or group of axles may exceed the limits established in section 321.463,* subject to limits and routes established by the issuing authority. . . . (Emphasis added).

Section 321E.1 provides in pertinent part:

The department and local authorities may in their discretion and upon application and with good cause being shown therefor issue permits for the movement of construction machinery being temporarily moved on streets, roads or highways and for vehicles with indivisible loads carried thereon which exceed the maximum dimensions and weights specified in sections 321.452 to 321.466, but not to exceed the limitations imposed in sections 321E.1 to 321E.15 except as provided in sections 321E.29 and 321E.30. . . . When in the judgment of the issuing local authority in cities and counties the movement of a vehicle with an indivisible load or construction machinery which exceeds the maximum dimensions and weights will be unduly hazardous to public safety or will cause undue damage to streets, avenues, boulevards, thoroughfares, highways, curbs, sidewalks, trees, or other public or private property, the permit shall be denied and the reasons therefor endorsed upon the application.

The emphasized portion of §321E.29 in terms authorizes exceptions only to the weight limitations contained in §321.463. No reference is made to length nor to the length limitations set forth in §321.457. As a general matter of statutory construction, when a statute designates a particular category of person, thing, conduct or circumstance, a court will ordinarily infer that all omissions should be understood as exclusions. *See* Sutherland, *Statutory Construction*, §47.23. See also *North Iowa Steel Co. v. Stably*, 253 Iowa 355, 112 N.W.2d 364 (1961).

The existence of §307.10(5), The Code 1979, also supports the conclusion that the omission of any reference to length limits in §321E.29 reflects a deliberate choice by the legislature. Subsection 5 provides:

The commission may adopt such rules which permit vehicles and combinations of vehicles in excess of the length limitations imposed under section 321.456, 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. 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 therewith shall be of no further force and effect.

This section provides a specific delegation of authority to the Department of Transportation to make rules concerning the length of trucks, subject to the approval of the General Assembly. Although this section relates to general rule-making authority rather than the issuance of emergency permits, its existence indicates that the legislature distinguishes clearly between weight and length limits and is fully capable of making explicit reference to §321.456 when it is their intention to provide authority to modify the length limitations contained therein. Thus, §307.10(5) strongly supports the conclusion that §329E.29 was intended to refer only to the weight of vehicles.

Nor does the reference in §321E.29 to "the discretion and judgment provided for in §321E.1" suggest a different result. That reference is clearly to the penultimate sentence of §321E.1, which authorizes an issuing local authority to refuse a permit, if in its judgment the movement of a particular oversize vehicle will cause undue damage to roads or will be unduly hazardous to public health. The significance of the reference is to make clear that local authorities have the same discretion to deny the emergency permits for overweight vehicles with divisible loads authorized by §321E.29 that they have to deny the permits for oversize indivisible construction machinery authorized by §321E.1. The reference in §321.29 to §321E.1 cannot fairly be read to extend the emergency permit authority to overlong trucks.

August 14, 1979

STATE OFFICERS AND DEPARTMENTS: Governor, Energy Policy Council, Department of Transportation; Disaster Emergencies, Acute Energy Shortage, Article III, Section 1, Constitution of Iowa, §§29C.3, 29C.6, 93.8. Disaster emergency declaration of June 14th, 1979, did not set forth facts sufficient to establish basis for exercise of emergency powers under §29C.6. Section 29C.6 does not conflict with §93.8. Because it is inappropriate for the Attorney General to engage in fact finding, no view is expressed on whether the circumstances more nearly comport with a public disorder under §29C.3. In a disaster situation, 29C.6 does not authorize the suspension of non procedural provisions of regulatory statutes. If narrowly construed, the first sentence of section 29C.6(6) is not per se unconstitutional as an unlawful delegation of legislative power. (Miller and Osenbaugh to Rush, 8-14-79) #79-8-11

Senator Bob Rush: You have requested the opinion of this office concerning the validity of the proclamation of disaster emergency issued by the Governor on June 14, 1979. The proclamation found an emergency due to the shortage of fuel and disruptions of supply and resulting inability to transport goods within the State. The proclamation directed the Department of Transportation to issue special permits for the movement of vehicles in excess of statutory weight and length limitations for a period of sixty days.

You have summarized your questions as follows:

1) Did valid grounds exist for the proclamation of a disaster emergency under Chapter 29C?

2) If the Energy Policy Council has not passed a resolution, does the governor have authority to declare an emergency under Chapter 29C on the basis of an energy emergency?

3) If action under Chapter 29C was proper, did the supporting circumstances more nearly coincide with the public disorder provisions of §29C.3 than with the emergency disaster provisions of §29C.6?

4) Do statutes limiting truck lengths and weights qualify as regulatory statutes prescribing the conduct of state business?

5) What are the limits to suspension-of-statute powers in §29C.6(6)?

6) Does the authority granted in §29C.6(6) violate Article III of the Constitution?

In response to your request, it is necessary first to determine whether as a matter of law the statement of facts supports the finding of a disaster emergency as provided in sections 29C.2 and 29C.6(1), The Code. If so, it would further be necessary to determine whether section 93.8, which authorizes action in energy emergencies, nonetheless foreclosed use of Chapter 29C as a basis for emergency powers in response to an energy shortage.

The facts upon which the declaration of disaster emergency is based are a significant shortfall of gasoline and diesel fuel and the economic consequences to the people of the State resulting from the inability of the trucking industry to transport fuel due to shortage of fuel and disruptions in supply.[1] Section 29C.2 defines a disaster as follows:

> "Disaster" means man-made 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.

An energy shortage is not on its face of the type of natural occurrence disasters listed by the legislature. When specific words follow a general word, the application of the general term is restricted to things that are similar to those enumerated. 2A Sutherland *Statutory Construction*, §47.17, p. 103 (4th ed. 1973). Nor does the proclamation state facts from which it could be concluded that the energy shortage was a "man-made catastrophe". "Catastrophe" is defined in Webster's New Twentieth

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[1] The Governor's June 14th Proclamation made the following findings:

> Whereas, the State of Iowa is experiencing a significant shortfall of gasoline and diesel fuel, which shows no sign of remedy in the near future; and
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> Whereas, the constant unimpeded shipment of petroleum products is essential so that the shortage of available product is not exacerbated; and
>
> Whereas ,the shortage of fuel and disruptions in supply limit the ability of the trucking industry to transport raw materials and commodities to Iowa citizens and to businesses both rural and urban; and
>
> Whereas, the lack of these products and transportation create unfavorable immediate and long-term economic consequences which would threaten the health and safety of the people of the State; and
>
> Whereas, a temporary waiver of current statutory limitations regulate the maximum and individual axle and gross weights of trucks will facilitate the conservation of existing fuel supplies, thereby reducing the threat of adverse developments,

Century Dictionary (1971) as "a disastrous overthrow or ruin," "any great and sudden calamity, disaster, or misfortune," or "any event that disturbs or overthrows the existing order of things." The proclamation does not state the basis upon which the Governor determined that the energy shortage was a "man-made catastrophe "or that such a catastrophe is "imminently threatened," section 29C.6(1), The Code. In our opinion, the proclamation provides inadequate findings in that the reasons stated establish only a threat to the public health and safety but do not additionally establish that a catastrophe has occurred or is imminently threatened as required by sections 29C.2 and 29C.6(1). Since the statute requires a statement of reasons, the validity of the proclamation must be measured by the stated reasons.

When there is a requirement of law that reasons be stated by executive officials or administrative agencies responsible for decisions, there is an implicit corollary that the decision must stand or fall on the basis of the reasons stated.

United States v. Laird, 469 F.2d 773, 780 (2d Cir. 1972); *See also, SEC v. Chenery Corp.*, 318 U.S. 80, 87 L.Ed. 626, 633, 63 S.Ct. 445, 459 (1943); Schwartz, Administrative Law §207, p. 586-7 (1976).[2] The Iowa courts will review a finding of emergency to determine whether such in fact exists and whether it justifies the exercise of emergency powers. *First Trust Joint Stock Land Bank v. Arp*, 225 Iowa 1331, 1334, 1335, 283 N.W. 441, 443 (1939).

Our restrictive interpretation is reinforced by the sweeping powers that may be exercised under Chapter 29C. Among other powers, the Governor may suspend regulatory statutes dealing with procedural matters, *see* §29C.6(6). Any such action deeply intrudes upon normal legislative prerogatives. We think Iowa courts would sanction the exercise of such unusual powers on the part of the executive only in the most extraordinary situations.

You ask whether the Governor has authority to declare a disaster emergency under §29C.6 in an energy crisis even if the Energy Policy Council has not passed a resolution pursuant to §93.8 of the Code. Section 93.8 provides:

Emergency powers. If the council by resolution determines the health, safety, or welfare of the people of this state is threatened by an actual or impending acute shortage of usable energy, it shall transmit the resolution to the governor together with its recommendation on the declaration of an emergency by the governor and recommended actions, if any, to be undertaken. Within thirty days of the date of the resolution, the governor may issue a proclamation of emergency which shall be filed with the secretary of state. The proclamation shall state the facts relied upon and the reasons for the proclamation.

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[2] We observe that the Governor and his staff doubtless concluded that they were faced with an urgent situation requiring expeditious action. It is possible and, indeed, quite likely that the Governor possessed additional information not recited in the proclamation which contributed to the decision to declare an emergency. For example, a significant truck strike was emerging at the time of the proclamation. Although this office and a reviewing court may as citizens be aware of such facts, it is rather clearly established that a court could not consider unstated factual premises in determining the lawfulness of executive action.

If §29C.6 were so broadly construed as to authorize its invocation whenever "the health, safety, or welfare of the people of this state is threatened by an actual or impending acute shortage of usable energy", the terms of §93.8 would prevail over §29C.6. As Iowa Courts have often stated:

A fundamental rule is that where a general statute, if standing alone, would include the same matter as a special act and thus conflict with it, the special act will be considered an exception to the general statute whether it was passed before or after such general enactment. *Yarn v. City of Des Moines*, 243 Iowa 991, 998, 54 N.W.2d 439, 443, and citations; 82 C.J.S., Statutes, section 369, pages 843, 844.

The rules just mentioned that a special statute will prevail over a general one apply only where the two are repugnant or inconsistent. Of course it is not necessary to apply such a rule where the two acts are consistent.

Iowa Mutual Tornado Insurance Association v. Fischer, 245 Iowa 951, 955, 65 N.W.2d 162, (1954); *See also*, Section 4.7, The Code; *Goevgen v. State Tax Commissioner*,, 165 N.W.2d 782, 787 (Iowa 1969), Vol. 2A, Sutherland *Statutory Construction* §51.05, p. 315 (4th ed. 1973). Section 93.8 is also the later enactment and would therefore be presumed to control in case of inconsistency. Section 4.8, The Code; *Doe v. Ray*, 251 N.W.2d 496, 503 (Iowa 1977).

If they dealt with the same subject matter, sections 93.8 and 29C.6 would be inconsistent as to the requirements for the declaration of an emergency and the emergency powers delegated to the Governor. Section 93.8 requires the Energy Policy Council to recommend a declaration of emergency. Section 93.8 delegates certain powers to the Governor in cases of energy emergency. By implication, other powers are excluded. *See*, Op. Att'y. Gen. 79-6-2 (Osenbaugh to Gallagher, 6-6-79). Section 29C.6 delegates quite different powers to the Governor.

Under our restrictive interpretation of §29C.6, however, §93.8 does not simply address itself in a more minute way to subject matter within the scope of §29C.6. Rather, we find that §93.8 addresses itself to non-catastrophic problems not within the scope of §29C.6. The requirements for a declaration of emergency are significantly less restrictive under §93.8 than for a disaster emergency under §29C.6 and the powers authorized by the former provision are correspondingly less sweeping. If the Energy Policy Council determines that public health, safety, or welfare is threatened by an "actual or impending acute shortage of energy", it may pass a resolution authorizing the governor to take limited action even if the situation does not rise to a man-made catastrophe or natural disaster as required by Chapter 29C. Thus, action may be taken under §93.8 in situations where §29C.6 may not properly be invoked. However, if the energy difficulties can be said to be not simply "acute" but are catastrophic in nature, the Governor may, acting under authority of §29C.3, declare a disaster and exercise more sweeping powers. Because §93.8 is different in scope than §29C.6, the general rule that the specific statute controls over the general is not applicable.

The two-tiered scheme of emergency powers makes sense. Where non-catastrophic energy emergencies arise, there is sufficient time to convene the Snergy Policy Council, debate the problem, and pass an appropriate resolution in a public meeting. Such a process comports more closely with

normal decisionmaking than unilateral executive action. In a catastrophic situation, however, time may not allow for such procedural niceties, and a delay of hours might seriously prejudice the public welfare. Indeed, in a truly catastrophic situation, it may not even be possible to contact members of the Energy Policy Council or any other governmental body, let alone expeditiously convene a meeting of the body.

Your third question is whether the supporting circumstances more nearly coincided with a public disorder provision of §29C.3 than with the emergency disaster provisions of §29C.6. A definitive answer to this question would require fact finding which is beyond the scope of an opinion of the Attorney General. We note, however, that the Governor's proclamation on its face made no mention of facts suggesting the prospect of any substantial interference with the public peace which might constitute a significant threat to the health and safety of citizens or a significant threat to public or private property as required by §29C.3(1).

Your fourth question requested our opinion on the use of section 29C.6(6) to suspend statutory limitations on the length and weight of trucks. Section 29C.6(6), The Code, states that the Governor may:

Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders or rules, *of any state agency, if strict compliance* with the provisions of any statute, order or rule *would in any way prevent, hinder, or delay necessary action in coping with the emergency* by stating in proclamation such reasons. Upon the request of a local governing body, the governor may also suspend statutes limiting local governments in their ability to provide services to aid disaster victims.

The first sentence of this section authorizes the suspension of only procedural provisions of regulatory statutes. This is in contrast to the limited authority for suspending substantive provisions of statutes which limit local government's ability to provide services (found in the second sentence of section 29C.6(6)) and the authority found in section 29C.6(2):

The governor may temporarily suspend or modify, for not to exceed sixty days, any public health, safety, zoning, transportation, or other requirement of law or regulation within this state when by proclamation, he deems such suspension or modification essential to provide temporary housing for disaster victims.

(2):If section 29C.6(6) were construed to authorize suspension of substantive statutory requirements, these other grants of suspension authority as essential to provide temporary housing or to allow local governments to provide services would be unnecessary. We therefore conclude that section 29C.6(6) should be read literally to allow suspension of only statutory provisions prescribing procedures for the conduct of state business.

Thus, the statute authorizes a disaster emergency proclamation which would suspend section 321E.15, The Code, which requires prior notice to local officials and hearing before adoption of regulations for the movement by permit of vehicles and indivisible loads. Section 321E.29, The Code, authorizes the Department of Transportation in "special or emergency situations" to issue special permits which authorize gross weight for vehicles in excess of the limits established in section 321E.29, The Code. Thus, section 29C.6(6) would, in a valid disaster emergency,

authorize the Governor to suspend the notice and hearing procedural requirement of §321E.15. However, the disaster emergency proclamation goes beyond Sections 19C.6(6) and 321E.29 in two respects. Section 321E.29 authorizes the Department of Transportation or local officials to issue special permits; but the emergency proclamation directs the Department to issue such permits. The proclamation additionally suspends the length limitations on vehicles set forth in section 321.457.(3), The Code. Suspension of these statutory requirements is not authorized under section 321E.29 nor under section 29C.6(6) since these are not "provisions . . . prescribing the procedures for conduct of business . . . of any state agency . . . "[3]

Suspension of length limitations on motor vehicles is beyond the authority delegated to the Governor and is therefore unlawful. Whether the Governor has authority to direct the Department to issue special weight permits is a close question. Section 321E.29 delegates this discretionary determination to the Department or local authorities. Section 29C.6 may arguably authorize the Governor to assume powers of state agencies as either the suspension of "procedures for conduct of state business . . . of any state agency" under subsection (6) or the transfer of "direction . . . or functions of state departments . . . for the purpose of performing or facilitating disaster services" under sub-section (11). However, there is no express legislative statement authorizing the transfer of rule-making authority from an administrative agency in which it has been vested to the Governor. Because this question and the question of the Governor's authority to suspend orders and rules of administrative agencies under section 29C.6(6) raise very complex legal and constitutional issues and we have determined that the proclamation of disaster emergency was improperly issued, we decline to reach these issues.

We note that nothing in this opinion prevents the Department of Transportation from issuing emergency excess weight permits pursuant to §321E.29, The Code. Section 321E.29 provides that the Department of Transportation or local authorities may issue excess weight permits "for special or emergency situations . . . subject to the discretion and judgment provided for in section 321E.1 (requiring consideration of safety hazards and undue damage to the roads). Since the statute gives no further guidance, determination of when "special" or "emergency" situations exist which triggers the statutory provision rests in the sound discretion of the DOT or local authorities. The Department of Transportation, however, may not generally impose by rule new restrictions upon permit applications without following the notice and hearing procedural requirements of §321E.15 and the relevant provisions of the Iowa Administrative Procedure Act, §17A *et seq.*

You further request our opinion whether the authority granted in section 29C.6(6), The Code, violates Article III of the Iowa Constitution. Article III, Section 1, entitled "Of the Distribution of Powers," states:

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

[3] In a separate opinion issued this date, we conclude that §321E.29 authorizes the DOT to issue emergency permits for only overweight and not for overlength vehicles. *See* Op. Atty. Gen., #79-8-10.

to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

Section 29C.6(6) arguably allows executive encroachment of a legislative function by authorizing the Governor to suspend "the provisions of any regulatory statute prescribing the procedures for conduct of state business . . . of any state agency . . . " The constitutional limitation on distribution of powers does not prevent the delegation of legislative functions if adequate limitations are imposed on its exercise. The adequacy of these checks on the exercise of the authority delegated hinges on the sufficiency of substantive standards and procedural safeguards and the necessity for delegation. *Warren County v. Judges of Fifth Judicial District*, 243 N.W.2d 894, 900 (Iowa 1976).

As we have construed it, the statute authorizes suspension only of procedural provisions of statutes and only when strict compliance with such procedural provisions would prevent, hinder, or delay necessary action in coping with a disaster emergency. The provision is analogous to an emergency exception from otherwise applicable procedural requirements. *Cf.*, §§17A.4(2) and 17A.5(2)(b)(3), re emergency rulemaking. Since we have determined that the section operates only in catastrophes, natural disasters or invasions from without, the authority granted is available only in very limited circumstances. The statute provides standards and procedural safeguards which limit executive discretion. The Governor must not only state the facts upon which the disaster emergency finding is based, section 29C.6(1), but must also state the reasons why the procedural provisions would hinder necessary action in coping with the emergency, section 29C.6(6). Additionally, the disaster emergency is limited in duration to thirty days unless extended by the Governor, section 29C.6(1). The Governor's findings are subject to judicial review. *First Trust Joint Stock Land Bank v. Arp*, 225 Iowa 1331, 1334, 283 N.W. 441, 443. The authority to suspend any statute which provides procedural safeguards is a broad and awesome power. Section 29C.6(6) would remove in certain circumstances procedural safeguards which limit legislative delegations of power under other statutes. The absence of such procedural safeguards could render those statutes invalid where inadequate standards exist. *See, Iron Workers Local No. 67 v. Hart*, 191 N.W.2d 758, 772 (Iowa 1971). In our opinion, the courts must construe section 29C.6(6) narrowly in order to provide adequate safeguards for its operation. If construed as applicable only in disasters clearly fitting within the definition in section 29C.6(2) and as allowing suspension only of intraagency procedures and only to the extent necessary to cope with such disaster, it would in our opinion be facially constitutional. (Of course, the power may not be exercised to deny due process or other constitutional rights.) If not so construed, we have serious doubts as to its facial constitutionality under Article III, Section 1.

In summary, it is our opinion that the proclamation in question did not set forth facts sufficient to establish the basis for the exercise of emergency powers under §29C.6, the Code. Because in our view the provisions of Chapter 29C should be narrowly construed, it does not conflict with §93.8. Because it is inappropriate for the Attorney General to engage in fact finding, we take no view on whether the circumstances in June more nearly comported with a public disorder under §29C.3, the Code.

In a disaster emergency, section 29C.6(6) does not authorize the suspension of nonprocedural provisions of regulator statutes. If construed narrowly, the first sentence of section 29C.6(6) is not per se unconstitutional as an unlawful delegation of legislative power.

August 15, 1979

STATE OFFICERS AND DEPARTMENTS: BOARD OF REGENTS: Section 720-1.5 (262) IAC. Where the liability for damage caused by a motor vehicle accident involving a student and a regents institution vehicle has not been established by consent or legal process, no authority exists for the institution to withhold official transcripts of the student. (Hagen to Angrick, Citizens' Aide/Ombudsman, 8-15-79) #79-8-12 (L)

August 15, 1979

STATE OFFICERS AND DEPARTMENTS: State Historical Department and its Division of Historical Museum and Archives is authorized to administer a federally funded project concerning county and municipal records and may provide assistance to local political subdivisions or private institutions in the area of record preservation and archival functions. Chapter 303, Code of Iowa, 1979. (Hagen to Musgrove, Director, Division of Historical Museum and Archives, State Historical Department, 8-15-79) #79-8-13(L)

August 16, 1979

SOCIAL SERVICES: AFDC BENEFITS: Unemployed Parents Program: §§239.2(4), 17A.4(2), 17A.5(2), Code of Iowa, 1979; §407 Social Security Act, 42 U.S.C. §607. The controlling federal statute, 42 U.S.C. §607 relating to eligibility for AFDC benefits for unemployed fathers is based on gender and is not substantially related to the achievement of any important governmental interest. It was declared unconstitutional by the U.S. Supreme Court. In view of the fact that the Department of Social Services cannot, because of federal policy continue the unemployed fathers program, the Department may extend the program to all families made needy by the unemployment of a parent. (Robinson to Williams, Acting Director, Department of Social Services, 8-16-79) #79-8-14 (L)

August 16, 1979

JUVENILE LAW: Relationship between the new Juvenile Justice Bill and the Child Labor Law. Chapters 92 and 232, 1979 Code of Iowa. §§92.1, 92.2, 92.6, 92.8, 92.10, 92.17, 232.52(2)(a). Section 232.52(2)(a) does not permit a juvenile court to prescribe work for a child which is prohibited by Chapter 92. (Hoyt to Johnson, Deputy Commissioner, Bureau of Labor, 8-16-79) #79-8-15

Mr. Walter H. Johnson, Deputy Commissioner, Bureau of Labor: You have requested an official Attorney General's Opinion concerning the relationship between Section 232.52(2)(a) of the new Juvenile Justice Bill and the Child Labor Law. Specifically, you have asked whether Section 232.52(2)(a) permits a court to prescribe work for a child which would be prohibited by Chapter 92 and whether a minor would have to obtain the appropriate permit or certificate before that work could be performed.

Chapter 92, 1979 Code of Iowa, is the Iowa Child Labor Law. It specifies permitted and proscribed work activities with regard to minors. The legislature's goal in enacting Chapter 92 was to prevent the exploitation of children in their labor-oriented activity.

Section 232.52(2)(a) concerns juvenile offender restitution. It allows:

An order prescribing a work assignment of value to the state or to the public, or prescribing restitution consisting of monetary payment or a work assignment of value to the victim. Such order may be the sole disposition or may be included as an element in other dispositional orders.

It is rehabilitative in nature and provides for victim restitution.

In interpreting these statutes, we are guided by familiar principles of statutory construction. The polestar is the legislative intent. The goal is to ascertain that intent and, if possible, give it effect. *Doe v. Ray*, 251 N. W. 2d 496 (Iowa 1977). The subject matter, reason, and spirit of the enactment must be considered, as well as the words used. A statute should be accorded a sensible, practical, and workable construction. *Matter of Estate of Bliven*, 236 N. W. 2d 366 (Iowa 1975). Finally, in construing a statute we must be mindful of the state of the law when it was enacted and seek to harmonize it with other statutes relating to the same subject. *Egan v. Naylor*, 208 N. W. 2d 915 (Iowa 1973).

I.

Does Section 232.52(2)(a) permit a court to prescribe work for a child which would be prohibited by Chapter 92?

Prohibitions on the work activity of minors are specified in Sections 92.1, 92.2, 92.6 and 92.8. Work activity exempted from the prohibitions of Chapter 92 is set forth in Section 92.17 as follows:

Nothing in this chapter shall be construed to prohibit:

1. Any part-time, occasional, or volunteer work for nonprofit organizations generally recognized as educational, charitable, religious, or community service in nature.

2. A child from working in or around any home before or after school hours or during vacation periods, provided such work is not related to or part of the business, trade, or profession of the employer.

3. Work in the production of seed, limited to removal of off-type plants, corn tassels and hand-pollinating during the months of June, July and August by persons fourteen years of age or over, and part-time work in agriculture, not including migratory labor.

4. A child from working in any occupation or business operated by his parents.

It is apparent that the Iowa Legislature recognized that certain types of child labor need to be exempted from the prohibitions of Chapter 92. The key question is whether work activity ordered under Section 252.32 (2)(a) is exempt from the prohibitions outlined in Chapter 92.

There are no provisions in either Section 92.17 or Section 232.52 which specifically exempt work activity ordered under Section 232.52(2)(a) from the prohibitions of Chapter 92.

One could argue that an implied exemption exists since work activity ordered under Section 232.52(2)(a) is neither business oriented nor does it involve an employer-employee relationship. Rather, it is of a nature similar to the activity exempted in Section 92.17(1), *i.e.* service oriented.

In construing statutes, however, there is a presumption against creating implied exemptions. Where certain exemptions are enumerated, by

statute, it is presumed that the legislature intended that no others be created. *Iowa Farmers Purchasing Ass'n., Inc. v. Huff*, 260 N. W. 2d 824 (Iowa 1977). The only work activities exempted from Chapter 92 are enumerated in Section 92.17. In enacting the new Juvenile Justice Bill, the Iowa Legislature did not exempt work activity ordered under Section 232.52 (2) (a) from the prohibitions of Chapter 92. We must be guided by what the legislature said, rather than what they might have said. *In Interest of Clay*, 246 N. W. 2d 263 (Iowa 1976). Thus, absent such an exemption, the juvenile court should not prescribe work for a child which would be prohibited by Chapter 92.

In responding to your question, it is important to note that there is no inherent conflict between the provisions of Chapter 92 and those of Section 232.52(2) (a). Both statutes can work in harmony. Work activities prohibited by Chapter 92 are clearly specified. In ordering work activities under Section 232.52(2) (a), it would be a simple matter for a judge to avoid ordering an activity prohibited by Chapter 92. Thus, Chapter 92 and Section 232.52(2) (a) need never conflict.

In addition, any ambiguity concerning the relationship between Chapter 92 and Section 232.52(2) (a) can be cleared up by the Committee on Child Labor which is empowered under Section 92.21 to formulate rules more specifically defining permitted and prohibited work activities.

II.

Does a minor have to obtain the appropriate permit or work certificate pursuant to work ordered under Section 232.52(2) (a).

Section 92.10 requires the following:

No person under sixteen years of age shall be employed or permitted to work with or without compensation unless the person, firm, or corporation employing such persons receives and keeps on file accessible to any officer charged with the enforcement of this chapter, a work permit issued as hereinafter provided, and keeps a complete list of the names and ages of all such persons under sixteen years of age employed.

Certificates of age shall be issued for persons sixteen and seventeen years of age and for all other persons eighteen and over upon request of the person's prospective employer.

We have already determined that work activity ordered under Section 232.52(2) (a) is not specifically exempted from the regulations of Chapter 92. Absent such an exemption, it would appear that minors engaged in work activity ordered under Section 232.52(2) (a) must adhere to the requirements set forth in Section 92.10.

It should be pointed out, however, that adherence to the requirements of Section 92.10 should present little problem. It would be a simple matter for the juvenile court to request the labor commissioner to issue the appropriate permit or certificate pursuant to the adjudication. Section 92.1 already provides such a procedure.

In addition, the Committee on Child Labor is empowered to formulate rules to determine if work permits or certificates should be required pursuant to work ordered under Section 232.52(2) (a). The Committee should be encouraged to address the issue.

August 16, 1979

COUNTIES AND COUNTY OFFICERS: Article III [§39A] of the Iowa Constitution, §§19A.3, 20.7(6), 79.1, 332.3(10) and 340.4, The Code 1979. County boards of supervisors have authority to establish sick leave policy for county employees. (Hyde to Kane, Jackson County Attorney, 8-16-79) #79-8-16(L)

August 17, 1979

COUNTIES AND COUNTY OFFICERS: Hospital Trustees — Chapter 347, Code 1979. Chapter 347 does not preclude the operation of a county health care facility in the absence of a county health care facility in the absence of a county public hospital. Such a facility may receive a tax levy under §347.7. The county board of hospital trustees may supervise the operation of such a facility. (Bennett to Kintigh, Wapello County Attorney, 8-17-79) #79-8-17(L)

August 17, 1979

MONEY AND INTEREST: Chapter 1190, §12(3), 67th G.A., 1978 Reg. Session; §§535.4, 535.8 (3), Loan charges limited. Lenders, Mortgages, Pledged Savings accounts. A Lender may not, as a condition of making a loan, require a borrower to place money or other income — producing assets on deposit with or in the possession or control of the lender or some other person if the effect is to increase the yield to the lender with respect to that loan. (Hagen to Pringle, Acting Supervisor, Savings and Loan Association, State Auditor's Office, 8-17-79) #79-8-18 (L)

August 17, 1979

MENTAL HEALTH: Transfer of proceedings under Chapter 229, Code of Iowa. §§229.6, 229.12, 229.14-16, 229.49, Supreme Court Rules of Civil Procedure, Rules 167-175. Rule 16 of the Supreme Court Rules under §229.40, Code of Iowa, does not authorize transfer of involuntary hospitalization proceedings from one county to another after a hearing at which it was found that Respondent is seriously mentally impaired. Where transfer of an involuntary hospitalization proceeding is found, prior to hearing, to be in the best interests of Respondent, the judge or referee is not restricted to transferring the proceedings to the county of residence or the county where respondent is found. (Golden to Kiple, Judicial Hospitalization Referee, 8-17-79) #79-8-19(L)

August 17, 1979

MUNICIPALITIES: Zoning Board of Adjustment: §414.8, The Code 1979; 1979 Session, 68th G.A., H.F. 174, §1. The restrictive language in the amendment to §414.8 regarding purchasing or selling real estate applies only to a majority of the board. The term "persons representing the public at large" refers to occupations. (Blumberg to Rush, State Senator, 8-17-79) #79-8-20(L)

August 20, 1979

COUNTIES; COURTS; MENTAL HEALTH: Power of counties to contract with third parties for the care of a mentally ill person. Article III, Section 39A, Constitution of the State of Iowa, Sections 229.13, 230.1, 230.15, 230.23, 332.1, 444.12, 444.12(3)(a), Code of Iowa. If a county and a third party wish to enter into a contract whereby the third party agrees to assume part of the liability imposed on the county for the care of a mentally ill person at a private facility, they may do so. The district court has the authority to commit to a private facility. While the court has no authority to compel such a contract, there is no reason why the court cannot take the proposed contractual arrangement into consideration prior to making a placement decision. (Fortney to Morrison, Hamilton County Attorney, 8-20-79) #79-8-21(L)

August 20, 1979

TAXATION: PROPERTY TAX: INTEREST ON REDEMPTION FROM TAX SALE. Section 447.1, Code of Iowa, 1979 as amended by S.F. 321, Acts of 68th G.A., First Session (1979). The applicable rate of interest to be paid upon redemption from tax sale should be governed by the law in effect at the date of sale. County Auditors should calculate tax sale redemption interest on a day by day basis. (Price to Briles and Kudart, 8-20-79) #79-8-22 (L)

August 20, 1979

BANKING: MORTGAGE ASSUMPTIONS & EFFECTIVE DATE OF NEW STATUTE: House File 58, Section sixteen (16), paragraph c, Acts of the Sixty-eighth General Assembly, 1979 Session. This statute, effective July 1, 1979, controls loans entered into after that date, and is prospective and not retroactive in application. Prior to July 1, 1979, there were no restrictions prohibiting lenders from enforcing a due on sale clause in a mortgage accelerating or modifying the terms of the mortgage when the initial borrower sells the secured property. (Hagen to Rush, State Senator, 8-20-79) #79-8-23

Honorable Bob Rush, State Senator: You have requested an opinion from this office concerning the effects of certain provisions of Senate File 158, recently signed into law after adoption by the Sixty-eighth General Assembly, 1979 Session. Specifically, your questions were as follows:

1. Do the provisions of paragraph 2(c) of Section 22 apply to loan agreements executed prior to July 1, 1979?

2. Can a seller sell a home on contract and not have to worry about a "due on sale" clause before July 1, 1979?

3. Can a buyer assume an existing loan without fear of the lending institution increasing the interest rate before July 1, 1979?

4. In either case (2 and 3 above), does the buyer have to occupy the property or can the buyer use this as income property?

Initially, it must be noted that the Acts of the Sixty-seventh General Assembly, 1978 Session, Chapter one thousand one hundred ninety (1190), section twelve (12), subsection two (2), paragraph c, as amended effective July 1, 1979, by Senate File 158, 1979 Session, section twenty-two (22), was further amended subsequent to your opinion request by House File 658, section sixteen (16), effective July 1, 1979. The relevant section now reads as follows:

c. If the purpose of the loan is to enable the borrower to purchase a single-family or two-family dwelling, for his or her residence, any provisions of a loan agreement which prohibits the borrower from transferring his or her interest in the property to a third party for use by the third party as his or her residence, or any provision which requires or permits the lender to make a change in the interest rate, the repayment schedule or the term of the loan as a result of a transfer by the borrower of his or her interest in the property to a third party for use by the third party as his or her residence shall not be enforceable except as provided in the following sentence. If the lender on reasonable grounds believes that its security interest or the likelihood of repayment is impaired, based solely on criteria which is not more restrictive than that used to evaluate a new mortgage loan application, the lender may accelerate the loan, or to offset any such impairment, may adjust the interest rate, the repayment schedule or the term of the loan. A provision of a loan agreement which violates this paragraph is void.

Absent a statute to the contrary, a provision for the acceleration of the maturity of the entire debt on certain conditions, including sale or con-

veyance of the secured property, is valid and enforceable. 59 C.J.S. Mortgages §113. Other jurisdictions have developed case law precluding a lender from declaring indebtedness due and payable, simply on the basis of a mortgage or contract clause which provided that maturity of indebtedness could be accelerated if the secured property was sold or conveyed, without justifying the acceleration under valid business reasons. *See Mutual Federal Savings and Loan Association v. American Medical Services, Inc.*, 223 N.W.2d 921 (Wisc. 1974); *Hucker v. Pulaski Federal Savings and Loan Associations*, 481 S.W.2d 725 (Ark. 1972); *Baltimore Life Insurance Company v. Harn*, 15 Ariz. App. 78, 486 P.2d 190 (1971). Section sixteen (16) of House File 658 codifies this rule of law, stating that while due on sale or acceleration clauses can be valid and not against public policy, effective July 1, 1979, they are enforceable only in accordance with certain statutory principles.

In specific response to your questions:

1. House File 658, section sixteen (16), is effective July 1, 1979. A statute is presumed to be prospective in its operation unless expressly made retrospective. Section 4.5, Code of Iowa, 1979. Because there is no mention made of retroactive application, this statute must be considered prospective in nature and would apply only to loans closed after July 1, 1979.

2. Prior to the enactment of Senate File 158, section twenty-two (22), superseded by House File 658, section sixteen (16), there existed no authority in Iowa, either statutory or case law, which prohibited a lender from calling a note by enforcement of a due on sale clause upon the sale, conveyance or transfer of secured property by the borrower. If the parties to the loan agreement have bargained for and agreed to this contingency, we believe that a "due on sale" term in a mortgage is valid and enforceable at the lender's option upon the sale, transfer or conveyance of the property by the borrower prior to July 1, 1979. Subsequent to the effective date of House File 658, section sixteen (16), a due on sale term is not prohibited, but the borrower is protected from its automatic enforcement.

3. A mortgage is an agreement between the lender and the original borrower only. Prior to July 1, 1979, there was no obligation on the part of the lender to permit an assumption by a subsequent buyer without modification of the existing mortgage terms. House File 658, section sixteen (16) does restrict the lender's ability to change the interest rate or repayment schedule for a subsequent buyer of the property without reasonable justification based on specified criteria.

4. Prior to July 1, 1979, the nature of the use of the property would have no effect on the ability of the lender to accelerate the note or vary its terms upon sale of the property. House File 658, section sixteen (16) applied only to loans where the borrower and any subsequent buyer purchased a single-family or two-family dwelling to be used as that party's residence. The provision of section sixteen (16), effective July 1, 1979, would protect a borrower or subsequent buyer who purchased a duplex as investment property, as long as one unit was used as that party's residence.

August 23, 1979

CONSERVATION COMMISSION: Voting Procedure — Rule 290-60.3 (5) (17A) I.A.C. (11-17-75); Sections 1, 43, 46, *Robert's Rules of Order;* Sections 17A.2(1), 17A.3(1), Code of Iowa 1979. The chairman of the Conservation Commission may not cast the votes of commission members who are present but do not vote on a motion. When a quorum (2/3) of the commission is present, but only three members cast votes on a motion, all of which are affirmative, the motion is properly adopted. (Ovrom to Patchett, 8-23-79) #79-8-24

Representative John Patchett: This is in response to your request for our opinion concerning the validity of the voting procedure of the Iowa State Conservation Commission on September 26, 1978, in which the commission, by voice vote, adopted the master plan for Lake MacBride. According to your letter, all seven commissioners were present at the meeting, and the vote was as follows: three voted "aye", one abstained and two did not vote. The chairman counted the two non-votes as "ayes" and said the motion carried 5-0, with one abstention.

You posed two questions:

1) May the chairman cast the votes of members who were present but neither voted nor abstained?

2) If the chairman cannot do so, has the master plan for Lake MacBride been adopted since only three commissioners voted in favor of it?

Under the Iowa Administrative Procedure Act, (Chapter 17A, Code of Iowa 1979) each agency is required to make a rule setting forth its general course and method of operation. Section 17A.3(1). The Conservation Commission has done so in the following rule:

Conduct of commission meeting. All commission meetings shall be held in compliance with chapter 28A and section 107.10 . . . . A quorum of the commission members as defined in chapter 17A must be present to transact commission business. *The Chairman shall conduct the meeting in accordance with Robert's Rules of Order.*

Rule 290-60.3(5)(17A) I.A.C. (11-17-75).

Initially it should be noted that it is *Robert's Rules of Order* which governs the method of voting. The quorum requirement is that two-thirds of the members eligible to vote must be present in order to transact agency business. Section 17A.2(1), Code of Iowa 1979. The quorum refers only to the number of members present, and not to the number voting on a particular motion. *Robert's Rules of Order Newly Revised,* Section 39, at 293 (1971) (hereinafter referred to as *Robert's Rules of Order.* Since the Conservation Commission has adopted *Robert's Rules of Order* as controlling its method of conducting agency meetings, one must look there to determine whether the voting procedure was proper.

1. CAN THE CHAIRMAN CAST THE VOTES OF COMMISSION MEMBERS WHO WERE PRESENT BUT NEITHER VOTED NOR ABSTAINED?

Voice vote is the usual method for taking a vote. *Id.,* at Section 4, p. 37. The chair's powers with respect to a voice vote are limited to voting, if so desired, when his or her vote will affect the result — i.e. to break or to cause a tie. *Id.,* at Section 43, p. 343. It is also the duty of the chair to put questions to a vote and to announce the result of each vote.

Id., at Section 46, p. 376. However, there is no authority in *Robert's Rules of Order* for the chair to cast the votes of non-voting members, and therefore the Conservation Commission chairman was without authority to do so.

2. HAS THE MASTER PLAN NEVERTHELESS BEEN ADOPTED, SINCE THERE WERE ONLY THREE VOTES IN FAVOR OF IT?

The basic requirement for an assembly to approve a motion is that the "propostion must be adopted by a *majority vote;* that is, direct approval must be registered by *more than half of the members present and voting* on a particular matter . . ." *Id.*, at Section 1, p. 3. (emphasis added) The "majority vote" requirement is set forth more fully as follows:

[I]t means more than half of the votes cast by persons legally entitled to vote, excluding blanks or abstentions, at a regular or properly called meeting at which a quorum is present.

Id., at Section 43, p. 339.

Thus, *Robert's Rules of Order, which has been adopted* by the Conservation Commission, establishes that a "majority vote" is necessary in order for the commission to approve a motion. This means more than half of the members present and voting, or, stated differently, more than half of the votes cast, excluding blanks and abstentions. Although all seven commission members were present at the September, 1978 meeting, there were only three members *present and voting*, i.e. the number of votes cast, excluding blanks and abstentions, was three. Since all three votes cast were "ayes", the majority vote requirement is clearly met under *Robert's Rules of Order*. The motion to adopt the master plan for Lake MacBride was therefore approved and properly adopted by the Conservation Commission.

August 24, 1979

PUBLIC RECORDS: Confidentiality: Chapter 68A, §§68A.1, 68A.2, 68A.6 and 68A.8. Circulation records of a public library are public records and are open for public inspection and copying. The custodian of the records may bring a court action to restrain a particular request to examine records if the custodian believes the examination would not be in the public interest and would result in substantial and irreparable injury to one or more persons. (Schantz to Drake, 8-24-79) #79-8-25

The Honorable Richard F. Drake, State Senator: You have asked for an opinion of the Attorney General on whether the circulation records of a public library are open to the public under Iowa's Public Records Law, Chapter 68A, 1979 Code of Iowa. It is our opinion that such records are open to the public, although a court might allow exceptions to that general policy in exceptional cases.

Section 68A.1, The Code, declares that "all records and documents of or belonging to . . ." a state or local governmental unit are public records. Section 68A.2, The Code, states that all public records are open for public inspection and copying unless some other Code section permits or requires the records be kept confidential. You have cited no Code section authorizing secrecy of library circulation records and we have found none. Based on the clear language of the statute it appears such records are public records and must be open for public inspection unless this statute cannot be constitutionally applied to library circulation records.

A respectable argument can be advanced to the effect that a requirement of open library circulation records infringes upon rights guaranteed by the First Amendment to the United States Constitution. The United States Supreme Court has recognized a constitutional right to read derived from the First Amendment. *See e.g., Lamont v. Postmaster General*, 381 U.S. 301, 85 S.Ct. 1493 14 L.Ed.2d 398 (1965); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63, 92 S.Ct. 2576, 2581-82, 33 L.Ed.2d 683

(1972). However, the open records law does not on its face purport to regulate the right to read. Rather, the argument would have to be that the existence of the statute would create a "chilling effect" upon a citizen's reading of unpopular or controversial books because of the possibility that neighbors, parents or police might discern what the citizen was reading. Several circumstances combine to dilute the "chilling effect" argument in this context. A citizen can read a book at the library without checking it out and thus create no record for public examination. In addition, books may be purchased or borrowed from friends without the creation of public records. If anything is chilled, then, it is the willingness to check out books from a public library, rather than the right to read in a general sense.

By analogy to the decision of the United States Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), we conclude a court would likely reject the "chilling effect" argument here. *Buckley* involved a challenge to a federal statute requiring that the identity of all donors over $100 to political committees relating to federal office be reported to the Federal Election Commission and be open for public inspection and copying. The plaintiffs alleged that this disclosure requirement and others would deter potential donors to unpopular candidates and parties and could subject those who did contribute to harassment, threats and intimidation. The Supreme Court was unwilling to void the requirement on the record made in that case, although the court left open the possibility that actual threats and harassment of donors could create such a serious threat to First Amendment rights in particular stiuations that the reporting requirements could not be constitutionally applied, 424 U.S. at 71, 96 S.Ct. at 659. Our reading of *Buckley* leads us to conclude that a court would be unlikely to require a blanket exception to the open records requirement for all library circulation records, but might entertain a specific showing that a person was threatened or harassed based upon access to such circulation records.

However, the Iowa Open Records Law provides a safety valve which could be utilized in lieu of the constitutional challenge. Section 68A.8, The Code, provides a procedure to restrain the examination of a specific public record " . . . 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." This section creates a separate justification for confidentiality, i.e. a record not made confidential by any other 68A exception may be kept confidential if public access would not be in the public interest and irreparable harm would result. *See Des Moines Register and Tribune v. Osmundson*, 248 N.W.2d 493, 502 (Iowa 1979); Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency, The Rulemaking Process*, 60 Ia.L.Rev. 731, 790. It should be noted that an action for an injunction under 68A.8 may be brought only to restrain the examination of specific records and not an entire class of records such as library circulation records. In such a proceeding, the injunction would be sought by the custodian of the records, who would have the burden of proving that the examination of records would serve no public purpose and would cause irreparable harm. In short, a public library could not state simply that its records are confidential unless a person gets a court order requiring the release of records. Chapter 68A does permit the custodian

of the records to deny a citizen permission to inspect public records for a reasonable time in order to obtain an injunction, but only if the custodian in good faith believes he or she is entitled to such an injunction. A bad faith refusal to permit the inspection of public records could subject the person responsible to criminal sanctions pursuant to §68A.6.

Although we have concluded that library circulation records are public records within the meaning of Chapter 68A and open to public inspection, we are not unmindful of the serious concerns of librarians about the policy implications of such a holding. The privacy and First Amendment concerns in this area are not insubstantial. For the most part, what a person reads is simply no one else's business. There are situations, in our view rather infrequent, in which law enforcement officials may have a very legitimate interest in those records. For example, it is our understanding that this opinion request developed from a situation where Muscatine police officers attempted to verify a murder suspect's alibi that he had been at a public library at the time of the murder by examining the library's records to determine if the suspect had checked out any books on the date in question. However, the provision exempting certain records from public disclosure contained in §68A.7 contemplates the possibility that a court or the lawful custodian of the records can make exceptions to the general rule of confidentiality. Such a procedure might well provide ample opportunity for access in those situations where a legitimate need for inspection can be established. In the end, however, these are arguments for adding an additional exception to §68A.7 for library circulation records and must be addressed to the legislature.

August 24, 1979

COUNTIES: Part-time County Attorney — §§332.62, 332.63 and 340.9, The Code 1979. When the position of County Attorney is changed to part-time, the Board of Supervisors initially sets the salary. Thereafter, it is the responsibility of the compensation board. (Blumberg to Robbins, Boone County Attorney, 8-24-79) #79-8-26 (L)

August 28, 1979

SCHOOLS: CONTENT OF SCIENCE COURSES: Sections 66.1(1), 257.25(11), The Code 1977; §§257.25(3)(4) and (6), Ch. 280, §§280.3, 601A.2(10), The Code 1979; Ch. 1179, Acts of the 67th G.A. 851 1979); Sections 280.3 and 601A.2(10) do not relate to the content of public school courses. Nothing in Iowa law requires the teaching of the creation model in public school science courses. (Hagen to Van Gilst, State Senator, 8-28-79) #79-8-27

The Honorable Bass Van Gilst, State Senator: You asked for our opinion concerning discrimination in education and the content of course materials used by Iowa public schools. The specific questions you raised are as follows:

1. As the Iowa Code requires science courses in secondary grades, can censorship of the scientific evidences of the Creation Model be considered as an act of discrimination just as it would be if Black History were left out of History classes?

2. Can the materials in the State Library under "creation" be used by public school teachers in science classes?

In your letter you refer to an opinion issued by this office in December, 1977. That opinion was in response to an inquiry from the State Superin-

tendent of Public Instruction as to whether a provision of §280.3, The Code 1977, was enforceable. The language at issue was:

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.

That sentence is part of a chapter enacted by the 65th General Assembly entitled "Uniform School Requirements" and contains a number of miscellaneous duties of boards of public school districts in Iowa. It was the conclusion of the 1977 opinion that the provision was enforceable and that the sanctions for failure to carry out the duties of the chapter were removal of the district from the approved list of schools pursuant to §257.25(11) or removal of board members pursuant to §66.1(1), The Code 1977.

It is our opinion that the sentence of §280.3, The Code 1979, quoted above does not pertain to the *content* of educational programs. Although the sentence is ambiguous it is a part of a chapter which contains a variety of unrelated requirements. We believe that the sentence quoted above pertains to the "race, color, creed, sex, marital status or place of national origin" of the *student*. Educational programs do not possess, *e.g.*, *race* or *color* or *sex* or *marital status*. Those are characteristics which people possess. It is our opinion that the statutory purpose of that sentence is to prohibit discrimination in the furnishing of educational programs on the basis of the "race, color, . . . " of the recipient of an educational program, and is not concerned with content of courses.

Because we believe the sentence quoted above is a prohibition against discrimination directed toward students, we do not believe your questions are related to that sentence in §280.3, The Code 1979.

Discrimination in public accommodations is prohibited in Iowa and the definition of public accommodation was exanded to specifically include "each state and local government unit or tax-supported district of whatever kind, nature, or class that offers services, facilities, benefits, grants or goods to the public, gratuitously or otherwise." Ch. 1179, Acts of the 67th G. A. §3, p. 851, 852 (1979), codified as §601A.2(10, 2d ¶), The Code 1979. Thus, the sanctions of the Iowa Civil Rights law have been added to those existing in 1977, if any school district is found to discriminate in furnishing education to students in Iowa. Again, however, these provisions do not relate to the content of courses.

As your request notes, §257.25, The Code 1979, does require that science courses be taught in elementary and secondary schools. Nothing in this section, nor in any other section of the Code, purports to specify in detail the content of such courses, much less require the use of particular materials to be used in their teaching. In our opinion, nothing in the Iowa Code nor the Constitutions of Iowa or the United States requires teaching the "Creation Model" in these science courses.

In response to your second question, it is not the appropriate function of this office to venture opinions on whether it is sound policy for teachers to use particular materials in the State Library in their science courses.

August 31, 1979

CITIES AND TOWNS: Township Clerk—Chapter 64, §§359.20-.27, The Code 1979. A township clerk is required to execute and file an official bond in an amount, fixed by the county board of supervisors, as public interest may require. (Hyde to Hoth, Des Moines County Attorney, 8-31-79) #79-8-28 (L)

August 31, 1979

VETERANS PREFERENCE; PUBLIC EMPLOYEES: Sections 70.1, 400.10, 400.11, The Code 1979. Code sections which give an absolute preference to veterans in the selection process of state and local government employees do not violate the Equal Protection Clause of the United States Constitution under *Personnel Administrator of Massachusetts v. Feeney*, U.S. , 99 S.Ct. 2282, L.Ed.2d (1979). (Hagen to Kudart and Orr, State Senators, 8-31-79) #79-8-29

The Honorable Arthur Kudart and The Honorable Joan Orr, State Senators: We have received your letter dated March 28, 1979, requesting an opinion of this office concerning the possible liability of the State of Iowa and Iowa cities as a result of the filing of civil rights complaints claiming discrimination on the basis of sex because of the Iowa veterans preference statutes, found in Chapters 70 and 400, The Code 1979.[1] We postponed our response while awaiting the outcome of a case pending before the United States Supreme Court challenging the veterans preference law of Massachusetts. The United States Supreme Court issued its decision on June 5, 1979. *See Personnel Administrator of Massachusetts v. Feeney*, U.S. , 99 S.Ct. 2282, L.Ed.2d (1979). We respond to your specific questions as follows in light of that decision:

1. Could the state be liable and required to hold harmless any city against whom a civil rights complaint is filed?

2. Can damages be recovered by a complainant against a city because of that city's adherence to state law under Chapter 70 and 400?

3. Would the state be liable for damages from a city because of its adherence to the statutes set forth in Chapter 70 and 400?

4. Could the state be sued for violation of 42 U.S.C. Section 1983, Federal Civil Rights Laws, because of the state's failure to enact legislation that would correct a potentially discriminatory employment policy?

Sections 70.1 and 400.10-.11, The Code 1979, give an absolute preference to veterans in the selection process of state and local government employees in Iowa.[2] Iowa cases have construed the preference to be mandatory, controlling, not irreconcilable with other civil service statutes, highly remedial, and requiring a liberal construction. *Herman v. Sturgeon*, 228 Iowa 829, 293 N.W. 488 (1940); *Case v. Olson*, 234 Iowa 869,

[1] Your letter further discusses revisions in the veterans preference law proposed by Senate File 75 and House File 665, First Session, 68th General Assembly (1979), which would alter the absolute preference for veterans currently in effect, and bring the preference policy for local governments into line with state merit employees (Section 19A.12(21), The Code 1979) and federal service employment as established by the United Civil Service Commission. Our opinion is limited to the provisions and effect of the current veterans preference law.

[2] *See, e.g.*, §70.1, The Code 1979: "In every public department and upon all public works in the state, and of the counties, cities, and school cor-

14 N.W.2d 717 (1944); *Dennis v. Bennett*, 140 N.W.2d 123 (Iowa 1966); *Geyer v. Triplett*, 237 Iowa 664, 22 N.W.2d 329 (1946); *Brightman v. Civil Service Commission of the City of Des Moines*, 171 N.W.2d 612 (Iowa 1969). Earlier versions of the statute were held not to violate the Iowa Constitution prohibition against granting special privileges or immunities to any citizen or class of citizens. Iowa Constitution, Article I, §6; Acts 1904 (30th G.A.), Chapter 9; *Thurber v. Duckworth*, 165 Iowa 685, 147 N.W. 158 (1914); *Shaw v. City Council of Marshalltown*, 131 Iowa 128, 104 N.W. 1121 (1905). Veterans preference has faced no modern challenge to its constitutionality, however, based on an equal protection argument.

A statute[3] similar to the Iowa Code sections was before the Supreme Court in *Personnel Administrator of Massachusetts v. Feeney, supra.* In the action, brought pursuant to 42 U.S.C. §1983, "[t]he sole question for decision . . . [was] whether Massachusetts, in granting an absolute lifetime preference to veterans, has discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment." *Feeney*, 99 S.Ct. at 2292. The Supreme Court, after subjecting the statute in question to a multi-step analysis, concluded that Massachusetts had not so discriminated.

Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination . . . . [S]uch classifications must bear a 'close and substantial relationship to important governmental objectives,' *Craig v. Boren*, 429 U.S. 190, 197, and are in many settings unconstitutional.

Feeney, 99 S.Ct. at 2293.

If a statute is gender neutral on its face (as are both the Massachusetts and Iowa statutes), but is challenged on the ground that its effects

(Footnote Cont'd)

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porations thereof, honorably discharged men and women from the military or naval forces . . ., who are citizens and residents of this state shall be entitled to preference in appointment, employment, and promotion over other applicants of no greater qualifications," and §400.10, The Code 1979: "In all examinations and appointments under the provisions of this chapter, . . . honorably discharged men and women from the military or naval forces of the United States . . ., and who are citizens and residents of this state, shall be given the preference, if otherwise qualified."

The statute, now codified as Mass. Gen. Laws Ann., Ch. 31, §26 (West 1979), reads in part:

The names of persons who pass examination for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order:

(1) Disabled veterans . . .; (2) veterans . . .; (3) persons described [widow or widowed mother of veteran killed in action or who died from a service-connected disability incurred in wartime and who has not remarried] . . .; (4) other applicants . . . . Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the civil service rules. A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

A 1977 amendment extended the dependents' preference to "surviving spouses" and "surviving parents." 1977 Mass. Acts, 1977, Ch. 815.

upon women are disproportionately adverse, a two-fold inquiry is then required. First, is the statutory classification "indeed neutral"? Second, if the classification is not based upon gender, does the adverse effect reflect invidious gender-based discrimination? The federal district court in *Feeney* had concluded and the Supreme Court agreed that the Massachusetts law was not gender based in that the distinction was *between veterans and non-veterans, not between men and women.* The majority opinion concluded that the law did not reflect invidious discrimination but rather "remains what it purports to be: a preference for veterans of either sex, not for men over women." *Feeney*, 99 S.Ct. at 2296.

The Court specifically did not approve the policy behind veterans preference laws:

> Veterans hiring preferences represent an awkward—and, many argue, unfair—exception to the widely shared view that merit and merit alone should prevail in the employment policies of government. After a war, such laws have been enacted virtually without opposition. During peacetime they inevitably have come to be viewed in many quarters as undemocratic and unwise. Absolute and permanent preferences, as the troubled history of this law demonstrates, have always been subject to the objection that they give the veteran more than a square deal. But the Fourteenth Amendment 'cannot be made a refuge from ill-advised . . . laws.' *District of Columbia v. Brook*, 214 U.S. 138, 150. The substantial edge granted to veterans by ch. 31, §23 may reflect unwise policy. The appellee, however, has simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex.
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> *Feeney*, 99 S. Ct. at 2297.

We believe that under a similar analysis, Sections 70.1, 400.10 and 400.11, The Code 1979, would withstand a federal equal protection challenge.

August 31, 1979

USURY: Chapters 535 and 537, 1979 Code of Iowa. Under the terms of §535.2, 1979 Code of Iowa, creditors may charge up to five percent interest per year without a prior written agreement. Rates exceeding five percent may be charged only pursuant to a bilateral written agreement between the parties to the transaction. The maximum lawful rate that may be provided for in any written agreement is that rate which is determined by the Superintendent of Banking each month. However, pursuant to Chapter 537, 1979 Code of Iowa, higher finance charges may be provided for pursuant to written agreements in consumer credit transactions. Under Chapter 537, the terms "interest" and "carrying charge" are both encompassed within the broader term "finance charge". The sale of insurance is excluded from the Iowa Consumer Credit Code when there is no credit extended. (McFarland to Halvorson, State Representative, 8-31-79) #79-8-30

Honorable Roger A. Halvorson, Representative—17th District: You have requested an opinion on Chapters 535 and 537 of the Iowa Code and specifically ask the following questions:

1. May a creditor charge interest on due accounts without a prior written agreement with the debtor?

2. If the answer to the first question is "yes", what is the maximum rate of interest that may be charged?

3. Is the phrase "carrying charge" synonymous with the word "interest" under the language of the ICCC?

Chapter 535, 1979 Code of Iowa, is the general usury statute in Iowa and its provisions apply to any transaction involving interest charges unless a transaction is specifically excepted from certain provisions of Chapter 535 by another chapter of the Iowa Code. (Op. Att'y. Gen. #79-5-27)

Section 535.2, as amended by Senate File 158, 68 G.A. 1979 Session, provides as follows in §19:

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:* [Emphasis added].

* * *

* * *

b. Money after the same becomes due.

Thus, under the terms of §535, a creditor may charge interest on due accounts without a prior written agreement with the debtor, but only to the extent of five percent a year. A creditor may charge more than five percent only if the parties have agreed in writing first. In other words, a unilateral notice on an invoice that a certain rate of interest in excess of 5% a year will be charged on delinquent accounts is ineffective. Before a rate higher than 5% may be charged, the parties involved in the transaction must execute a bilateral agreement in writing fixing the interest rate.

The interest rate that may be charged pursuant to a written contract between the parties is generally controlled by §535.3, as amended by S.F. 158.

a. The maximum lawful rate of interest which may be provided for in any written agreement for the payment of interest entered into during any calendar month commencing on or after the effective date of this Act shall be two percentage points above the monthly average ten-year constant maturity interest rate of United States government notes and bonds as published by the board of governors of the federal reserve system for the calendar month second preceding the month during which the maximum rate based thereon will be effective.

On or before the twentieth day of each month the superintendent of banking shall determine the maximum lawful rate of interest for the following calendar month as prescribed herein, and shall cause this rate to be published, as a notice in the Iowa administrative bulletin or as a legal notice in a newspaper of general circulation published in Polk county, prior to the first day of the following calendar month. This maximum lawful rate of interest shall be effective on the first day of the calendar month following publication. . . . .

Chapter 537, 1979 Code of Iowa, also known as the Iowa Consumer Credit Code (ICCC) provides an exception to the usury ceiling imposed by Chapter 535. The ICCC applies only to consumer credit transactions as defined by the five point test set out in §537.1301(13). Under the terms of the ICCC, creditors involved in consumer credit transactions may contract for and receive finance charges at rates in excess of rates allowed under the general usury statute.

Although the ICCC is an exception to Chapter 535 in that it authorizes parties to contract for finance charges at rates higher than interest rates

allowed under Chapter 535, the ICCC does not totally displace Chapter 535 in consumer credit transactions. The provisions of Chapter 535 are generally applicable on all transactions involving interest charges (finance charges) unless another chapter of the Code specifically provides otherwise. Thus, the rule that a written agreement is necessary before interest (finance charge) in excess of 5% per year is charged applies to consumer credit transactions as well as nonconsumer credit transactions. The ICCC does not provide otherwise.

Next, you requested a clarification of the meaning of various terms used by creditors to label the rates they charge for extending credit. The term "finance charge" is defined broadly by §537.1301(20), which provides:

> 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, ...
>
> (2) Time priced differential, credit service, service, *carrying or other charge*, however denominated. [Emphasis Added]

Thus the terms "interest" and "carrying charge" are both encompassed within the broader term "finance charge". The sum of all of the charges which the consumer pays for the extension of credit may not exceed the maximum finance charge that may be applied in consumer credit transactions pursuant to Article 2 of the ICCC.

The following brief summary will capsulize my answer to your series of questions. Creditors may charge up to 5% interest per year without a prior written agreement. Rates exceeding 5% may be charged only pursuant to a prior written agreement. The maximum lawful rate that may be provided for in any written agreement is that rate which is determined by the Superintendent of Banking each month. However, higher finance charges may be provided for in written agreements in consumer credit transactions. Rates applicable in consumer credit transactions are set out in Article 2 of the ICCC, §537.2201 et seq. Under the ICCC the **terms "interest" and "carrying charge" are both encompassed within the broader term "finance charge".**

Finally, you indicated a particular interest in the applicability of the ICCC to the sale of insurance. Section 537.1202 provides in part:

> **Exclusions. This chapter does not apply to:**
>
> * * *
>
> **2. Except as otherwise provided in article 4, the sale of insurance if the insured is not obligated to pay installments of the premium and the insurance may terminate or be canceled after nonpayment of an installment of premium.**

Stated simply, the sale of insurance is excluded from the provisions of the ICCC when there is no credit extended. If the insured may cancel the policy after nonpayment of a premium, effectively no credit has been extended. In such a transaction, the purchaser has paid in advance to be insured for a specified period of time. Since such transactions are ex-

cluded from the ICCC, the maximum interest rates that may be agreed to in writing are controlled by Chapter 535.

September 4, 1979

PUBLIC RECORDS: Trade Secrets; Reports to Government Agencies; Energy Policy Council. Chapter 68A; sections 93.7(3), 17A.3(1)(d), The Code; 5 U.S.C. §552(b)(4); 18 U.S.C. §1905. The Energy Policy Council may disclose records showing allocations of fuel under set-aside program but must delete the names of suppliers if such would disclose information obtained under section 93.7(3), The Code. Allocation orders may be released without prior notice and opportunity to be heard where notice to a large class of affected persons is impracticable and the confidentiality determination is not based on facts unique to each individual affected. (Miller and Osenbaugh to Rapp, 9-4-79) #79-9-1

Honorable Steve Rapp, State Representative: We have received opinion requests from Representative Steve Rapp and Edward J. Stanek, Director of Energy Policy concerning the confidentiality of information contained in state petroleum set-aside authorization orders. Given the identity of certain issues, we are issuing one opinion in response to both requests.

Representative Rapp asked the following question:

Do the provisions of section 69A.2, Code of Iowa, providing citizens with the right to examine and copy public records,[1] apply to the records of the Iowa Energy Council setting out the distribution of fuels, including quantities, names of suppliers and recipients, and dates, under the state fuel set-aside program administered under the general authority of subsection 93.7(9), Code of Iowa?

Mr. Stanek asked essentially the same question and further asked what procedures should be followed to provide notice to affected persons, to determine confidentiality claims, and to provide appeals to aggrieved parties.

The state set-aside program allocates a percentage of gasoline and middle distillate fuel entering the state each month. The Energy Policy Council allocates this state set-aside pursuant to its authority to "[a]llocate state-owned or operated energy supplies to those determined to be in need," section 93.7(9), Iowa Code, 1979, and pursuant to authority delegated to the Council by the United States Department of Energy under the Emergency Petroleum Allocation Act (P.L. 93-159) and D.O.E. regulations, 10 C.F.R. Part 205.

In determining whether information contained in Council allocation orders may be released, it is necessary to distinguish between information regarding prime suppliers who ship fuel into the state for sale to jobbers and information regarding those jobbers or dealers allocated the fuel. Section 93.7(8) requires suppliers to periodically report certain information regarding sale and supply of fuel. That section provides in relevant part:

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[1] The opinion request concerns information contained in Council orders authorizing allocation from the state set-aside. This opinion is accordingly limited to information contained in such orders and does not resolve questions concerning other records of the Council, such as documents submitted by applicants or by suppliers.

Notwithstanding the provisions of chapter 68A, information and reports obtained under this section shall be confidential except when used for statistical purposes without identifying a specific supplier and when release of the information will not give an advantage to competitors and serves a public purpose.

Because the amount of the state set-aside is a fixed percentage of fuels entering the state each month, if the amounts of fuel allocated to individual recipients from prime suppliers were made available, it would be a simple matter to compute the total set-aside from a prime supplier for that month and from that the amount of fuel shipped into the state by that supplier. To the extent this information is provided by the supplier under section 93.7(3), it is confidential "except when used for statistical purposes without identifying a specific supplier and when release of the information will not give an advantage to competitors and serves a public purpose." The issue is whether disclosure is allowed "when release of the information will not give an advantage to competitors and serves a public purpose" even though the supplier is identified. There are arguments in favor of the view that the quoted language creates two separate exceptions. If the two parts of the last sentence of 93.7(3) are read together, the second phrase seems a meaningless addition since it is unlikely that release of information will give an advantage to competitors when specific suppliers are not identified. Also, this second phrase standing alone is still more protective of confidentiality than the provisions in §68A.7(6) which would allow disclosure if a public purpose were served even though the report would provide an unfair advantage to competitors. However, the use of the conjunction "and" rather than "or" implies that the requirements of both phrases must be met before the information can be disclosed. The Iowa Supreme Court has held that "and" and "or" may be used interchangeably if demanded to effectuate the legislative intent. See cases cited in *Jones v. Iowa State Highway Commission*, 207 N.W.2d 1, 3 (Iowa 1973). However, in this case, it is not clear whether the legislature intended the two "when" clauses to establish a single exception or two separate ones. Neither construction would be inconsistent with the apparent legislative intent.

Ordinarily, in statutory construction the grammatical sense of the words is to be adhered to, unless that sense is contrary to the clear intent and purpose of the statute, or if it would result in an absurdity or a repugnance or inconsistency in different provisions thereof. [Citation omitted] The particular word 'and', in the section being construed, must be given the meaning and sense which the law most clearly requires, and that is a conjunction or copulative sense.

Haugen v. Drainage District, 231 Iowa 288, 313, 1 N.W.2d 242, 255 (1941). In the absence of evidence of clear legislative intent to the contrary, we conclude that the last sentence of §93.7(3) creates a single exemption which prohibits the release of information provided by suppliers except when used for statistical purposes.

Of course, the confidentiality provisions of section 93.7(3) would not apply if the Council obtained the information from a source other than the supplier or if the information is otherwise publicly available. Thus, if the Council learns from another non-confidential source the total volume of fuel shipped into the state by a supplier, this information would not be protected by section 93.7(3).[2]

[2] It should be noted that information regarding the supply of state purchased fuel is not protected by section 93.7(3). Section 93.8 states, "The

You also question whether the Council must disclose the identity of recipients of the set aside, the quantity of fuel allocated each, and the dates of the allocation orders. This infomrmation is not protected under dates of the allocation orders. This information is not protected under that section. It is therefore necessary to determine whether such information fits within one of the categories of confidential records under section 68A.7, The Code, or whether granting confidential treatment to such information is necessary to prevent denial of services from the United States Government (e.g., loss of delegation of the set-aside program), section 68A.9, The Code.

It is our understanding that certain recipients claim that revealing the allocation of fuel to them would allow predatory actions by competitors to entice away customers made aware of their shortage of fuel. It is also claimed that this information could affect the "spot prices" such jobbers or fuel users must pay to acquire fuel from private sources. Recipients could thus arguably assert that allocation orders are confidential as either trade secrets under section 68A.7(3) or "[r]eports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose" under section 68A.7(3).[1] If it is determined that the information in question constitutes a trade secret, the inquiry ends there. If not a trade secret, the information is confidential only if its release would give advantage to competitors and additionally would serve no public purpose.

In our opinion information regarding allocation of set-aside fuel to a business is not a "trade secret recognized and protected as such by law." Section 68A.7(3). The Iowa Supreme Court has approved the definition of trade secrets in the Restatement of Torts, section 757, comment b. *Basic Chemicals, Inc. v. Benson*, 251 N.W.2d 220, 226 (Iowa 1977). Section 68A.7(3) explicitly directs that the term "trade secrets" in Chapter 68A is to be defined in accordance with its recognized legal meaning. It is therefore appropriate to use the Restatement standard which has been approved by the Supreme Court in a case involving private records. *See*, Op. Att'y. Gen. #79-6-16 (Schantz and Cosson to Nelson). The language specifically adopted in *Basic Chemicals* states in part, "A trade secret is a process or device for continuous use in the operation of the business." 251 N.W.2d at 226. The Restatement definition itself further states:

It [a trade secret] differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events

(Footnote Cont'd)

council shall include in its [quarterly] report [to the governor and the general assembly] the amount, price, and disposition of the fuel contracted for each month pursuant to subsection 9 and the name of the supplier of the fuel." This disclosure requirement applies to supplies for which the Council contracts; it does not apply to the set-aside program under which the Council acquires allocation authority by operation of law rather than by contract.

[1] While an agency order or decision is not a report to a governmental agency, the fact of inadequate supply was reported to the agency. Disclosure of the information in the decision would thus reveal information contained in a report to the agency. We therefore assume that this provision applies to the allocation orders.

in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like.

The statute itself, by creating a separate category for reports which would give advantage to competitors apart from the trade secret exemption, recognizes that some information of advantage to competitors is not a trade secret protected by law. Applying the Restatement definition and construing sections 68A.7(3) and (6) together, we conclude that business information which would give advantage to competitors is not a trade secret unless the information was developed for continuous use in the operation of the business. Allocation information is therefore not a trade secret.

Thus in order for the set-aside allocation orders to be confidential, it would be necessary to determine not only that release would give advantage to competitors but also that release would serve no public purpose, the Director must consider the policy of chapter 68A "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." Section 68A.8. Furthermore, section 17a.3(1)(d) requires agencies to make available for final inspection all orders or decisions, deleting only such identifying details as necessary "to prevent a clearly unwarranted invasion of personal privacy or trade secrets . . . " We would advise the Director that the policy of public accountability of agencies in the allocation of benefits would support a finding that release of the orders would serve a public purpose. This determination is entrusted to the Director as lawful custodian of the records. Section 68A.7.

It is also necessary to determine whether the information must be kept confidential in order to prevent the denial of services or essential information from the United States government. Section 68A.9, Iowa Code, 1979. By participation in the federal set-aside program, the State is subject to the requirements of the Federal Freedom of Information Act, 5 U.S.C. §522, and possibly the federal Trade Secrets Act, 18 U.S.C. §1905. 10 C.F.R. 205.9(f). (If individuals claim confidentiality at the time of submission of the materials, the procedures for notice and determination set forth in that regulation must be followed.) The federal Freedom of Information Act exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4). This exemption is broader than sections 68A.7(3) and (7), The Code, discussed above, in that confidential business information other than trade secrets is protected from mandatory disclosure. Under this federal test, commercial information is exempt if release would cause substantial harm to one's competitive position. *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). However, the federal Freedom of Information Act is purely a disclosure statute; it does not prohibit agencies from disclosing information within an exemption. *Chrysler Corporation v. Brown*, U.S. , 60 L.Ed.2d 208, 219, 99 S.Ct. 1705, 1713 (1979). However, 18 U.S.C. §1905 makes criminal the release by United States' employees of certain information regarding trade secrets, operations, income, etc., of persons or business associations where such

disclosure is "not authorized by law." While federal agencies have no authority to authorize the disclosure of information protected by 18 U.S.C. §1905 and exempted from mandatory disclosure under 5 U.S.C. §552(b), *Chrysler Corporation*, 60 L.Ed.2d at 226, 99 S.Ct. at 1719, the Iowa legislature has by passage of Chapter 68A authorized the release of information not within the scope of its exemptions. Disclosure would thus be "authorized by law" and outside the scope of 18 U.S.C. §1905. In our opinion, the disclosure by the Energy Policy Council of commercial or financial information not protected by section 68A.7, Iowa Code, 1979, is not prohibited by federal law.

Since the Energy Policy Council has at present no effective rules requiring submitters to make claims of confidentiality at the time of submission, it is necessary to determine whether Chapter 68A or due process requires notice to affected individuals before disclosure of information. Chapter 68A is silent on this point but does impose an affirmative duty on agencies to disclose information unless the information is within a confidentiality exemption. Section 68A.7.

In *Pharmaceutical Mfrs. Assn. v. Weinberger*, 411 F.Supp. 576 (D.C. D.C. 1976), the Federal District Court upheld Food and Drug Administration regulations providing prior notice only when the question of confidentiality was close or uncertain. Factors indicating due process was met without notice prior to disclosure were the expertise of the agency, the stringent disclosure requirements of the FOIA which gave agencies only 10 days to resolve requests, and procedures by which individuals could claim confidentiality by notation on the submission (even though the FDA was not bound by these claims). The Court discussed the due process right to notice:

> . . . notice requirements are relative and circumstantial rather than absolute. They are determined by weighing the private rights at stake, the government's interests, the type of proceeding, the mannr of notification, the likelihood of eliciting a response, and the practical difficulties of time and cost.

411 F.Supp. at 578. Applying these factors to an Energy Policy Council determination whether notice must be provided to persons supplied fuel under the set-aside program, we note that the difficulties of providing notice are great. In May over 900 persons received allocations. The Council's small staff would be greatly burdened if it were necessary to notify all individuals. The resulting delay could be lengthy. Additionally, these persons have voluntarily applied for state assistance and the information requested is contained in agency decisions. Where individuals have made no claim for confidential treatment in these circumstances, it would not appear that the applicants would have a reasonable expectation of confidentiality. Additionally there is a clear indication of legislative policy towards disclosure of agency decisions. Section 17A.3(1)(d). Furthermore, if the Council decides to release the information for the reasons set forth in this opinion, its decision would not be based on resolution of fact questions unique to the individuals affected. *See, Board of Supervisors of Linn County v. Dep't. of Revenue*, 263 N.W.2d 227, 239, 240 (Iowa 1978).

We would therefore advise the Council that, upon request for disclosure, it must make a reasoned determination whether to provide notice to affected individuals based on the degree of certainty of the confidentiality

determination, the practicability of notice, the public interest in disclosure, the impact on individuals who might claim confidential treatment, and the likelihood that individuals could make significant contributions to the decision-making process. In so doing the agency's action must be reasonable. Section 17A.19(8). In a case where the agency concludes that disclosure is warranted, notice to all is impracticable, but that claims of confidentiality are likely to be made, we would advise the Council to release its determination, provide as much notice as is practicable through press releases, notice to associations, etc., and allow the 5-day period provided by 10 C.F.R. 205.9(f) for any person making such a claim to apply to district court for an injunction under section 68A.

The procedure proposed by the Council in its May 30, 1979, notice of intended action follows 10 C.F.R. 205.9(f) by providing for notation of confidentiality claims on submitted documents and providing five days notice before disclosure to those claiming confidentiality. Such procedure appears consistent with due process. *Pharmaceutical Manufacturers, supra.*

The Council could further advise applicants on the application and authorization forms that the authorization order constitutes public information, that any claim to confidentiality of other information submitted in support of the application must be noted on the face of the application, and that a second copy with claimed confidential information deleted must be submitted to prevent waiver of confidential treatment. The Director as "lawful custodian of the records" has the responsibility to determine whether to withhold information under section 68A.7. Upon receipt of a request for information, the Director should release any records he determines are not confidential. If he has substantial doubt, he may seek a judicial order pursuant to section 68A.8. *See*, Op. Att'y. Gen. #79-6-16 (Schantz and Cosson to Nelson). If, prior to a request for disclosure, the director or the Council believes that an entire category of information may arguably be confidential under section 68A.7, the agency should follow the rule-making procedures of chapter 17A to allow input by individuals who may be affected. Any interpretive rule issued by the Council would be subject to judicial review under section 17A.19 (8) or section 68A.8.

In conclusion, it is our opinion that the Director must release information contained in allocation orders if he determines such release would serve a public purpose. Such public purpose can be found in the public interest in agency accountability for allocation decisions. Section 93.7(3) does require deletion of information regarding suppliers if such identifying details would disclose information submitted by suppliers pursuant to that section. The Director may disclose non-confidential material without prior notice and opportunity to be heard where the confidentiality determination affects a large class of persons and notice to each is impracticable.

September 5, 1979

CITIES AND TOWNS: Impoundment period for stray dogs. Iowa Const. Art. III, §§38A and 39A. §§188.1(4), 188.26, 188.27, 188.35, 188.36, 351.3, 351.7, 351.8, 351.26, 351.27, 351.33, 351.34, 351.35, 351.37, The Code 1979. Iowa law provides no impoundment period for dogs with a license and rabies vaccination tag, therefore local officials should consult any municipal or county ordinances controlling this situation since local governments may enact ordinances of this nature pursuant to the Iowa Const., Art. III, §§38A and 39A. The statutory period within §351.37 applies only to dogs without a valid rabies vaccination tag. Dogs without a license may be taken up pursuant to the statutory procedures of Ch. 188 or killed pursuant to §351.26. (Benton to Robinson, State Senator, 9-5-79) #79-9-2 (L)

September 5, 1979

COUNTIES AND COUNTY OFFICERS: County Recorders. Sections 110.11, 110.12, 1979 Code of Iowa — A county recorder may, but is not required to, demand a cash deposit or a bond from depositaries he or she designates to sell hunting and fishing licenses. (Ovrom to Priebe, State Senator, 9-5-79) #79-9-3 (L)

September 5, 1979

SCHOOLS: Experimental Laboratory, Schools: Fourteenth Amendment to Constitution of United States, §2 U.S.C. §2000d, §265.4, The Code 1979, Chapter 273, The Code 1979. 1) Past admissions policy of Malcolm Price Laboratory School of the University of Northern Iowa, wherein only Black students from Waterloo are admitted for up to 100 seats in the school raises a serious question of equal protection and might be found to violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, but could also be sustained depending on standard of review applied and whether less race-conscious alternatives are available to accomplish program goals. Given the prospect of legal challenge, state agencies are generally advised to avoid admissions or other benefit programs in which race is an exclusive criteria unless the activities are designed to remedy the effects of identifiable past discrimination. Even if a legal violation has occurred, it is doubted that a court of equity would order a radical retrospective remedy. 2) A policy of admitting all children of a family once one child has been admitted is not unlawful. 3) The admissions program at Malcolm Price Laboratory School does not appear to discriminate unlawfully against the handicapped. (Appel to Lind, State Representative, 9-5-79) #79-9-4 (L)

September 6, 1979

TAXATION: SCAVENGER TAX SALE. Sections 446.7 and 446.18, The Code 1979. There cannot be a scavenger tax sale under section 446.18 unless the real property to be sold has been advertised and offered for regular tax sale two years prior to the date of the scavenger sale and remains unsold. Also, there must be a delinquency for each of these two years but such delinquency need not be for the full amount due that year. A scavenger sale can, however, be avoided by paying one full year's delinquent taxes, interest and costs before the scavenger sale because this would leave only one year's tax delinquent at the time of the scavenger sale.

TAXATION: PROPERTY TAX—PUBLIC ACCESS TO ASSESSOR'S AND TREASURER'S RECORDS. Sections 68A.1 and 68A.2, The Code 1979. Copies of the computerized records pertaining to assessed values, legal descriptions, and property tax payable per parcel belonging to either the county assessor or the county treasurer are obtainable in a computer readable medium form by a citizen who pays the reasonable cost of copying these records. (Donahue to Kudart, State Senator, 9-6-79) #79-9-5

The Honorable Arthur (Bud) Kudart, State Senator: You have requested an opinion of the Attorney General regarding the interpretation and application of section 446.18, The Code 1979, dealing with "scavenger sales"; and the availability to the public for copying certain computerized county real property records. Specifically, in your letter you asked the following:

1) Would a parcel of real property which has been advertised and offered at the regular annual tax sale under section 446.7, The Code, for two consecutive years but goes unsold for lack of bidders be subject to a scavenger sale under section 446.18, The Code, when the third year's taxes become delinquent and the parcel is advertised for the third consecutive year, but the delinquent taxes for years one and two were paid each year shortly after the date of the section 446.7 tax sale.

2) May the owner of real property which would be subject to a scavenger sale under section 446.18 avoid the scavenger sale by paying less than the full amount of taxes, penalties, and interest prior to the date of the scavenger sale.

3) May a taxpayer avoid the penalty and interest which attach by virtue of tax sale by tendering payment in full of taxes, penalties, interest and costs which had accrued prior to the time of tax sale, to the county treasurer after the adjournment of the tax sale but prior to the time the treasurer receives payment from the tax sale purchaser?

4) Does a citizen who pays the reasonable copying costs have a right to obtain a copy of the county's computerized tape or other computer-readable medium of the county's real property records consisting of assessed values, legal descriptions and the amount of property tax due per parcel.

Your first and second questions are closely related and will be considered together herein.

Section 446.18, The Code 1979, provides as follows:

"'Scavenger sale'—notice. Each treasurer shall, on the day of the regular tax sale each year or any adjournment thereof, offer and sell at public sale, to the highest bidder, all real estate which remains liable to sale for delinquent taxes, and shall have previously been advertised and offered for two years or more and remained unsold for want of bidders, general notice of such sale being given at the same time and in the same manner as that given of the regular sale."

In 1940 O.A.G. 72, the Attorney General construed section 7255, The Code 1939, and opined:

"You asked for a construction of Section 7255 and your question is: 'Under the above Section, can a person, whose property has been advertised for the scavenger sale provided for in said Section 7255, stop the sale of his property by paying up the first year's delinquent tax?'

"Section 7255 provides as follows: 'The treasurer shall *** sell *** a real estate *** which *** shall have previously been advertised and offered for two years or more and remained unsold for want of bidders, ***'.

"When this first year's tax has been paid before the scavenger sale then clearly at the time of the sale there are not then two years' delinquent taxes against the property and the property should not be sold at scavenger sale."

An examination of section 7255, The Code 1939, and section 446.18, The Code 1979, discloses that these statutes are identical.

The 1940 Attorney General Opinion is correct as far as it goes. It is clear that if the taxpayer has paid the first year's taxes there cannot be a scavenger sale. The further question then is can a scavenger sale be avoided by paying only the first installment of real estate taxes or for even a lesser amount, such as one penny, for the first year.

Section 446.18 states in pertinent part:

"Scavenger sale . . . Each treasurer shall . . . offer and sell at public sale, to the highest bidder, all real estate *which remains liable to sale for delinquent taxes, and shall have previously been advertised and offered for two years* or more and remained unsold for want of bidders . . . ." (Emphasis added.)

Section 446.18 does not unequivocally state that there must be two full years' taxes delinquent upon the property prior to the scavenger sale thereof. The statute only states that the property subject to delinquent taxes be advertised and offered for regular tax sale under section 446.7 in two previous years before it may be sold at scavenger sale. When read in its entirety, the statute clearly speaks in terms of two years. It does not, however, mean that there must be two *full* years previous delinquent taxes due before there can be a scavenger sale. If there is any amount of delinquent tax due, even one penny due from a year in which the real property was offered for tax sale, that year would be considered a full year of the two years for which the real property must be advertised and offered for tax sale prior to the date of the scavenger sale. This interpretation of section 446.18 is further bolstered by an analysis of section 446.7, which provides in relevant part:

"Annual tax sale. Annually, on the third Monday in June the treasurer shall offer at his office at public sale all lands, city lots, or other real property on *which taxes of any description for the preceding fiscal year or years are delinquent, which sale shall be made for the total amount of taxes, interest, and costs due and unpaid thereon*, including all suspended taxes . . ." (Emphasis added.)

Under section 446.7 it is clear that real property could be subjected to a tax sale for any year in which there was *any* amount of delinquent tax, interest and costs due and unpaid. It does not matter in the least that a part of the taxes had been paid.

Since section 446.18 is a part of Chapter 446, all statutory sections of the law that pertain to tax sales should be considered together (*pari materia*). *Northern Natural Gas Co. v. Forst*, 205 N.W.2d 692 (Iowa Sup.Ct. 1973). Therefore, if a tax sale pursuant to section 446.7 could be held even though part of the taxes for the year had been paid, such part payment would, likewise, not preclude a scavenger sale pursuant to section 446.18.

To construe section 446.18 other than as set forth above would lead to impractical, unworkable, and illogical results. If section 446.18 was interpreted to mean that there must be two *full* years' delinquent taxes due prior to the date of a tax sale, a scavenger sale could be avoided by the payment of an amount as small as one penny. This type of interpretation would be ridiculous and make section 446.18 unworkable. The Iowa Supreme Court has stated that statutes must be given reasonable

and workable interpretations. In *Janson v. Fulton*, 162 N.W.2d 438 (Iowa Sup.Ct. 1968), the Court stated at pp. 442, 443:

"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.)

It seems rational to conclude that the legislature intended that before there can be a scavenger sale under section 446.18, the real property subject to the sale must have been previously advertised and offered for sale for two separate years in which there were delinqunt tax due and unpaid. It is equally clear that one of these two years' delinquent taxes can be for an amount less than a full year's taxes. As stated in 1940 O.A.G. 72, there cannot be a scavenger sale under section 446.18 when the first year's taxes, interest and costs are paid in full before the time of the scavenger sale.

Therefore, with reference to your first and second questions, there cannot be a scavenger tax sale under section 446.18 unless the real property to be sold has been advertised and offered for regular tax sale two years prior to the date of the scavenger sale and remains unsold. Also, there must be a delinquency for each of these two years but such delinquency need not be for the full amount due that year. A scavenger sale can, however, be avoided by paying one full year's delinquent taxes, interest and costs, before the scavenger sale because this would leave only one year's tax delinquent at the time of the scavenger sale.

Pursuant to our phone conversation of July 30, 1979, you have requested that your third question be withdrawn from your request for an Attorney General opinion. Therefore, this office will not render any opinion regarding that question.

By your fourth question, you asked if a citizen paying the reasonable copying costs has a right to obtain a copy of computer tape or other computer-readable medium of computerized county real property records of assessed values, legal descriptions and property tax payable per parcel. All such records are under the custody of the county treasurer or the county assessor.

An analogous question was recently considered in O.A.G. #79-3-6, a copy of which is attached for your convenience. The applicable portion of the cited opinion states that records of assessed values, legal descriptions and the amount of property tax due are public records as defined by section 68A.1, The Code 1979, and are, therefore, open to public examination and copying, as provided in section 68A.2, The Code 1979, unless expressly made confidential by statute. Although the above-mentioned opinion deals with the county assessor's records only, the conclusions in this opinion that the county assessor's records constitute public records under section 68A.1 are equally applicable to these records of the county treasurer.

Therefore, it is the opinion of this office that copies of the computerized records pertaining to assessed values, legal descriptions, and property tax payable per parcel belonging to both the county assessor and the county treasurer are obtainable in a computer readable medium form by a citizen who pays the reasonable cost of copying these records.

September 12, 1979

UNIFORM RESIDENTIAL LANDLORD AND TENANT LAW AND MOBILE HOME PARKS RESIDENTIAL LANDLORD AND TENANT LAW: Chapters 562A and 562B, §§562A.2(2)(a), 562A.6(2), 562B.2, 562B.7(4), 562B.7(5) and 562B.21. When "B" buys a mobile home, rents a mobile home space in a mobile home park, and then rents the mobile home to "C," the rental relationship between "B" and "C" is covered by the Uniform Landlord and Tenant Act rather than the Mobile Home Parks Residential Landlord and Tenant Laws. (Graf to Murray, State Senator, 9-12-79) #79-9-6

Honorable John S. Murray, Senator: We are in receipt of your letter requesting an opinion of the Attorney General. In your letter, you state:

There are two chapters of the Iowa Code that apply to residential landlord-tenant relationships: Chapter 562A, which applies to dwelling units defined in terms of structures or parts of a structure, and Chapter 562B, which applies to mobile homes and mobile home parks.

A question has been raised concerning what law would apply to the person who rents a space in a mobile home park, purchases a mobile home, places it on that space, and then rents the mobile home to tenants.

You ask "whether in this situation, Chapter 562A or 562B or some other Code provision would apply to the relationship between the mobile homeowner (not the park owner) and his or her tenant."

Chapter 562A, Code of Iowa (1979), is the *Uniform Residential Landlord and Tenant Act*. Section 562A.6(2) therein defines a "dwelling unit" as follows: "Dwelling unit means a structure or the part of a structure that is used as a home, residence, or sleeping place."

Chapter 562B, Code of Iowa (1979), is the *Mobile Home Parks Residential Landlord and Tenant Law*. Section 562B.7(2) therein defines a "dwelling unit" as follows: "Dwelling unit excludes real property used to accommodate a mobile home."

Clearly, a mobile home could fall within the definition of a "dwelling unit" as defined in §562A.6(2) if it is used as a home, residence or sleeping unit. Likewise, §562B.7(2) merely tells us that a "dwelling unit" as defined for purposes of the *Mobile Home Parks Residential Landlord and Tenant Act* does not include the land on which a mobile home sits.

Section 562B.7(4) goes on to define a "mobile home" as follows:

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 designed, constructed, or reconstructed as will permit the vehicle to be used as a place for human habitation by one or more persons; but shall also include any such vehicle with motive power not registered as a motor vehicle in Iowa.

Section 562B.7(5) defines a "mobile home space" as follows:

Mobile home space means a parcel of land for rent which has been designed to accommodate a mobile home and provide the required sewer and utility connections.

Thus, Chapter 562B distinguishes a "mobile home" from a "mobile home space" and herein lies the answer to your question. The definition of "mobile home" does not include the land on which it sits. The land on which the mobile home sits is distinguishingly termed the "mobile home space."

September 12, 1979

STATE OFFICERS AND DEPARTMENTS. Natural Resources Council. 1909 Session, 33rd G.A., Ch. 266, Chapter 455A, Code of Iowa 1979; Section 109.15, Code of Iowa 1979; 580 I.A.C. §§5.3(455A), 7.2(109). 1909 act which gives the city of Emmetsburg certain powers over Five Island Lake does not exempt the city from compliance with Natural Resources Council regulations. (Ovrom to Wertepny, Deputy Director, Iowa Natural Resources Council, 9-12-79) #79-9-7 (L)

September 13, 1979

AGRICULTURE: Mandatory Recordation of Conveyances of Agricultural Land: §558.44, The Code 1979. Section 558.44 requires the mandatory recordation by the grantee or lessee of all conveyances of agricultural land and agricultural leases of a duration greater than five years with renewals, made after July 1, 1979. The section applies to all land which at the time of conveyance was suitable for use in farming. The section requires the recordation of escrow transactions and requires the disclosure of beneficial ownership by nonresident alien land holders. (Hamilton to Harbor, State Representative, 9-13-79) #79-9-8

Mr. William H. Harbor, State Representative: You have requested an Attorney General's opinion concerning the operation of §558.44 of the Iowa Code 1979, dealing with the mandatory recordation of agricultural land conveyances. In particular you asked about the responsibilities of various parties to land sales under the law. Section 558.44 provides:

"Every conveyance or lease of agricultural land, except leases not to exceed five years in duration with renewals, conveyances or leases made from estates to heirs or devises shall be recorded by the grantee or lessee with the county recorder not later than one hundred eighty days after the date of conveyance of lease.

"For an instrument of conveyance of agricultural land deposited with an escrow agent, the fact of deposit of that instrument of conveyance with the escrow agent as well as the name and address of the grantor and grantee shall be recorded, by a document executed by the escrow agent, with the county recorder not later than one hundred eighty days from the date of the deposit with the escrow agent. For an instrument of conveyance of agricultural land delivered by an escrow agent, that instrument shall be recorded with the county recorder not later than one hundred eighty days from the date of delivery of the instrument of conveyance by the escrow agent.

"At the time of recordation of the conveyance or lease of agricultural land, except a lease not exceeding five years in duration with renewals, conveyances or leases made by operation of law and distributions made from estates of decedents to heirs or devisees, to a nonresident alien as grantee or lessee, such conveyances or leases shall disclose, in an affidavit to be recorded therewith as a precondition to recordation, the name, address, and citizenship of the nonresident alien. In addition, if the nonresident alien is a partnership, limited partnership, corporation or trust, the affidavit shall also disclose the names ,addresses, and citizenship of the nonresident alien individuals who are the beneficial owners of such entities. However, any partnership, limited partnership, corporation, or trust which has a class of equity securities registered with the United States securities and exchange commission under section 12 of the Securities Exchange Act of 1934 as amended to January 1, 1978, need only state that fact on the affidavit.

"Failure to record a conveyance or lease of agricultural land required to be recorded by this section by the grantee or lessee within the specified time limit is punishable by a fine not to exceed one hundred dollars per day for each day of violation. The county recorder shall record a conveyance or lease of agricultural land presented for recording even though not presented within one hundred eighty days after the date of convey-

ance or lease. The county recorder shall forward to the county attorney a copy of each such conveyance or lease of agricultural land recorded more than one hundred eighty days from the date of conveyance. The county attorney shall initiate action in the district court to enforce the provisions of this section. Failure to timely record shall not invalidate an otherwise valid conveyance or lease.

"The provisions of this section are effective July 1, 1979, for all conveyances and leases of agricultural land made on or after July 1, 1979."

The purpose of §558.44 is to enable the legislature to obtain more accurate information concerning agricultural land ownership and patterns of land transfer in the state. The Iowa legislature has been hampered in its efforts to address the problems of the demise of the family-owned farm and the increase in corporate and nonresident alien ownership of agricultural land, by the incomplete nature of land records in the state. To deal with the problem, the legislature has enacted such measures as the reporting requirements of §§172C.5-8 and the definition of "beneficial interest" in §172C.1(17). In 1978, the legislature decided that to enforce the provisions of Ch. 172C it was necessary to require that all conveyances of agricultural land be recorded so that they would appear in county land records. The great majority of land sales in this state are being recorded, mainly to insure priority of title. But, there has been nothing in the Iowa law requiring recordation and parties with a motive to conceal their land purchasing activities have been able to do so. Section 558.44 was the legislative response to this problem.

In operation, §558.44 is simple. The basic provision of the act requires that:

"Every conveyance or lease of agricultural land, except leases not to exceed five years in duration with renewals, conveyances or leases made by operation of law, and distributions made from estates to heirs or devisees shall be recorded by the grantee or lessee with the county recorder not later than one hundred eighty days after the date of conveyance or lease".

The statute became effective on July 1, 1979, and applies to all conveyances or leases of agricultural land made after that date. Thus, any conveyances signed prior to July 1, 1979, or any lease agreements entered into before that date, are not covered by the act.

The statute provides that conveyances deposited with escrow agents must be reported both by the escrow agent at the time of deposit and by the grantee after delivery from the escrow agent. As a precondition to recordation of a conveyance to a nonresident alien, as defined in §558.43, an affidavit listing the name, address, and citizenship of the individual must be filed with the county recorder. For business entities that are included in the definition of nonresident alien, the affidavit must disclose the names, addresses and citizenships of the beneficial owners of the entities. Businesses registered with the U.S. Securities and Exchange Commission under §12 of the Security Exchange Act of 1934 need only indicate that fact.

Failure to comply with the recordation requirements of §544.44 is punishable by a fine not to exceed $100 per day for each day of the violation. The act is to be enforced through the cooperative effort of the county recorders and county attorneys. The county recorder must record all conveyances and leases presented for recording, including those not presented within one hundred and eighty days of conveyance. For all

conveyances recorded late, the county recorder shall forward a copy of such conveyance to the county attorney. The use of the word "shall" in §558.44 imposes a duty on the county recorder and removes any discretion in the matter, under §4.1(36)(a), The Code 1979. Section 558.44 provides that the county attorney then "shall initiate action in the district court to enforce the provisions of the section". This provision also imposes a duty on the county attorney to enforce the act, and is in accordance with the duties of the county attorneys under §336.3(1). Finally, the act provides that failure to timely file will not invalidate an otherwise valid conveyance or lease. This provision recognizes that while the information obtained by §554.44 is important, there would be a great potential for disrupting land ownership matters, an area founded on certainty, if failure to file would invalidate a conveyance.

That, in effect is §558.44. Basically, it provides that the party acquiring the interest in the property, the grantee, or the party leasing the property, the lessee, must record the fact of their actions with the county recorder within one hundred eighty days or be subject to a fine. The special provisions for escrow transactions and nonresident alien purchases are designed to cover special situations. The definition of "beneficial ownership" is an important attempt to prevent the masking of land records by the artificial use of numerous layers of business entities.

Although §558.44 is straightforward in its operation, there are certain questions that have arisen concerning its operation that need to be addressed. Your letter has identified a number of these. Questions that will be discussed in this opinion include:

1. What is "agricultural land"?

2. Does §558.44 apply to conveyances of agricultural land for non-agricultural uses?

3. Does the phrase "leases not to exceed five years in duration with renewals" affect the common type of farm lease in effect in Iowa?

4. What are the responsibilities of escrow agents and nonresident alien purchasers?

5. What is a "conveyance" and when does it occur?

I

One prefatorial question is what is "agricultural land"? Section 558.43(4) defines it as "agricultural land as defined in §172C.1". Section 172C.1(5) defines agricultural land as "land suitable for use in farming". Section 172C.1(6) defines "farming" as:

"the cultivation of land for the production of agricultural crops, the raising of poultry, the production of eggs, the production of fruit or other horticultural 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".

This definition establishes the premise that the vast majority of land conveyances in Iowa involving rural land and land traditionally used in farm related production are subject to the recording provisions of §588.44. The definition of "farming" should not present any problem to

parties conveying land or to county recorders in the implementation of the statute.

II

One related question that arises in determining which conveyances are covered by §558.44 relates to the size of the tract involved. Of concern is whether or not the sale of tracts of agricultural land to nonagricultural uses, such as residential, must be recorded. Since §558.44 covers conveyances of agricultural land, it is the opinion of the attorney general that if at the time the land is sold it is used for farming, or suitable for use in farming, the land is agricultural and the conveyance must be recorded. By way of example, if a party purchases 160 acres of agricultural land to be used as a subdevelopment, that conveyance would need to be recorded. On a subsequent sale of lots within that development, these conveyances would probably not need to be recorded if the use of the land had changed and the land was not now suitable for use in farming. Another example is if a party bought two acres of agricultural land for a rural homesite. That conveyance would also need to be recorded since the land at the time it was purchased was agricultural land under §§558.43 and 44.

Thus, the key in determining whether a conveyance should be recorded is the use of the land at the time of the conveyance or lease. The effect of requiring the recordation of conveyances of land to nonfarm uses should not prove burdensome because the vast majority of these transactions are already recorded.

III

A third significant question concerning §558.44 relates to those conveyances excepted from the act, in particular the meaning of "leases not to exceed five years in duration with renewals". A significant amount of farmland in Iowa is operated under the lease and the importance of agricultural leases in this state has given rise to special statutory provisions regulating the creation and termination of farm leases. *See* §§562.5-8. (*See also* Art. 1, §24 of the Iowa Constitution, which outlaws leases of agricultural land for periods greater than twenty years).

Under these provisions a farm tenancy lease, defined as one covering "farm tenants, except mere croppers, occupying and cultivating an acreage of forty acres or more", shall continue for the following crop year under the same terms and conditions unless written notice of termination is given by September 1. §562.6. Thus, when a notice of termination is not given, the lease continues by operation of law. Since leases made by operation of law are excepted from §558.44, possible renewals of greater than five years caused by the operation of §562.6 are not a problem. Most lease forms in use contain this provision and thus present no problem under §558.44. But there are other questions concerning some forms of agricultural leases and renewals that need to be addressed.

As noted above, §558.44 excepts leases of less than five years with renewals. The effect of that exception is that all agricultural leases which are of a definite duration of five years or less, and are not renewable for a total period of more than five years or are renewed by operationtion of law, as discussed above, do not have to be recorded. Thus the majority of farm leases, being annual in nature, and often oral, are

excepted from the recording requirements. For instance, if a lease is for a period of one year and is not renewable, instead requiring the writing of a new lease, such a lease is exempted from the statute.

Some confusion may arise in the case of a lease form which is an annual lease but which contains an open-ended renewal provision. For instance, the most commonly used lease forms in Iowa provide that:

"The term of this lease shall be for a period of one year beginning and ending , and continuing thereafter year to year, unless either party gives written notice to the other as specified by Iowa law, such to be given on or before of the lease year to become effective the following March 1".

While it is possible that such a lease could be renewed for a period of more than five years, this renewal occurs by operation of §562.6 and, thus, is not covered by §558.44. Further, in this situation, either party has the ability to terminate the lease and thus there is no assurance that the lease could run for five years solely by the insistence of one party.

A lease form that guarantees the lessee the right to renew for a certain period is a different matter. For instance, if a lease was for a period of three years and provided the lessee with the right to renew at his option for another three-year period, the lease would be for a duration of greater than five years with renewals and should be recorded at the time it was signed. Any lease that guarantees at the time of signing that the lessee shall be able to occupy the land for a period of greater than five years, if he so chooses, falls under the recording requirement for leases of greater than five years duration with renewals. While this interpretation is necessary to give meaning to the language used in §558.44, it is probable that there are few leases in use that contain a guaranteed right of renewal.

IV

A fourth question that may arise concerning §558.44 concerns the responsibilities of escrow agents and nonresident alien purchasers. The section relating to escrow agents simply requires for every conveyance deposited with an escrow agent the fact of the deposit be recorded by the agent. The Iowa State Bar Association has developed a special form for this purpose. When the conveyance is delivered out of escrow, the conveying instrument is then to be recorded by the grantee.

The provision of §558.44 relating to nonresident aliens and beneficial ownership is specially designed to require that the nonresident alien acquiring the interest in the property disclose his/her name, address, and cititzenship. This information is to be contained in an affidavit that must be filed as a precondition to recording the conveyance. Since the duty to record is on the grantee or lessee, it is his/her duty to file this affidavit. This same requirement applies to business entities defined as nonresident aliens under §558.43(1), except that those registered with the Securities and Exchange Commission under §12 of the Securities Exchange Act of 1934, as amended to January 1, 1978, need only state that fact on the affidavit.

V

One final question concerning §558.44 is the meaning of "conveyance" and when it occurs for the purpose of the runnning of the one hundred

eighty day period. Section 558.43(3) defines "conveyance" as "all deeds and all contracts for the conveyance of an estate in real property except those contracts to be fulfilled within six months from date of execution thereof".

This definition clearly encompasses the vast majority of transactions in which an estate in real property is transferred to another, including land sales by installment contract. For purposes of the §558.44 one hundred eighty-day period, the date of conveyance is the day that the transaction is completed, i.e. when the documents are executed. This date would generally appear on the deed, contract or lease.

VI

In summary, §558.44 provides that all conveyances of agricultural land must be recorded by the grantee within one hundred eighty days. In addition, all leases of more than five years duration with renewals must be recorded by the lessee. If a party fails to record a lease within the time period, they may be subject to a fine of $100 per day for each day they are in violation. The statute provides special provision to cover the recordation of conveyances deposited for escrow and sets forth a procedure to determine the beneficial ownership of nonresident alien-owned tracts.

September 13, 1979

FUNERAL DIRECTORS, SALE OF LIFE INSURANCE: Under Chapters 156, 147, 258A, The Code 1979, it is not a ground for license revocation when funeral homes market life insurance policies issued by an insurance company licensed to do business in Iowa, so long as no commission or gratuity is paid by the funeral director. Commissions paid by the issuing insurance company from premiums are not prohibited by section 156.12, The Code 1979, since the funeral director is not involved in the payment. (Lindebak to Pawlewski, Commissioner, State Department of Health, 9-13-79) #79-9-9 (L)

September 13, 1979

CITIES AND TOWNS: COUNTIES: LIENS: Unpaid charges for sewer and solid waste services furnished by a city — §384.84, Chapters 445 and 446, Code of Iowa 1979. A city has a lien against real property thereby served for charges for sewer and solid waste services furnished by the city when such charges become delinquent. Upon certification of unpaid charges by a city, the county auditor is required to implement procedures leading to collection of such unpaid charges by the county treasurer "in the same manner as taxes," including appropriate listing to achieve collection which may be effected by listing in the special assessment book along with other special charges against real property. (Peterson to Shepard, Butler County Attorney, 9-13-79) #79-9-10 (L)

September 14, 1979

COUNTY PUBLIC HOSPITALS: Article III, section 39A, Article XI, section 3, Iowa Constitution; Chapters 23, 24, 74, 252, 347 and 613A; Sections 24.2, 24.3, 24.6, 14.14, 14.26, 74.1, 74.5, 135C.1, 252.22, 252.27, 252.28, 252.35, 343.10, 347.7, 347.13, 347.14, 347.16, 347.26, 444.11, 444.12, 613A.2, 613A.4, 613A.8, The Code 1979; 770 I.A.C. 81.10(5), 81.13(22). I. Application of County Home Rule does not extend to a county public hospital organized pursuant to chapter 347, although a hospital's board of trustees statutory powers are similar in scope to those exercised by county boards of supervisors pursuant to the constitutional grant of home rule. II. The hospital board of trustees, in the exercise of its

discretionary powers, can expend hospital funds for the recruitment of doctors to engage in private practice in the hospital, subject to certain budgeting and funding limitations. III. A health care facility operated pursuant to chapter 135C in conjunction with a county public hospital can receive no reimbursement of costs expended for care and treatment of indigent patients receiving medical assistance under Title XIX beyond that received from the program as "payment in full." The county itself would be responsible for all reasonable charges in the support of a patient determined to be "indigent and entitled to free care" by the board of hospital trustees, but not eligible to participate or participating in the medical assistance program under Title XIX. IV. A county hospital operated pursuant to chapter 347 possesses authority to incur debt through the issuance of warrants. If a hospital's budget estimates prove to be inadequate as a fiscal year progresses, chapter 24 which limits authority to issue anticipatory warrants, provides an alternative means for dealing with the inadequacy through taxation. V. A county public hospital organized pursuant to chapter 347 could incur debt by issuing public warrants, but remains the entity responsible for that debt. (Hagen and Hyde to Cady, Franklin County Attorney, 9-14-79) #79-9-11

G. A. Cady III, Franklin County Attorney: You have asked for the opinion of the Attorney General with respect to a number of issues related to the operation of a county hospital pursuant to chapter 347, The Code 1979. The questions you propound arise in the context of the factual situation presented by you which can be summarized as follows:

The Franklin General Hospital located in Franklin County, Iowa, is a county public hospital established pursuant to chapter 347 by a vote of the people in 1962, and is operated by a board of trustees whose members are elected as provided in section 347.25. In conjunction with the operation of the hospital, the hospital board of trustees also operates a health care facility pursuant to §135C.1, The Code 1979.

The value of the taxable property for 1978 within Franklin County, as certified by the County Auditor, was $441,000,578. For fiscal year commensing July 1, 1978, and ending July 30, 1979, the estimated expenditures of the Franklin General Hospital were $3,817,098, while actual expenditures were $3,122,107. Estimated expenditures for fiscal year commencing July 1, 1979, to June 30, 1980, are $3,840,633. The budget for the hospital for the fiscal year ending June 30, 1980, has been adopted and certified to the Franklin County Board of Supervisors.

Franklin County has recently experienced a shortage of doctors, which has directly affected the income of the hospital. With fewer doctors referring patients to the hospital, its facilities are being used less frequently.

When anticipated expenditures exceeded anticipated revenue for coming months, the hospital board of trustees authorized the treasurer of the board to issue warrants up to a maximum figure. The Hampton State Bank currently holds Franklin General Hospital's unpaid warrants which are accruing interest at the rate of six percent (6%) per year. As of June 30, 1979, there were $406,000 in warrants held by the bank.

The relevant taxes assessed per thousand against the taxable property of Franklin County for the fiscal year ending June 30, 1979, and the fiscal year June 30, 1980, are as follows:

	Fiscal Year Ending June 30, 1979	Fiscal Year Ending June 30, 1980
Hospital Bonds	.24227	.22611
Hospital Maintenance Fund	.27000	.18012
Hospital Emergency Fund	0	0

In light of the factual situation you have related, we will address your specific questions below.

I. Does the County Home Rule Amendment, chapter 1206, Acts of the 67th General Assembly, 1978, Article III, section 39A of the Iowa Constitution extend to a county public hospital board of trustees organized pursuant to chapter 347 of the Iowa Code?

The Iowa Constitution was amended in 1978 when Article III, section 39A was adopted, providing that counties need no longer seek express statutory authority for each exercise of governmental power in the determination of local affairs, where such exercise is not inconsistent with state law.[1] We do not believe that the County Home Rule Amendment applies to county hospitals operated pursuant to ch. 347, The Code 1979.

The counties of Iowa were laid out when Iowa was a territory. The 1846 Constitution provided in Article XI, section 2, that "no new county shall be laid off hereafter, nor old county reduced to less content than four hundred and thirty-two square miles." That Constitution was replaced by the 1857 Constitution of Iowa, still in effect, which provides in Article XI, section 2, that "no new county shall be hereafter created containing less than four hundred and thirty-two square miles . . .". *See Garfield v. Brayton*, 33 Iowa 16 (1871). It is our opinion that the County Home Rule Amendment applies *only* to the governmental units of the ninety-nine geographic counties. A county hospital is *not* a "county" as that term is used in the 1978 Home Rule Amendment even though the geographical boundaries of the county hospital "municipality" are congruent with those of the county. A board of supervisors is the legislative or policy-making body for a county. *Mandicino v. Kelly*, 158 N.W.2d 754, 760 (Iowa 1968). A county hospital board of trustees holds the control and management of a county hospital. *Phinney v. Montgomery*, 218 Iowa 1240, 1243, 257 N.W. 208, 210 (1934).

Notwithstanding the fact that the County Home Rule Amendment does not apply to a county public hospital organized pursuant to chapter 347,[2] the county hospital board of trustees is vested with broad authority in

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[1] The impact of the amendment was addressed in an opinion issued by this office, Op. Atty. Gen. #79-4-7.

[2] A county public hospital operated pursuant to ch. 347 may be a separate "municipality" as defined in §24.2, The Code 1979, because it has "the power [under §347.7] to levy or certify a tax or sum of money to be collected by taxation." Section 24.2(1), The Code 1979. See *Phinney v. Montgomery*, 218 Iowa 1240, 257 N.W. 208(1934); 1930 Op. Atty. Gen. 320. [*See* Division IV, below]. A county hospital is not, however, a "municipal corporation", and thus also not subject to the Municipal Home Rule Amendment, Article III, section 38A, of the Iowa Constitution.

its own right. The mandatory powers and duties set forth in §347.13 are comprehensive. In addition, the board of trustees possesses a variety of optional powers and duties as provided in §347.14, including the power to:

10. Do *all things necessary* for the management, control, and government of said hospital and exercise *all the rights and duties pertaining to hospital trustees generally*, unless such rights of hospital trustees generally are *specifically denied* by this chapter, *or* unless such duties are *expressly charged* by this chapter. [Emphasis added].

In contrast, prior to the effective date of the County Home Rule Amendment, counties were limited to the exercise of only those powers granted in express terms, or necessarily or fairly implied in or incident to those powers expressly granted. *Mandicino v. Kelly*, 158 N.W.2d 754 (Iowa 1968); *Scott County v. Johnson*, 209 Iowa 213, 222 N.W. 378 (1928); *McSurely v. McGrew*, 140 Iowa 163, 118 N.W. 415 (1908). We conclude that power granted by the language of §347.14(10) is as broad for the board of trustees of a county hospital operating under ch. 347, on the subject matter for which the board is responsible, as is that now enjoyed by the governing bodies of the ninety-nine counties under the Home Rule Amendment. Important constitutional and statutory limitations which apply to financing of local governmental units were not affected, however, by the Home Rule Amendment nor by §347.13(10).

In summary, the application of the County Home Rule Amendment does not extend to a county hospital board of trustees organized pursuant to ch. 347, but a hospital board's statutory powers are similar to those exercised by counties pursuant to the constitutional grant of home rule.

II. Can a county public hospital organized pursuant to ch. 347 of the Iowa Code expend hospital sums for the solicitation of doctors to engage in practice in the county even though such doctors will not be directly employed by the county hospital?

In our opinion, there is no provision in ch. 347 or elsewhere which specifically prohibits a hospital board of trustees from soliciting doctors to practice medicine in the county. Also, in our opinion, a board of trustees of a county hospital could decide that it was not prevented from such activity or from expenditures for that purpose by the language of ch. 347, especially §347.14(10). The powers of the board of trustees pursuant to §347.14 are couched in permissive and discretionary terms; i.e., the board "may . . . do all things necessary." *See Wolf v. Lutheran Mutual Life Insurance Company*, 236 Iowa 334, 18 N.W.2d 804 (1945). Sections 347.28, 347.29 and 347.30 further encourage and promote relationships between the county public hospital and independent physicians.

In summary, the county hospital board of trustees can expend hospital sums for the solicitation of doctors to engage in private practice in the county, subject to funding and budgeting limitations as discussed below. We believe this is a *policy* decision to be made by the board of trustees. A board of trustees might decide it was a wiser course, however, to encourage the formation of and/or cooperate with citizens groups organized for the purpose of recruiting doctors to practice medicine in the county, rather than to spend limited or nonexistent hospital funds for the purpose.

III. Does §347.16(2) require the county board of supervisors to reimburse the county public hospital for expenses incurred in caring for indigent patients in a health care facility as defined in §135C.1 which is operated in conjunction with the hospital?

As factual background, you informed us that in conjunction with the operation of Franklin General Hospital, the hospital board of trustees also operates a health care facility as defined in §135C.1, The Code 1979, which houses a number of indigent patients.

The provision for care and treatment of indigent persons is the obligation of the county and its board of supervisors. Section 347.16(2), The Code 1979,[1] provides as follows:

> Free care and treatment shall be furnished in a county public hospital to any sick or injured person who has legal settlement under §252.16 in the county maintaining the hospital, and who is indigent. The board of hospital trustees shall determine whether a person is indigent and entitled to free care under this subsection, or may delegate that determination to the overseer of the poor or the office of the department of social services in that county, subject to such guidelines as the board may adopt in conformity with applicable statutes.

Section 252.22, The Code 1979, provides that "[a]ll laws relating to the support of the poor as provided by this chapter shall be applicable to care, treatment, and hospitalization provided by county public hospitals." Since §347.26, The Code 1979, empowers the county to establish and operate a health care facility in conjunction with a county hospital, the county's obligation to provide care and treatment would extend to indigent patients sheltered in that facility.

Section 252.27, The Code 1979 provides:

> The relief [for the poor] may be either in the form of food, rent, or clothing, fuel and lights, *medical attendance*, civil legal aid or in money . . . [Emphasis added].

The term "medical attendance", relating to the support of the poor, has been construed by the Iowa Supreme Court to have a broad meaning, and to include hospitalization, medical service, medical supplies, nursing and watching of sick, poor persons. *See Scott v. Winneshiek County*, 52 Iowa 579, 3 N.W. 626 (1879); 1946 Op. Atty. Gen. 8.

Payment of claims for the care of the poor made by the hospital trustees on behalf of either the county public hospital or the health care facility being operated in conjunction therewith is the responsibility of the board of supervisors acting pursuant to §232.35, The Code 1979:

> All claims and bills for the care and support of the poor shall be certified to be correct by the proper trustees and presented to the board of supervisors, and, if they are satisfied that they are reasonable and proper, they shall be paid out of the county treasury.

See Phinney v. Montgomery, 218 Iowa at 1244, 257 N.W. at 211; 1954 Op. Atty. Gen. 69, 71.

There are limitations, however, to the amount to which the county is obligated for the care and treatment of poor persons. Sections 252.24

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[1] This Code section was adopted in 1978, replacing §347.16(2), The Code 1977, which had contained the language: "Cost of said care shall be the liability of the county, and upon claim made therefore paid under the authority and in the manner specified by §252.35." Relevant sections of ch. 252, "Support of the Poor", were not amended by the 1978 or 1979 sessions of the legislature, and the obligation of the county and its board of supervisors to provide care and treatment of indigent persons remains mandatory.

and 252.35 require payment only of "reasonable" charges; §252.28 provides:

When medical services are rendered by order of the trustees or overseers of the poor, *no more shall be* charged or *paid* therefor than is *usually charged* for like services in the neighborhood where such services are rendered. [Emphasis added].

Further, the Franklin County health care facility operated pursuant to §135C.1, The Code 1979, houses a number of patients eligible to receive state and federal aid under Title XIX of the Social Services Act (Medicaid). As a result of the facility's participation in the Title XIX program, the State Department of Social Services reimburses the county a sum per day for every Title XIX patient in the facility. As of July 1, 1979, that payment was $22.27, which was the maximum allowable payment under the program. The facility's audited cost as of July 1, 1979, per patient per day was approximately $42.30. While only a portion of the support of those patients receiving Title XIX aid is financed by state and federal funds, no supplementation of that payment is allowed under the Title XIX program from any other source. 770 I.A.C. §81.10(5). Under the Department of Social Services administrative rules, and contractual obligations assumed by a health care facility participating in Title XIX, the facility accepts the payment on behalf of indigents "as payment in full." 770 I.A.C. §81.13(22).

Thus, the county facility can expect no reimbursement of the costs expended for the care and treatment of indigent patients receiving aid under Title XIX, beyond that presently paid. The county would not be foreclosed from voluntarily assuming obligations of the health care facility that may exist because of deficits incurred in caring for Title XIX patients, but the county may not reimburse the health care facility on a per-patient supplementation basis.[1] The county would be responsible for all reasonable expenses incurred in the support of a patient determined to be "indigent and entitled to free care" by the board of hospital trustees, but not eligible to participate or participating in the medical assistance program under Title XIX. Section 347.16(2), The Code 1979. The "reasonable" expense would be determined by the county board of supervisors, based on usual charges for like services in the neighborhood where the services are rendered.

As to those charges, it is "the duty of the Board of Supervisors to direct the drawing of warrants for the payment of claims when certified to be correct by the Board of Hospital Trustees." *Phinney v. Montgomery*, 218 Iowa at 1244, 257 N.W. at 210. *See also* 1964 Op. Atty. Gen. 26; 1963 Op. Atty. Gen. 30.

IV. Can a county public hospital organized pursuant to ch. 347 of the Iowa Code incur debt through the issuance of the public warrants, and, if so, is there a limitation on the amount of debt which may be incurred through the issuance of such warrants?

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[1] Similarly, a family may not reimburse a health care facility for expenses incurred on behalf of a family member receiving aid under Title XIX, but could give a separate "donation" to the facility. The donation would not be considered supplementation of the Title XIX payments.

Operation of a county public hospital is a proprietary function of government, and as such, is fraught with inherent problems under local budget law. Ordinarily, a county hospital's income structure is based primarily on charges for its services and not on taxation. Franklin General Hospital's certified budget for the year ending June 30, 1979, demonstrates the problem vividly. The total budget as certified was $3,817,092. The estimated cash reserve was $54, 112. The amount to be raised by taxation was $273,510 or only *seven percent* (7%) of the *total* budget. All other revenue, $3,597,695, was to be obtained from other sources. Problems arise when an unexpected drop in hospital income from charges for services occurs, as has occurred at Franklin General.

Your question raises three major problems which will be discussed.

A. May a county hospital operating under ch. 347, The Code 1979, incur debt through the issuance of warrants?

A county hospital organized pursuant to ch. 347, The Code 1979, is a public body or municipal entity within the meaning of §24.2(1):

> The word 'municipality' shall mean the county, school corporation, and *all other public bodies or corporations that have power to levy or certify a tax or sum of money to be collected by taxation* . . . [Emphasis added].

See 1965 Op. Atty. Gen. 468; 1930 Op. Atty. Gen. 320. Section 347.7, The Code 1979, provides for *certification* by the hospital board of trustees of a tax to be levied at the time of levying ordinary county taxes.

Because of its status as a "municipality", it is our opinion that a county public hospital may incur debt through the issuance of public warrants under chapter 74, The Code 1979, "Public Warrants Not Paid For Want of Funds." Section 74.1 states in pertinent part:

> This chapter shall apply to all warrants which are legally drawn on a public treasury, including the treasury of a city, and which, when presented for payment, are not paid for want of funds.
>
> This chapter and its procedures *shall also apply whenever a municipality, as defined in section 24.2, or a city shall determine that there are not or will not be sufficient funds on hand to pay the legal obligations of a fund.* Said municipality is authorized to provide for the payment of such *present* and *future obligations* by drawing one or more *anticipatory* warrants payable to a bank or other business entity authorized by law to loan money in an amount or amounts *legally available* and believed to be sufficient *to cover the anticipated deficiencies.* [Emphasis added].

The county public hospital would also be subject to the limitation on indebtedness of governmental entities contained in Article XI, section 3, of the Iowa Constitution:

> No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate, exceeding five percentum on the value of the taxable property within such county or corporation.

As you indicated, the 1978 assessed value of the taxable property of Franklin County, which is the taxable jurisdiction of Franklin General Hospital, was $441,000,578.

B. What may a local governmental unit do under the Iowa Constitution and local budget law if its estimates in its certified budget prove to be inadequate as the fiscal year progresses?

Fundamental regulation of the budgeting process for local governmenal units in Iowa is contained in the Constitution and chs. 23 and 24, The Code 1979. In addition, funding of county hospitals operating under ch. 347 is provided for in particular in §347.7:

If the hospital be established, the board of supervisors, at the time of levying ordinary taxes shall levy a tax at the rate voted not to exceed fifty-four cents per thousand dollars of assessed valuation in any one year for the erection and equipment thereof and also a tax not to exceed twenty-seven cents per thousand dollars of value for the improvement, maintenance, and replacements of the hospital, as certified by the board of hospital trustees . . . The proceeds of such taxes shall constitute the county public hospital fund . . .

No levy shall be made for the improvement, maintenance, or replacements of the hospital until the hospital has been constructed, staffed, and receiving patients.

The word "maintenance" as used in that section has been construed to mean "current expense of the institution." 1928 Op. Atty. Gen. 132, 133.

The county hospital board must conform to the requirements of §24.3, The Code 1979, in preparing its budget. If estimates as certified to the county board of supervisors by the hospital board of trustees prove to be inadequate as the fiscal year progresses, the county hospital could utilize the emergency fund levy procedure set forth in §24.6, The Code 1979.

As a "municipality" under the provisions of §24.2(1), The Code 1979, the county hospital has the power to levy a tax for an emergency fund pursuant to §24.6, which provides in pertinent part:

Each municipality as defined herein, may include in the estimate herein required, an estimate for an emergency fund. Each such municipality shall have power to assess and levy a tax for such emergency fund at a rate not to exceed twenty-seven cents per thousand dollars of assessed value of taxable property of the municipality, provided that no such emergency tax levy shall be made until such municipality shall have first petitioned the state board to make such levy and received its approval thereof.T ransfers of moneys may be made from the emergency fund to any other fund of the municipality for the purpose of meeting deficiencies in any such fund arising from any cause provided, however, that no such transfer shall be made except upon the written approval of the state board, and then only when such approval is requested by a two-thirds vote of the governing body of said municipality.

Under the statute, if the board of trustees of a county hospital decides it needs to certify a tax levy for an emergency fund, it must seek permission of the State Appeal Board created by §24.26. The Iowa Supreme Court has discussed the use of an emergency fund by a governmental unit in *Mathewson v. City of Shenandoah*, 233 Iowa 1368, 1370, 11 N.W.2d 571, 572 (1943):

The establishment and use of an emergency fund is discretionary with the governing body of a municipality and subject to the approval of the state board. Of course, the exercise of such discretion should be honest and not arbitrary.

An emergency levy is not a general substitute for other taxes. The purpose of the emergency fund is to supply deficiencies in any other fund arising from any cause. We think the statute contemplates that the defi- approval thereof. Transfers of moneys may be made from the emergency fund, should be occasional rather than continuous. A contrary interpretation would afford opportunity for the annual levy, for an unlimited

period, of emergency-fund taxes intended to augment a certain other fund, in excess of the statutory tax limit for such fund.

The contours of the emergency levy section of the Code have been further discussed in opinions issued in the past by this office.

We believe the emergency fund provided for in Section 373 [The Code 1924] is a separate and distinct fund and by levying the same no greater tax would be levied and collected for any of the purposes for which other funds are raised . . .

Therefore, we are of the opinion that the tax levy authorized by Section 373 is an addition to and supplements the other levies and that it should be used only for an emergency or other expenditure as provided in the Section.

1926 Op. Atty. Gen. 37, 38.

It will be noted that the statute does not provide for what purpose such fund may be used except that it must be used for an emergency. We believe this fund may be used for any purpose for which the city may be required to expend its funds provided, of course, that an emergency exists for the use of said fund for any municipal purpose. Of course, as long as there is money in any fund of the city or *municipality* the emergency fund may not be used for the purpose for which said fund is created. We believe that it is not necessary to state in the estimate or the proposed budget the exact purpose for which said fund may be used. Manifestly, such fund is created for the purpose of meeting an emergency that may arise in the city and is not limited to any particular fund.

An emergency is defined by Webster's Unabridged Dictionary as follows:

Sudden or unexpected appearance or occurrence; unforeseen occurrence or *combination of circumstances* which calls for immediate action or remedy; pressing necessity; exigency. [Emphasis added].

This fund, therefore, is created for the purpose of meeting the expenses or cost of the municipality for some purpose or necessity that could not be foreseen, or for some sudden occurrence or combination of circumstances which calls for immediate action. The use of the fund is, therefore, limited to an expenditure for such purposes.

1926 Op. Atty. Gen. 444.

We believe that the Franklin General Hospital Board of Trustees could base a request for an emergency levy to alleviate its financial problems resulting from the loss of income that you have described. The emergency fund estimate must be included in the taxing body's certified budget estimates for a given fiscal year, and the emergency fund would be assessed and levied at the time of other taxes. Thus, any emergency fund levy would be available only in future budget estimates to resolve problems arising during the current fiscal year. *See* §74.5, The Code 1979. Further, such an emergency levy would be only a temporary solution. The State Appeal Board would not be expected to permit the emergency levy to be permanent, if the income of the hospital did not increase to the extent necessary to support its continued operation under the usual tax levies and other income sources.

C. What limits are imposed on the use of warrants?

Chapter 74, The Code 1979, contains no limitation on the *amount* of warrants that may be issued, except that they are to be "legally drawn on a public treasury." The legal limit on the amount of warrants which may be issued by a municipality is found in §24.14, The Code 1979:

No greater tax than that so entered upon the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; and *thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor* . . . [Emphasis added].

This section was construed by the Iowa Supreme Court in *Clark v. City of Des Moines*, 222 Iowa 317, 319, 267 N.W. 97, 98 (1936), in language applicable to the circumstances you have described in your inquiry.

This statute then limits *not only the taxation that may be* levied, but *the expenditures* of the city of public moneys to the amount as originally would be derived from the estimates of the budget made up in August of 1934, and *was clearly without question a violation of the statute.*

No one can read this chapter of the Code and the sections therein involved without coming to the conclusion that the legislature in enacting this chapter had in mind not only the limitation of taxation that might be levied, *but expenditures that might be made.* What is the result of following such procedure as was followed by the city council in this case? The result is that if there was any shortage in the amount they claim will be collected other than by taxation, in that year, warrants may be drawn up to whatever amount it may be raised to, and the result will be that *if there is a shortage*, the city or municipality so doing is ordinarily faced *with making a bond issue to take up such expenditures as are excessive, or to provide for them in the next year's taxation levy.* This was what the legislature was trying to avoid. *There can be no excuse for such procedure by the city council.*

* * * *

The power to tax arises by a legislative act. Municipalities cannot tax except as authorized by the legislature. 26 R.C.L. section 13, p. 27; 61 C.J. p. 81, wherein it is said:

The taxing power of the state is exclusively a legislative function, and taxes can be imposed only in pursuance of legislative authority, there being *no such thing as taxation by implication.* Subject to the fundamental or organic limitations on the power of the state, the legislature has plenary power on the matter of taxation, and it alone has the right and discretion to determine all questions of time, method, nature, purpose, and extent in respect of the imposition of taxes, and subjects on which the power may be exercised, and all incidents pertaining to the proceedings from beginning to end; and the exercise of such discretion, within constitutional limitations, is not subject to judicial control. [Emphasis added].

222 Iowa 321-323, 267 N.W. 99-100. *See also* 1967 Op. Atty. Gen. 13; 1938 Op. Atty. Gen. 19.

In conformity with *Clark v. City of Des Moines*, we believe a county hospital board of trustees is without authority to issue warrants in excess of that provided for in its certified budget estimates established pursuant to ch. 24 and to be collected in the ensuing year or in future years if authorized. 1930 Op. Atty. Gen. 54; 1968 Op. Atty. Gen. 32, 34.

D. Summary of conclusions.

A county hospital operated pursuant to chapter 347, The Code 1979, possesses authority to incur debt through the issuance of warrants. If a hosiptal's budget estimates prove to be inadequate as a fiscal year progresses, an emergency fund levy can be included in budget estimates for future fiscal years on a temporary basis. The authority to issue anticipatory warrants is limited by §24.14, and a hospital should not

issue warrants which have not been anticipated in the regular budgetary process or by emergency estimate procedures.

V. If the board of trustees of a county public hospital incurs debt through the issuance of warrants and is unable to pay such debt, what liability exists for the county to pay such debt?

A county hospital is a separate municipality or governmental entity under the definition of §24.2(1), The Code 1979, in that it has "power to levy or certify a tax . . .". Although its geographical boundaries are identical to those of the county, it is separate. In our opinion, the debt incurred by a county hospital operating under chapter 347, The Code 1979, is a liability of the hospital as a governmental entity and not a liability of the county where the hospital is located.

The power to levy or certify a tax up to fifty-four cents per thousand of assessed value of the county for the erection and equipment of a hospital and up to twenty-seven cents for improvement, maintenance and replacements found in §347.7, constitutes the fundamental taxing power of the county hospital board of trustees. The budget making process is that set forth in chapter 24, The Code 1979. Chapter 23, The Code 1979, regulates bonding and letting of contracts. As discussed in section IV above, we believe that a county hospital may levy an emergency tax subject to approval of the State Appeal Board under §24.6, The Code 1979, which could be used in future years to satisfy current obligations. *See* §74.5, The Code 1979.

The county board of supervisors is required by chapter 252, The Code 1979, to support the poor. *See Council Bluffs Savings Bank v. Pottawattamie County*, 216 Iowa 1123, 250 N.W. 233 (1922). Claims submitted by the hospital to a board of supervisors for "medical attendance" of those entitled to free care because of indigency are to be paid. *See above.* Additional claims *may* accrue to a county hospital from the county orphan fund, §444.11, The Code 1979, and the county mental health and institutions fund, §444.12, The Code 1979, *if* a county hospital furnishes care to persons covered by those Code sections. Otherwise we believe the county board of supervisors, under its own taxing and budgeting responsibilities, is not responsible for the debts incurred by a county hospital board of trustees pursuant to chapter 347, The Code 1979. It is not prohibited from voluntarily assuming any such obligations.

In summary, we believe the county public hospital organized pursuant to chapter 347, can incur debt through the issuance of warrants but if it does, it alone is responsible for that debt.

VI. Are the board of trustees and the administrator of the county public hospital exempt from tort liability pursuant to §613A.4(3) for decisions made in carrying out their duties pursuant to §347.13 and §347.14 of the Code of Iowa?

While a county hospital organized pursuant to chapter 347 falls within the definition of municipality under §613A.1(1), The Code 1979, it is not obvious what relevance chapter 613A, "Tort Liability of Governmental Subdivisions" has to the factual and legal issues you have raised. Section 613A.2 imposes liability on every municipality 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 proprie-

tary function." Section 613A.4(3) exempts claims "based upon an act or omission of an officer or employee, exercising due care, in the execution of a statute, ordinance, or officially adopted resolution, rule, or regulation of a governing body." We are unable to identify a potential plaintiff or discern an actionable common law tort arising from the circumstances you have described which would bring the duty of the governing body to indemnify and defend its officers under §613A.8 into play.

Whether certain language of §343.10, The Code 1979, making it "unlawful . . . to issue any warrant . . . which will result . . . 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 years. Any officer . . . issuing [such] a warrant . . . shall be held personally liable for the payment of the . . . warrant . . ." has any application to the circumstances you have presented requires a factual determination inappropriate for us to make. In any event, §613A.8 extends the obligation to indemnify officers or employees, "except in cases of malfeasance in office, willful and unauthorized injury to persons or property, or willful or wanton neglect of duty."

VI. In conclusion, it is our opinion that:

1. Application of County Home Rule does not extend to a county public hospital organized pursuant to chapter 347, although a hospital's board of trustees statutory powers are similar in scope to those exercised by county boards of supervisors pursuant to the constitutional grant of home rule.

2. The hospital board of trustees, in the exercise of its discretionary powers, can expend hospital funds for the recruitment of doctors to engage in private practice in the county, subject to certain budgeting and funding limitations.

3. Franklin County's health care facility operated pursuant to chapter 135C in conjunction with Franklin General Hospital can expect no reimbursement of the costs expended for the care and treatment of indigent patients receiving aid under Title XIX, beyond that presently paid as "payment in full." Franklin County would be responsible for all *reasonable* charges incurred in the support of a patient determined to be "indigent and entitled to free care" by the board of hospital trustees, but not eligible to participate or participating in the medical assistance program under Title XIX.

4. A county hospital operated pursuant to chapter 347 possesses authority to incur debt through the issuance of warrants. If a hospital's budget estimates prove to be inadequate as a fiscal year progresses, ch. 24, The Code 1979, which limits the authority to issue anticipatory warrants, provides an alternate means for dealing with the inadequacy through taxation.

5. Franklin General Hospital as organized pursuant to chapter 347 could incur debt through the issuance of public warrants, as limited by the Iowa Constitution and chapter 24, but it remains the entity responsible for that debt.

6. Chapter 613A, "Tort Liability of Governmental Subdivisions" has little obvious relevance to the situation described at Franklin General Hospital, and whether the governmental entity or the individual trustees may be liable on any theory is not an appropriate topic for this opinion.

September 17, 1979

MENTAL HEALTH: Involuntary hospitalization hearings under Chapter 229, Code of Iowa. §§229.12, 229.21, 602.5, Rules 16 and 17 of the Supreme Court Involuntary Hospitalization Rules authorized by Iowa Code §229.40. District judges and judicial hospitalization referees cannot hold involuntary hospitalization hearings outside their county of appointment unless the parties consent. No hearings may be held by a district judge or hospitalization referee outside of the judicial district of their appointment. Judicial hospitalization referees and district judges may ask questions during involuntary hospitalization proceedings. The county attorney must be present during questioning by the judge or judicial hospitalization referee at involuntary hospitalization proceedings. (Golden to Neighbor, 7-17-79) #79-9-12

Mr. Charles G. Neighbor, Jasper County Attorney: You requested advice whether a judicial hospitalization referee has authority to hold an involuntary hospitalization hearing outside the county where both the referee holds office and the petition was filed. Specifically, you requested advice whether the Jasper County Hospitalization Referee has authority to hold a hearing at the Mental Health Institute, in Mount Pleasant, Henry County, Iowa. You also requested advice whether the Judicial Hospitalization Referee is permitted to ask questions during a hearing under Iowa Code §229.12. Finally, you asked whether the county attorney is required to be present during examination of witnesses by the hospitalization referee.

Analysis of Iowa Code Chapter 229, the Supreme Court Involuntary Hospitalization Rules authorized by Iowa Code §229.40, and Iowa Code §602.5 suggests that while an involuntary hospitalization hearing may be held in another county if both parties consent, it may not be held in a different judicial district. Therefore, it would be impermissible for a referee from Jasper County in the Fifth Judicial District to hold a hearing at Mount Pleasant in the Eighth Judicial District.

Analysis of Iowa Code §229.12 suggests that the referee or judge may ask questions at the hearing. However, the primary responsibility for examination of witnesses is on the county attorney and the respondent's attorney. The county attorney or his designee must be present during the presentation of evidence.

Iowa Code Chapter 229 indicates that after a petition for involuntary hospitalization is filed in a particular county, the clerk for that county and the judges of that county issue the orders and hold the hearings required by Iowa Code Chapter 229. The statute does not specifically establish where the hearing, required by Iowa Code §229.12, is to be held.

Rules 16 and 17 of the Supreme Court Involuntary Hospitalization Rules, promulgated under Iowa Code §229.40, both address the question where the hearing, required by Iowa Code §229.12 may be held. Rule 16 states:

The hearing provided in section 229.12, The Code, shall be held in the county where the application was filed unless the judge or referee finds that the best interests of the respondent would be served by transferring the proceedings to a different location.

Rule 17 states:

The hearing required by section 229.12, The Code, may be held at a hospital or other treatment facility, provided a proper room is available

and provided such a location would not be detrimental to the best interests of the respondent.

The question is whether either of these rules authorizes a judge or referee from one county to hold a hearing in another county and specifically in a county which is in a different judicial district. In our view, they do not.

Rule 16 permits the judge to "transfer the proceedings". On its face, this provision might suggest that it is authority for a referee from one county to hold a hearing elsewhere. However, the legal term "transfer" connotes a change of jurisdiction not merely a change of location.[1] Moreover, the term transfer is used in the Rules of Civil Procedure to describe the process of transmitting a cause from the docket of one court to the docket of another.[2]

In view of the language with which it was written, Rule 16 was apparently written to deal with the situation where it would be desirable to change the court and judge handling the matter, and not where only the location was at issue. This is in any event the construction which must be given it in view of Iowa Code §4.1(2), which requires that terms having special legal meaning be given that effect.

Rule 17 of the Supreme Court Involuntary Hospitalization Rules authorizing the holding of hearings at hospitals provided such location would not be detrimental to the best interests of the respondent could have been intended to permit the holding of hearings outside the county where the petition was filed. Many patients are treated outside of their home county due to the limited number of available facilities. However, if such an intent existed, it was not stated.

This raises questions about the power of a referee to hold a hearing in another county in view of Iowa Code §602.5, the general statute concerning where the district court may hold a hearing. The hospitalization referee is appointed by the district court, and acts in place of district court judges. Furthermore, his findings may be appealed to the district court. *See* Iowa Code §229.21. Thus, absent express contrary authority, the general limitations on the location of district court hearings are applicable.

Iowa Code §602.5 states:

Courts must be held at the places in each county, as designated by the chief judge of the judicial district, except for the determination of actions, special proceedings, and other matters not requiring a jury, when they may be held at some other place in the district with the consent of the parties.

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[1] *See Black's Law Dictionary*, 1669, 4th Ed. 1969, which defines "transfer of a cause" as "the removal of a cause from the jurisdiction of one court or judge to another by lawful authority."

[2] Rule 173 of the Rules of Civil Procedure is headed "Transferring Cause". It states: "When a change is ordered and the required costs paid, the clerk shall forthwith transmit to the proper court his transcript of the proceedings with any original papers of which he shall retain an authenticated copy. The case shall be docketed in the second court without fee and shall proceed."

To the extent that §602.5 restricts hearings to the county, absent consent, and to the extent it restricts hearings in any event to the judicial disrict, it would be inconsistent with Rule 17 if that were construed to permit hearings at any hospital, anywhere.

This potential conflict brings into the effect the statutory construction rules of Iowa Code Chapter 4. Iowa Code §4.7 entitled "Conflicts between general and special statutes" states: "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." Iowa Code §4.7. Since it is required that an effort be made to reconcile the provisions before the general provision may be disregarded it is necessary to see whether Rule 17 and Iowa Code §602.5 can both be given effect.

Since Rule 17 nowhere states where the "hospital" at which hearings may be held should be located, it is arguable that the language of the provisions can be reconciled. Rule 17 is then construed to authorize the holding of hearings in hospitals but only in those locations permitted by Iowa Code §602.5. Since Iowa Code Chapter 229 proceedings are nonjury or special proceedings[3], hearings may be held anywhere in the judicial district so long as the petitioners and the respondent consent. Therefore, if the judicial hospitalization referee finds that holding a hearing at a hospital "would not be detrimental to the interests of the respondent" and the petitioners and respondent agree, a hearing may be held at any hospital in the judicial district, but not outside the district.

The authority of the judge or referee to ask questions in the involuntary hospitalization proceeding is not discussed in Iowa Code Chapter 229. The primary responsibility for presenting evidence and examination of witnesses is placed on the county attorneys and respondent's attorney. Iowa Code §229.12(1) states: "At the hospitalization hearing evidence in support of the contentions made in the application shall be presented by the county attorney. During the hearing the applicant and the respondent shall be afforded an opportunity to testify and to present and cross-examine witnesses and the court may receive the testimony of any other person." The question is, therefore, whether questioning by the judge is impliedly authorized.

Iowa Code §229.12(3) states "The respondent's welfare shall be paramount and the hearing shall be conducted in as informal a manner as may be consistent with orderly procedure, but consistent therewith. The issue shall be tried as a civil matter." As noted above, the court is also permitted to "receive the testimony of any other interested person." In our view, these provisions impliedly authorize a limited power of the court to ask questions.

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[3] The proceeding under §229 are tried to the court, no right to jury is granted. *See* Bezanson, Involuntary Treatment of the Mentally Ill in Iowa, 61 Ia. L. Rev. 261, 339-344 (1975), which indicates that this provision is constitutional.

The informality of the proceeding and the fact that the welfare of the respondent is a primary concern may lead to circumstances where the judge or referee feels he/she should intervene. Court-appointed attorneys handling involuntary hospitalization proceedings may in some circumstances be inexperienced and may fail to ask certain important questions. In view of the informality of the proceedings and the preeminence of the welfare of the respondent it would not be improper under such circumstances for the referee or judge to ask important questions.

In addition, the authorization for the court to receive the testimony of other interested persons also suggests a judicial power to make inquiries. It would be difficult for the judge or referee to receive the testimony of persons not called if he could not ask them questions. Therefore, these witnesses may be examined by the judge or referee.

As noted above, however, the primary responsibility for presenting evidence is on the attorneys. Subject to certain limitations, involuntary hospitalization proceedings are "tried as a civil action". *See* Iowa Code §229.12(3). The judge should not take over primary responsibility for presentation of either the petitioner's or respondent's case.

This analysis is also relevant to the question concerning the county attorney's presence during questioning. The statute requires the county attorney to represent the petitioners in presenting evidence supporting the petition. *See* Iowa Code §229.12(1). It would not be consistent with this procedure for the county attorney to absent himself while evidence was presented by the referee.[1]

September 17, 1979

USURY: INTEREST RATES. Section 535.2, 1979 Code of Iowa. Under Section 535.2, as amended, corporations or individuals borrowing over $500,000 for agricultural purposes, or individuals borrowing over $100,000 for business purposes, may by written agreement be charged prepayment penalties. Individuals borrowing money for an agricultural purpose in an amount less than $500,000 may not be charged a loan processing fee if its effect is to raise the interest rate above the rate established by §535.2; if the amount borrowed for an agricultural purpose under a written agreement is in excess of $500,000, a loan processing fee may be assessed by the lender. If an Iowa resident borrows money offering a mortgage on land in another state as collateral, the interest rate that may be charged is governed by §535.2. (Ormiston to Shull, State Representative, 9-17-79) #79-9-13

Honorable Douglas Shull, State Representative: You have requested an opinion of the Attorney General on the following series of questions relating to Senate File 158:

"1. Can corporations or individuals borrowing over $500,000.00 for agricultural purposes, or individuals borrowing over $100,000.00 for business purposes, be charged penalties for paying off the loan before it is due, so-called prepayment penalties?

"2. Can points be charged to individuals borrowing money for an agricultural purpose where:

"a. The loan is for an amount less than $500,000.00; or

[1] *See* Op. Atty. Gen. dated June 8, 1979, holding that participation by the county attorney in involuntary hospitalization proceedings is mandatory.

"b. The loan is for $500,000.00 or more?

"3. What rate of interest can be charged an Iowa resident borrowing money and giving a mortgage as security on land located in a state with a lower usury rate than that in the state of Iowa?"

Section 535.2, the Usury Statute of Iowa, has been amended by the new Senate File 158, to exempt certain specific types of borrowers from the interest rate strictures set forth in the statute at §535.2(2), 1979 Code of Iowa:

> Any domestic or foreign corporation, . . . and any person borrowing money or obtaining credit in the amount of one hundred thousand dollars or more, exclusive of interest, for business purposes, and any person borrowing money or obtaining credit in the amount of five hundred thousand dollars or more, exclusive of interest, for agricultural purposes, may agree in writing to pay any rate of interest in excess of the rate permitted by this section, and no such corporation . . . or person so agreeing in writing shall plead or interpose the claim or defense of usury in any action or proceeding.

These specified groups are presumed to reach a separate arms' length transaction with lenders in this state and consequently are not subject to the limitations on the rates of interest established by the Usury Statute. The amended statute allows these borrowers to reach an agreement with the lender on any rate of interest accepted by both parties so long as it is memorialized by a written agreement. Since a prepayment penalty has the proximate effect of raising the rate of interest in a given circumstance, it would be an acceptable term of the written agreement between the parties. The law clearly assumes that borrowers exempted by the statute are not in need of the protection of the Usury Statute and can bargain for any rate of interest, including penalties on the prepayment of the loan.

The assessment of a loan processing fee or "points" on an agricultural loan of less than $500,000 but more than $35,000 would be impermissible in a written agreement if its effect would be to raise the overall interest rate beyond that allowed by the Usury Statute. Section 22.1 of 1979 S.F. 158 specifies, "A loan processing fee under authority of this paragraph shall be disregarded for purposes of determining the maximum charge permitted under §535.2." The definition, however, of "loan" under this paragraph includes loans only on single and double family dwellings. Consequently, the assessment of a loan processing fee on an agricultural loan of less than $500,00 but more than $35,000 must be viewed as interest governed by the limits set in §535.2, 1979 Code of Iowa. If the loan is for $35,000 or less, the controlling law may be found in Chapter 537, 1979 Code of Iowa, better known as the *Iowa Consumer Credit Code.*

The assessment of a loan processing fee on a loan in excess of $500,000 for agricultural purposes is governed by the considerations set forth above in the discussion of prepayment penalties assessed against a borrower specifically exempted from the strictures of Chapter 535 by 1979 S.F. 158. A loan processing fee may be assessed on this loan so long as it is pursuant to written agreement between the borrower and lender. Again, this borrower has been determined by the legislature to not be in need of the protection of the Usury Statute and thereby need not be subjected to its interest rate strictures in reaching a written loan agreement with the lender.

In answer to your third question, the rate of interest that may be charged an Iowa resident borrowing money and giving a mortgage as security on land located in a state with a lower usury rate than Iowa is limited by the Iowa Usury Statute. The location of the collateral does not alter the nature of the loan. The mortgage follows the note which is governed by Iowa law. At *91 C.J.S. Usury 4(8)*, the usury law applicable in relation to the situs of the property mortgaged is discussed:

When a loan is secured by a mortgage on land in one state but the transaction is properly referable to another state, the existence of usury in the transaction may be determined by the law of the latter state.

As a consequence, if the Iowa resident borrows and uses a mortgage on land in another state as collateral, the interest rate that may be assessed on the loan is governed by Chapter 535.2 as amended.

September 17, 1979

COUNTIES AND COUNTY OFFICERS: Incompatibility—§234.11, The Code 1979. The positions of Chairperson of the County Board of Social Welfare and County Conservator are not incompatible, assuming that they have no interaction. (Blumberg to Knuth, Jones County Attorney, 9-17-79) #79-9-14(L)

September 25, 1979

CRIMINAL LAW: Non-felonious Misconduct in Office: Public Contracts — §721.2(1), Chapters 24, 344 and 384, Code of Iowa (1979), Chapter 230-2, Iowa Administrative Code. Section 721.2(1) imposes non-felonious criminal liability on any public officer or employee who knowingly makes a contract that contemplates an expenditure known to be in excess of that authorized by law. An expenditure is authorized by law if it is supported by an appropriation created by an official act of the county's or city's governing body according to applicable procedures specified in Chapters 24, 344 and 384, Code of Iowa (1979) and Chapter 230-2, Iowa Administrative Code. The knowledge requirement of §721.2(1) is met whenever a person acts with actual, positive knowledge of the facts. Section 721.2(1) does not require proof of personal profit. (Richards to Johnson, Auditor of State, 9-25-79) #79-9-15

The Honorable Richard D. Johnson, Auditor of State: You have requested an opinion of the Attorney General regarding §721.2(1), Code of Iowa (1979), which imposes non-felonious criminal liability on public officials and employees for engaging in certain misconduct in office. Specifically, that section 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:

"1. Makes any contract which contemplates an expenditure known by him or her to be in excess of that authorized by law . . . ."

In relation thereto, you have raised the following questions for our consideration:

"1. What constitutes authorization by law to make expenditures for: (a) current operations; (b) capital programs?

"2. Does the existence of an unencumbered balance of cash and/or investments constitute authorization for expenditure or contract for expenditure under the law if there is not also an appropriation available?

"3. For municipalities, may the total expenditures for activities of a given program under the current operating budget exceed the total appropriated for that program without an approved budget amendment?

"4. If the responses to questions 2 or 3 are in the negative, does the issuance of a purchase order, either verbal or written, or the entering into a more formal contract by a city clerk or other fiscal officer constitute a violation of section 721.2(1)? Also, does the city council, collectively or individually, violate the statute by the approval of claims for expenditures, where information is available, or can be readily determined, which indicates the necessary appropriations are not available?

"5. Is the cited statute violated if a contract for expenditures is made under the assumption that an adequate appropriation balance is available when in fact, due to improper and/or inaccurate accounting, such balance is not available?

"6. Is the cited statute violated if the amount of a contract for expenditure exceeds the unencumbered balance, even though an appropriation is available due to an overestimate of anticipated revenues?

"7. Must there be evidence that the individual has personally profited from the negotiation of the contract to apply this section of the law? On what basis may an individual be prosecuted for contracting expenditures in excess of the amount authorized by law?

"8. Are there any budgetary transfers that do not violate this statute? Please consider specifically both cities and counties."

Your first three questions deal primarily with state laws regulating budget and financial management at the county and city levels of government. Your remaining questions involve application of §721.2(1) to these systems.

The financial affairs of Iowa's counties are closely regulated by Chapters 24 and 344, Code of Iowa (1979). Those of Iowa's cities are prescribed by Chapter 384, Code of Iowa (1979) and Chapter 230-2 of the Iowa Administrative Code. The budget law provided in these chapters "is not a mere estimate of probable revenues and expenditures, but a statutory method of controlling and limiting the expenditures of municipal bodies. The statutory limitations and prohibitions exhibited by the . . . statutes are mandatory and not directory." 1948 O.A.G. at 55. These statutory limitations on the use of public moneys are demonstrated by the following provisions:

"Section 24.14, Code of Iowa (1979) — No greater tax than that so entered upon the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; and thereafter no greater expenditure of public money shall be made for any specific purpose other than the amount estimated and appropriated therefor . . .

"Section 384.20, Code of Iowa (1979) — Public moneys may not be expended or encumbered except under an annual or continuing appropriation."

Based on our reading of these statutes, it is our opinion that an expenditure of public money is authorized by law only when the county board of supervisors pursuant to Code chapters 24 and 344, or the city council pursuant to Code chapters 384 and I.A.C. chapter 230-2 has made an appropriation therefor under the statutory procedures applicable thereto. *See Clark v. City of Des Moines*, 222 Iowa 317, 267 N.W. 97 (1936); 1948 O.A.G. 55; 1938 O.A.G. 77; 1938 O.A.G. 21; 1938 O.A.G. 19; 1936 O.A.G. 532; 1924 O.A.G. 123.

We turn then to an examination of the statutory procedures for budget appropriations applicable to counties and cities, respectively. The county budget process commences under §§24.25 and 344.1, Code of Iowa (1979) with the preparation by the various county offices and departments of itemized expenditures and revenues estimates which are submitted to the county auditor and board of supervisors. These cumulative estimates form the proposed county budget which must be organized according to §§24.3 through 24.8, Code of Iowa (1979). The proposed budget is then published with notice of hearing thereon pursuant to §24.9, Code of Iowa (1979). After public hearing under §24.11, "the board of supervisors shall appropriate, *by resolution*, such amounts as are deemed necessary for each of the different county officers and departments during the ensuing fiscal year, and shall specify from which of the different county funds created by law the appropriated funds shall be derived." Section 344.2, Code of Iowa (1979) (emphasis added). The adopted "resolution of appropriation" must be organized according to §§344.4 and 344.5, Code of Iowa (1979). Challenges to a "proposed budget, expenditure or tax levy, or . . . any item thereof," may be made by written protest to the state appeal board under procedures outlined in §§24.27 through 24.32, Code of Iowa (1979).

The county board of supervisors also has certain discretionary powers with a view toward fiscal flexibility. In additon to the usual county funds, an emergency fund [See §24.6] and a contingent fund [See §344.3] may be created. The original budget may be amended according to procedures provided in §24.9 "to permit appropriation and expenditure . . . of unexpended cash balances on hand at the close of the preceding fiscal year and which cash balances had not been estimated and appropriated for expenditures during the fiscal year of the budget sought to be amended." Similarly, if the board determines that actual receipts to a county fund will be greater than the original estimates, it may make "a supplementary appropriation *by resolution* at any regular meeting," appropriating the additional amounts to any county office supported by such fund upon a showing "that a specific need therefor exists." Section 344.6, Code of Iowa (1979) (emphasis added). Sections 344.8 and 344.9 further allow the board, *by resolution*, to make transfers of moneys within and between county offices. And moneys may be transferred between county funds pursuant to procedures in §§24.21 and 24.22, Code of Iowa (1979).

The mechanics of city finance parallel those of the county. The city budget process commences with the preparation of expenditures and revenues estimates according to §384.16(1). The proposed budget is published with notice of hearing thereon under §§384.16(2) and (3). After public hearing, the city council must adopt *by resolution* the final budget [*see* §384.16(5)] which "constitutes the city appropriation for each program and purpose specified therein." Section 384.18, Code of Iowa (1979). Objections to the budget may be made by written protest filed with the county auditor and submitted to the state appeal board for determination under procedures outlined in §384.19.

The city council is similarly vested with certain discretionary powers enabling fiscal flexibility. The original budget may be amended pursuant to procedures in §384.18 for any of the following purposes: "1. To permit the appropriation and expenditure of unexpended, unencumbered cash

balances on hand at the end of the preceding fiscal year which had not been anticipated in the budget [*and see* rule 230-2.2, I.A.C.]. 2. To permit the appropriation of amounts anticipated to be available from sources other than property taxation, and which had not been anticipated in the budget [*and see* rule 230-2.2, I.A.C.]. 3. To permit transfers from the debt service fund, the capital improvements reserve fund, the emergency fund, or other funds established by state law, to any other city fund, unless specifically prohibited by state law [*and see* rule 230-2.5, I.A.C.]. 4. To permit transfers between programs within the general fund [*and see* rule 230-2.3, I.A.C.]." The programs mentioned in §384.18(4) are defined in rule 230-2.1(4), I.A.C., as "any one of the following four major areas of public service that the city finance committee [created by §§384.13 - 384.15 of the Code] requires cities to use in defining its program structure: a. Community protection. b. Human development. c. Home and community environment. d. Policy and administration."

The superimposition of this system of programs over the city budget structure profoundly affects the flexibility of city finance. Under rule 230-2.4, I.A.C., a city council may transfer moneys between accounts without preparing a budget amendment and holding a public hearing as required by §384.18, when the transfer is between accounts in the same program. The rule does mandate that each city "provide its own written rules for transfers within programs." *See, e.g.*, Model Ordinance, Appendix B-1, *Instructional Guide to Program Budgeting and Accounting*, prepared by the League of Iowa Municipalities under the auspices of the City Finance Committee. Similarly, under rule 230-2.5(1), I.A.C., a city council may transfer moneys between city funds without preparing a budget amendment and holding a public hearing thereon when the transfer is between funds in the same program. These two rules are perhaps best illustrated by the following examples: (1) The "police operations" account and "disaster services" account receive moneys from the general fund and form part of the community protection program. Since both accounts involve the same fund and the same program, under rule 230-2.4 transfers (of appropriation authority) between the accounts do not require a formal budget amendment and public hearing. (2) A revenue receiving fund (*e.g.*, the federal revenue sharing fund) with an appropriation authority in the human development program receives a quarterly entitlement from the federal government. The "library services" account is part of the human development program and is basically supported by appropriations in the general fund. Since in this instance both funds are involved with the same program, under rule 230-2.5(1) the city council may transfer money from the federal revenue sharing fund's appropriation for the human development program to the general fund for use in library services without preparing a formal budget amendment and holding a public hearing thereon.

The preceding, lengthy analysis of the mechanics of county and city finance aptly points out the statutory controls and limits on the expenditures of local governmental bodies. Simply put, each expenditure requires an appropriation which, in turn, requires a formal act (e.g., a resolution) by the county or city governing body. Thus, in answer to your second question, the mere existence of an unencumbered balance of cash or investments does not constitute authorization by law for its expenditure. Before the county or city may use such moneys, the governing body must

appropriate same through budget amendments. Sections 24.9 and 384.18 (1), Code of Iowa (1979). And in response to your third question, the total expenditures for a city program may *not* exceed the current operating budget without an additional appropriation therefor which requires a formal act (e.g., a budget amendment) by the city council.

We next turn to an examination of §721.2(1), Code of Iowa (1979). The elements of this offense may be schematized as follows:

(1) a public officer, employee, or person acting under color of such office or employment,

(2) who *knowingly*,

(3) makes a contract,

(4) which contemplates an expenditure *known* to be in excess of that authorized by law.

The statute's coverage is clear; it is directed to any person acting in a public capacity, either *de jure* or *de facto*. "Contract" is, of course, a generic term relating to any promissory agreement between persons to do or not to do a particular thing. Cf. §362.5, Code of Iowa (1979) (" 'contract' means any claim, account, or demand against or agreement with a city, express or implied."). "Expenditure authorized by law" has already been thoroughly discussed.

The terms "knowingly" and "known" in §721.2(1) require additional scrutiny. "Were these terms talismanic, resolution of the question would be facile. But they encompass a spectrum of meanings." *United States v. Tolkow*, 532 F.2d 853, 858 (2d Cir. 1976). At one end they have been held to require actual, positive knowledge. *See Parsons v. Rinard Grain Co.*, 186 Iowa 1017, 173 N.W. 276, 280 (1919) ("Such want of knowledge may not be inferred from mere inattention or neglect. . . . Actual knowledge is required; constructive or that which might be obtained by the exercise of due care is not enough.") On the other end, it has been held that " 'knowingly' in criminal statutes is not limited to positive knowledge, but includes the state of mind of one who does not possess positive knowledge only because he consciously avoided it [deliberate ignorance]." *United States v. Jewell*, 532 F.2d 697, 702 (9th Cir.), cert. denied 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976); *and see, United States v. Tolkow*, 532 F.2d 853 (2nd Cir. 1976); Cf. §715.3, the person has information which would put a reasonable person on inquiry as to such facts, but acts without making a reasonable inquiry.") Ultimately, the precise meaning of the terms depends on the context in which they are used. *United States v. Murdock*, 290 U.S. 389, 395, 54 S.Ct. 223, 225, 78 L.Ed. 381, 385 (1933).

The proscription of §721.2(1) certainly arises whenever a person acts with actual, positive knowledge of the facts. *See* R. Perkins, *Perkins on Criminal Law*, Ch. 7, §4 at 775 (2d ed. 1969) ("Only in the most theoretical discussions would it ever be questioned that one has knowledge of facts of which he has been made aware by his own observations.") To so limit the statute's state of mind requirement is suggested by its usage of *both* "knowingly" and "known." *See United States v. Tolkow*, 532 F.2d 853, 858 (2d Cir. 1976). Although we recognize the growing trend toward imputing actual knowledge from deliberate ignorance of the facts, we decline by this opinion to extend this view to §721.2(1) and properly leave such conclusions to our judiciary.[1]

These foregoing principles are exemplified by the following answers to your remaining questions, which apply equally to both city and county employees. A purchase order is obviously a contract within the meaning of §721.2(1), since it is a promissory agreement that binds the issuing governmental body and encumbers public moneys. *See* Model Ordinance, Appendix B-3, *Instructional Guide to Program Budgeting and Accounting* (League of Iowa Municipalities). Although the terms of the contract may have been negotiated by another public employee, the knowing issuance of a purchase order therefor by a city clerk or other fiscal officer with knowledge that insufficient appropriations are available constitutes a violation of §721.2(1). If nothing else, the city clerk or other fiscal officer who acts with such knowledge is culpable as an aider and abettor of the offense. Section 703.1, Code of Iowa (1979); *State v. Lott*, 255 N.W.2d 105 (Iowa 1977). The same holds true for members of a city council who knowingly approve claims for expenditures knowing that the necessary appropriations therefor are unavailable. Of course, if these public officers and employees act as the result of mistake, as suggested in questions 5 and 6, the requisite knowledge is not present and the offense is not committed. *See* §701.6, Code of Iowa (1979) ("All persons are presumed to know the law. Evidence of an accused person's ignorance or mistake as to a matter of either fact or law shall be admissible in any case where it shall tend to prove the existence or non-existence of some element of the crime with which the person is chargd.") The basis or elements of this offense have already been outlined above; it is *not* ncessary to show that the individual has personally profited from the negotiations of a contract. Finally, §721.2(1) extends to every budgetary transaction involving the expenditure of tax dollars.

In summation, then, §721.2(1) imposes non-felonious criminal liability on any public employee who knowingly makes a contract that contemplates an expenditure known to be in excess of that authorized by law. An expenditure is authorized by law when it is supported by an appropriation created by an official act of a local governing body under specified statutory procedures. The statute's knowledge requirement obviously is met whenever a person acts with actual, positive knowledge of the facts and *may* also include knowledge resulting from deliberate ignorance of the facts.[1] If the county or city fiscal officer knowingly issues a purchase order or other form of contract with actual knowledge that insufficient appropriations exist, §721.2(1) is violated even though the fiscal officer did not negotiate the expenditure. Similarly, if the local governing body knowingly approves claims with actual knowledge of insufficient moneys, §721.2(1) is violated even though the governing body did not negotiate the contract. Obviously, if an additional appropriation to meet the excess is made according to statutory procedures before approval of the claims, no liability is created. And if the fiscal officer or governing body acts in honest mistake of the facts (e.g., inaccurate accounting, overestimates, etc.), the requisite knowledge is absent and the offense is not committed. Section 721.2(1) does not require proof of personal profit.

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[1] The concept of deliberate ignorance is not without its detractors. A highly critical examination of this theory may be found at Comment, 63 Iowa L. Rev. 466 (1977).

September 25, 1979

STATE OFFICERS AND DEPARTMENTS: IPERS—§§97B.41, 97B.49, and 97B.53, The Code 1979; 1979 Session, 68th G.A., S.F. 489, §7; 370 IAC §8.13. Members of IPERS who have terminated prior to retirement and leave their accumulated contributions in the system for a future retirement, are entitled to a benefit as set forth in §97B.49 or §97B.50. (Blumberg to Longnecker, Director, State Retirement Systems, 9-25-79) #79-9-16 (L)

September 26, 1979

JUVENILE LAW: Disclosure of information by a law enforcement agency as to the nature of an alleged juvenile offense. Chapter 232, §232.56, The Code 1977; chs. 68A and 232, §§68A.7(9), 232.149(2), 232.151, The Code 1979. The press may obtain information as to the nature of an offense that a juvenile allegedly committed from the appropriate law enforcement agency as long as the identity of the juvenile involved remains confidential. (Hoyt to Gallagher, State Senator, 9-26-79) #79-9-17

James V. Gallagher, Esquire, State Senator: You have asked whether the press is restricted from obtaining from the appropriate law enforcement agency information as to the nature of the offense that a juvenile offender allegedly committed.

As a general rule, information as to the nature of an alleged offense may be obtained from law enforcement agency records. Section 68A.7(9), The Code 1979, provides that records of current and prior arrests are public records. The daily log of a law enforcement agency, *i.e.* the summary of the law enforcement agency's actions compiled on a twenty-four hour basis is also accessible to the press. 1976 Op. Att'y Gen. 559.

Under the old juvenile law, law enforcement records regarding juveniles were also public records. §232.56, The Code 1977. The new Juvenile Justice Bill represents a dramatic change in media access to such records. Sections 232.149(2) and 232.151, The Code 1979, limit access to law enforcement records in an effort to protect the identity of the juvenile involved.

By enacting these Sections, Iowa joins the vast majority of states which limit access to juvenile law enforcement records in order to protect the identity of juvenile offenders. The rationale underlying such legislation is that the public has a general suspicion of any contact with the police. Being labeled as a juvenile offender may affect job opportunities, educational opportunities and attach various legal liabilities. In sum, "labelling" may hamper a juvenile's ability to become a productive member of society.

In construing Iowa's new statute, the goal is to ascertain the legislative intent and, if possible, give it effect. *Doe v. Ray*, 251 N.W.2d 496 (Iowa 1977). The subject matter, reason and spirit of the enactment must be considered, as well as the words used. A statute should be accorded a sensible, practical and workable construction. *In re Estate of Bliven*, 236 N.W.2d 366 (Iowa 1975).

Section 232.149(2) provides:

Records and files of a criminal justice agency concerning a child other than fingerprint and photograph records and files shall not be open to inspection and their contents shall not be disclosed except as provided in this section and section 232.150 unless the juvenile court waives its

jurisdiction over the child so that the child may be prosecuted as an adult for a public offense.

Section 232.151 provides:

Criminal penalties. Any person who knowingly discloses, receives, or makes use or permits the use of information derived directly or indirectly from the records concerning a child referred to in sections 232.17 to 232.150 except as provided by those sections shall be guilty of a serious misdemeanor. [67GA, ch 1088, §81]

These sections deal with law enforcement records concerning a child.

The term "records" is not defined in Ch. 232, The Code 1979. The term is, however, defined in the federal standards relating to juvenile records and information as follows:

A juvenile record is any record of or in the custody of a juvenile agency pertaining to a juvenile and maintained in a manner so that the juvenile *is identified or may be identified.* (Emphasis added)

IJA-ABA *Juvenile Records and Information Systems,* Tentative Draft, 5 (1977). Attempts to limit access to such records, then, are clearly aimed at protecting the juvenile's identity.

Similarly, the phrase "concerning a child" relates to the individual juvenile involved. Again, the accent is on protecting individual identity.

It seems clear that by enacting §§232.149(2) and 232.151 the Iowa legislature intended to prohibit disclosure of the contents of law enforcement records in order to protect the identity of the juvenile involved.

Your question, however does not deal with revealing the individual's identity, but with revealing information as to the nature of the alleged offense.

The language of the statute is aimed at protecting individual identity rather than the nature of the alleged offense. The rationale which supports limiting access to information as to the identity of the juvenile offender does not apply to information as to the nature of the offense. There is no reason for, nor is any interest served by, limiting media access to general information as to the nature of an alleged offense. As long as the identity of the juvenile remains confidential, the legislative intent is served.

Thus, the press is not restricted from obtaining information as to the nature of an offense that a juvenile allegedly committed from the appropriate law enforcement agency unless the release of that information would or could reveal the identity of the juvenile involved. If there is a doubt as to whether the release of such information would or could reveal the identity of the juvenile, the law enforcement agency should refrain from releasing the information.

September 26, 1979

COUNTIES: §§441.5-441.8, The Code 1979. An incumbent county assessor originally screened by the examining board and appointed by the county conference board would not be required to undergo an examination or screening process to be reappointed. (Hyde to Martens, Iowa County Attorney, 9-26-79) #79-9-18 (L)

September 26, 1979

COUNTIES: Domestic Animal Fund. §§351.6, 352.1, 352.3, The Code 1979. A Board of Supervisors acting upon a claim to the Domestic Animal Fund may neither defer its decision nor deny compensation in the event a claimant's damages are covered in whole or in part by insurance. (Benton to Smith, Assistant Clinton County Attorney, 9-26-79) #79-9-19(L)

September 26, 1979

JUVENILE LAW: The circumstances under which the names of juveniles involved with law enforcement authorities and the juvenile court may be revealed to the media. Ch. 4 §§4.1(13), 232, 232.54, 232.56, The Code 1977. Ch. 232, §§232.2(7), 232.2(21), 232.2(33), 232.8(1)(b), 232.29, 232.147(1), 232.147(2), 232.149(2), 232.151, The Code 1979. The name of a juvenile involved with a law enforcement agency may not be revealed to the media unless the juvenile is exempt from the confidentiality provisions of ch. 232. (Hoyt to Kirkenslager, State Representative, 9-26-79) #79-9-20

Larry Kirkenslager, State Representative: You have asked a number of questions concerning the confidentiality provisions of the new Juvenile Justice Bill. Generally, you have asked under what circumstances the name of a juvenile involved with a law enforcement agency can be revealed. In addition, you have asked several questions pertaining to Juvenile Court records. Specifically, you have asked:

1. Is the initial complaint on a juvenile part of the public record, if a petition has been filed alleging that a delinquent act has been committed?

2. If a case is handled by "informal adjustment" are the records of either the law agency or the court open?

3. Are reporters individually and newspapers as corporations subject to criminal penalties included in §232.151, The Code 1979, if the media uses the names obtained either directly or indirectly from the records?

4. Are court clerks required to keep confidential juvenile records separate from the public docket?

5. In the case of a juvenile, are court and law enforcement records public documents if the violation is excluded from the jurisdiction of the juvenile court under §232.8(1)(b), The Code 1979.

6. If the media routinely lists accident reports, may a juvenile's name be used? For example, if there is a two-car collision involving an adult driver, can both be used? If a juvenile gets a ticket, for example, failure to yield the right of way, can that charge be listed in the media?

Prior to July 1, 1979, the name of a juvenile involved with a law enforcement agency was a matter of public record. §232.56, The Code 1977. Similarly, juvenile court records were deemed to be public records. §232.54, The Code 1977.

The new Juvenile Justice Bill represents a dramatic change in media access to such records. Under the new bill, law enforcement records concerning a child are confidential. §232.149(2), The Code 1979. Similarly, juvenile court records are now confidential except in cases alleging delinquency. §§232.147(1) and (2), The Code 1979. By enacting the new legislation, Iowa joins the vast majority of other states which limit media access to juvenile records.

As a general rule, then, the name of a juvenile involved with a law enforcement agency may not be revealed unless the juvenile is exempt from the provisions of §232.149(2), and juvenile court records are confidential except in those cases alleging delinquency.

I

Is the initial complaint on a juvenile part of the public record if a petition has been filed alleging that a delinquent act has been committed?

Section 232.2(7), The Code 1979, defines a complaint as follows:

"Complaint" means a verbal or written report which is made to the juvenile court by any person and alleges that a child is within the jurisdiction of the court.

Section 232.2(33) defines official juvenile court records to include:

"Official juvenile court records" or "official records" means official records of the court of proceedings over which the court has jurisdiction under this chapter which includes but is not limited to the following:

a. The docket of the court and entries therein.

b. Complaints, petitions, other pleadings, motions, and applications filed with a court.

c. Any summons, notice, subpoena, or other process and proofs of publication.

d. Transcripts of proceedings before the court.

e. Findings, judgments, decrees and orders of the court.

The delinquency petition formally initiates judicial proceedings in the juvenile court.

Section 232.147(2) states:

Official juvenile court records in cases alleging delinquency shall be public records, subject to sealing under section 232.150.

Thus, since juvenile court records in cases alleging delinquency are public records, and since complaints are part of official juvenile court records, initial complaints on juveniles are public records.

II

If a case is handled by "informal adjustment" are the records of either the law agency or the court open?

Informal adjustment is defined in §232.2(21) as follows:

"Informal adjustment" means the disposition of a complaint without the filing of a petition and may include but is not limited to the following:

a. Placement of the child on nonjudicial probation.

b. Provision of intake services.

c. Referral of the child to a public or private agency other than the court for services.

The procedures relating to informal adjustments are set forth in §232.29, The Code 1979. Informal adjustment, as the name implies, is basically the out-of-court settlement of a complaint. Thus, the basic elements of informal adjustment are the complaint and the informal adjustment agreement.

We have already determined that the complaint is part of the official juvenile court record which is public in cases alleging delinquency. The informal adjustment agreement, however, is not filed in the juvenile court. Nor is it included as part of official juvenile court records. §232.2(33).

Thus, in a case handled by informal adjustment, the complaint is a public record while the informal adjustment agreement is not.

Law enforcement agencies are generally not involved in informal adjustment. To the extent they are, the provisions of §232.149(2) apply. Thus, any records of a law enforcement agency concerning a child involved with informal adjustment are confidential.

III

Are reporters individually and newspapers or corporations subject to the criminal penalties of §232.141, if they make use of names obtained directly or indirectly from confidential records?

Section 232.149(2) reads:

Records and files of a criminal justice agency concerning a child other than fingerprint and photograph records and files shall not be open to inspection and their contents shall not be disclosed except as provided in this section and section 232.150 unless the juvenile court waives its jurisdiction over the child so that the child may be prosecuted as an adult for a public offense.

Section 232.151 reads:

Criminal penalties. Any person who knowingly discloses, receives, or makes use or permits the use of information derived directly or indirectly from the records concerning a child referred to in sections 232.147 to 232.150 except as provided by those sections shall be guilty of a serious misdemeanor. [67 G.A., Ch. 1088, §81]

In sum, §232.149(2) generally prohibits disclosure of the contents of criminal justice agency records concerning a child and §232.151 provides a criminal penalty for persons who use, disclose, or receive information derived directly or indirectly from such records.

For the purposes of statutory construction, "person" means:

Person. 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.

§4.1(3), The Code 1979.

The language of these sections is clear and unambiguous. Individual reporters and newspapers as corporations are clearly subject to criminal penalties, if they knowingly make use of names obtained from confidential law enforcement records.[1]

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[1] In responding to your question, we are cognizant of the recent United States Supreme Court decision in *Smith v. Daily Mail Publishing Co.*, 95 S.Ct. 2667 (1979). The court held that a newspaper cannot be punished for the truthful publication of an alleged juvenile delinquent's name lawfully obtained by the newspaper.

Thus, if a newspaper obtains the name of a juvenile offender lawfully, that is independent of law enforcement records (for example,

IV

Are court clerks required to keep confidential juvenile records separate from public docket?

Most states require that confidential juvenile court records be kept separate from adult records. Piersma, *Law and Tactics in Juvenile Cases* 425 (3rd Ed. 1977).

Section 232.147, The Code 1979, provides that certain juvenile court recrods are confidential — they shall not be inspected and their contents shall not be disclosed.

Since confidential juvenile court records are not open for public inspection, court clerks should keep them separate from the public docket.

V

In the case of a juvenile, are court and law enforcement records public documents, if the violation is excluded from the jurisdiction of the juvenile court under §232.8(1)(b)?

Section 232.8(1)(b) of the new Juvenile Justice Bill excludes certain violations from the jurisdiction of the juvenile court.

Section 232.8(1)(b) reads:

Less than two years after the alleged commission of an act which would be an offense other than a simple misdemeanor if committed by an adult.

Violations by a child of provisions of chapters 106, 106A, 109, 110, 110A, 110B, 111, 321, or 321G which would be simple misdemeanors if committed by an adult, violations of county or municipal curfew or traffic ordinances, and violations by a child of the provisions of section 123.47, are excluded from the jurisdiction of the juvenile court and shall be prosecuted as simple misdemeanors as provided by law. The court may advise appropriate juvenile authorities and may refer violations of chapter 123 to the juvenile court when there is reason to believe that the child regularly abuses alcohol and may be in need of treatment.

Among the reasons for excluding these violations is that their commission does not necessarily reflect the presence of an emotional disturbance, the presence of family discord or anything beyond what leads an adult to commit these same violations. In sum, these violations are not symptomatic of underlying problems which require juvenile court intervention.

(Footnote Cont'd)

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directly from the victim), the newspaper cannot constitutionally be punished for the publication of that juvenile's name.

It is important to note that the court's holding was very narrow. It did not directly address the constitutional validity of state statutes which protect the anonymity of juvenile offenders. The court did, however, cite with apparent approval the rationale which supports protecting the anonymity of juvenile offenders. The court's holding focuses simply on the power of a state to punish the truthful publication of an alleged delinquent's name *lawfully obtained.*

The Iowa statute makes it unlawful to obtain the name of an alleged juvenile offender directly or indirectly from confidential records. Thus, the holding in *Smith* does not in terms, render §232.151 unconstitutional. *Smith* may, however, suggest that a narrow construction of the statute to preserve its constitutionality will be adopted by the courts.

It seems clear that the Iowa legislature intended that the excluded violations were not the type of activities to which the confidentiality provisions of Ch. 232 should apply.

This is evidenced by the language of §232.149(2), which exempts juveniles waived to adult court from the confidentiality protections of the section, an indication that these protections are meant to apply to juveniles within the jurisdiction of the juvenile court.

Further, the rationale which supports making confidential the identity of an alleged juvenile offender is inapplicable to the exempted violations. The rationale for protecting the juvenile's identity is to prevent him from being labelled and stigmatized. We have noted, however, that the excluded violations are not the type of violations to which a stigma is attached since their commission does not necessarily reflect any deep, underlying problems. Since no stigma is attached to these violations, the need for confidentiality is diminished.

Thus, the provisions pertaining to confidentiality contained in Ch. 232 should not be applied to violations excluded from the scope of the chapter. Court and law enforcement records pertaining to such violations are public records.

VI

If the media routinely lists accident reports, may a juvenile's name be used? For example, if there is a two-car collision involving an adult driver, can both be used? If a juvenile gets a ticket, for example, failure to yield the right of way, can that charge be listed in the media?

As indicated in the response to question number 5, traffic offenses are specifically excluded from the jurisdiction of the juvenile court in §232.8(1)(b), The Code 1979.

Because of the sheer volume of such offenses, as well as the fact that their commission does not signify any underlying problems connected with those who commit them, juvenile court intervention is inappropriate.

In addition, the nature of traffic offenses is such that no stigma is attached to them and thus, their is no need to make their commission confidential.

Therefore, the confidentiality provisions contained in Ch. 232 should not be applied to traffic violations.

September 26, 1979

HIGHWAYS, MINERAL RIGHTS, COUNTY HOME RULE AMENDMENT: County Boards of Supervisors are authorized to grant permits for mining of coal underlying a secondary road over which the county owns an easement for road purposes. The owner of the fee owns the mineral rights lying within the road right of way and has a right to mine the minerals unless to do so would unreasonably interfere with public rights to the easement. Such a proposal would not be a road closing pursuant to §306.11, The Code 1979, nor would it be a temporary closing within the meaning of §306.41, The Code 1979. The Board of Supervisors would be required to ensure the maintenance of any temporary detour route to reasonable safety standards to fulfill their duty to the motoring public. (Valde to Karpan, Monroe County Attorney, 9-26-79) #79-9-21

Mr. Frank J. Karpan, Monroe County Attorney: You have requested the opinion of the Attorney General regarding the authority of the Board

of Supervisors in Monroe County to allow the mining of coal lying beneath a secondary road in the county. A part of the proposal made to the Board of Supervisors by the company desiring to mine the coal is that the company will establish a detour route upon land owned or leased by it adjacent to the road. Traffic will be detoured from the present road to the route established by the company during the time it takes to mine the coal. Upon completion of the mining beneath the road right-of-way, the company will reconstruct the disturbed portion of the roadway in compliance with current secondary road standard design criteria. Specifically, you have posed the following five questions:

1. Is the Board of Supervisors required to grant such a request?

2. Is the Board of Supervisors authorized by law to grant such a request?

3. If such a request were granted, would this be a "closing" within the purview of Section 306.11 of the Code requiring notice and hearing?

4. If this request were granted, would this be a "temporary closing for construction" as defined by Section 306.41 of the Code?

5. If such request were granted, to what legal liability are the county and its Board of Supervisors exposed?

Your request states that the road is a secondary road and that Monroe County holds an easement over the property for road purposes. The county Board of Supervisors has jurisdiction and control over secondary roads within the county. Section 306.4(2), The Code 1979. Since you have stated that the county holds an easement for road purposes, it appears that the county does not own the fee title to the road. In cases such as this outside incorporated city limits, the public acquires only an easement, and, subject to such easement, the fee title of the land remains in the owner. *State v. F. W. Fitch Co.*, 236 Iowa 208, 211, 17 N.W.2d 380, 382 (1945); *Town of Kenwood Park v. Leonard*, 177 Iowa 337, 158 N.W. 655 (1916). As we do not have a copy of the easement here involved we are unable to define exactly the extent of the easement. In general, the ownership of the fee title is presumed to be in the abutting landowners and if an abutting owner owns the land on both sides of a road he is presumed to own the fee title to the entire road. *Iowa State Highway Commission v. Dubuque Sand and Gravel Co.*, 258 N.W.2d 153 (Iowa 1977); *See also*, 39A C.J.S. *Highways* §136 (1976). We do not have sufficient information to determine, nor have you asked that we determine, the ownership of the fee title to the road involved. It is sufficient to state that if the county is the holder only of an easement, it does not own the fee title to the road. For the purposes of this opinion, we will assume, without knowing, that the coal company is the owner of the fee title of the road or has a lease agreement with the owner of the fee title which entitles the company to all mineral rights in the coal owned by the fee titleholder.

The owner of the fee title to the roadway retains title to the minerals, oil and gas underlying the road. *Dubuque v. Benson*, 23 Iowa 248 (1867); Annot. 62 ALR2d 1311 (1958). The owner of such minerals may work mines and quarries to remove the minerals which he owns so long as the work can be and is done in a manner which does not unreasonably inter-

fere with public travel or the use and enjoyment of the surface easement. *Dubuque v. Benson*, 23 Iowa 248 (1867); 39A C.J.S. *Highways* §138 (1976); 39 Am. Jur. 2d *Highways, Streets and Bridges* §165 (1968). "The title to the land and all the profits to be derived from it, consistently with, and subject to, the easement, remain in the owner of the soil. He owns all the trees upon it and the mines and quarries under it." *Overman v. May*, 35 Iowa 89, 97 (1872). The courts of at least one state have held that where a public road passed across the land belonging to a sandstone quarry company the highway authority could not enjoin the quarry company from digging into the highway in order to extend excavations across the highway if the quarry company either detoured traffic over a temporary road or maintained a sufficient portion of the highway open to accommodate two-way traffic. *Clarendon v. Medina Quarry Co.*, 102 App. Div. 217, 92 N.Y.S. 530 (1905). This holding was based upon the fact that the quarry company was the owner of the fee title and had a legal right to quarry the stone underlying the highway *as long as the public use of the highway was not unnecessarily and unreasonably interfered with. See also Town of Glencoe v. Reed*, 101 N.W. 956 (Minn. 1904), where it was held that the only limitation upon the right of the owner of the fee to control and use the soil and natural deposits within the roadway easement is that such use must be consistent with the full enjoyment of the public easement. The Minnesota Supreme Court stated

> that the owner of the fee retains the right to use the land for any lawful purpose compatible with the full enjoyment of the public easement, and that the private right cannot be disregarded by the authorities, but must be respected in so far as may be consistent with the public right to have a safe, unobstructed and convenient right of way taking into consideration the nature and the situation of the property and the circumstances of the case.

101 N.W. 957. The Court held that the right of private use was allowable only to the extent that there was no injury to the roadway and that the minerals removed were not required to grade or improve the roadway.

The Iowa Supreme Court has stated in dictum in a case involving an easement for a railroad right of way that "[i]f the land should be underlaid with stone, coal, or other mineral, the owner (of the fee) would have the right, doubtless, to quarry and mine the same, provided this could be done without interfering with the use of the surface by the railroad company." *Hollingsworth v. The Des Moines & St. Louis R. Co.*, 63 Iowa 443, 444-445, 19 N.W. 325, 326 (1884).

While we believe the principles applied in these cases are still applicable, we do note that the cited cases were decided near the turn of the century and the considerations for public safety and convenience made necessary by today's modern highways and automobiles may well lead to a different result in a given factual situation.

In answer to your first question, it appears obvious that to strip the surface of the road to remove underlying coal will disturb the roadway and will interfere with the public travel and use of the surface easement. The owner of minerals underlying the road has no absolute right to remove or extract them if to do so will disturb or interfere with the surface easement rights held by the public. Therefore, in our opinion

the Board of Supervisors is not required as a matter of law to grant a request such as that made by the coal company.

However, in our opinion, the Board of Supervisors does have discretion to authorize such requests. The Board is granted jurisdiction over the secondary roads within the county. Section 306.4(2), The Code 1979. We believe that the County Home Rule Amendment, Article III, §39A, of the Iowa Constitution provides authority for the Board of Supervisors to allow the road to be temporarily closed. *See* Opinion of the Attorney General #79-4-7 (Miller and Hagen to Danker, Binneboese, Hullinger and Hansen, April 6, 1979). The opinion cited above explains the applicability of the County Home Rule Amendment and its four principal exceptions.

As explained in Opinion #79-4-7, an interpretation of a county's authority to act must initially begin with the premise that the county does indeed have such authority unless one of the four limiting exceptions is evident. We have said that county powers should be broadly construed and subject to liberal interpretation absent express statutory conflict, and that the four limitations should be narrowly construed. Therefore we first assume that the Board of Supervisors has the authority to grant the coal company's request, and proceed with an analysis of the four exceptions which might limit such authority.

The first two exceptions, county taxing limitations and county powers *vis a vis* municipal authority, are not applicable here. The third limitation found within the Home Rule Amendment itself requires that county actions "not [be] inconsistent with the laws of the general assembly." As explained in the above cited opinion, this limitation can be termed one of preemption. If the subject area is one which the state, by broad and comprehensive legislation, has intended to exclusively regulate, then any local government regulation regardless of content is inconsistent with the pervasive state legislation.

We do not believe that jurisdiction and control of highways is one of these pervasively legislated areas which the state has intended to legislate exclusively. Instead, we believe that a reading of the statutes indicates that the legislature has evidenced its intent to grant as much local control as possible to local governmental bodies. Pursuant to Section 306.4(2) the Board is vested with the authority and discretion to control and protect the public interest in the road easement. Further indication of the Legislature's intent to provide for local regulation of secondary roads may be found in Section 306.10, The Code 1979, which empowers the Board "to alter or vacate and close" any highway under their jurisdiction. Additionally Section 306.41, The Code 1979, provides authority for temporary closings of roads in certain cases, and pursuant to Section 319.14, The Code 1979, no person may excavate, fill or make physical changes within a right of way of a public road or highway under the Board's jurisdiction without first obtaining a permit from the Board. The Board is empowered to prescribe certain specifications in granting permits pursuant to Section 319.14. In passing these statutory provisions we believe the legislature has recognized that varying circumstances and conditions at different locales may require differing regulations and applications to best serve the needs of the entire public.

Opinion #79-4-7 posed and answered several general questions about

the County Home Rule Amendment. The fourth such question and response, found at page 19 of the opinion, is as follows:

(Q) In cases where the general subject matter is discussed in the Code but the specific action or procedure that the county desires to undertake is not prohibited, is the county's action limited to what is prescribed by the Code?

(A) No, unless the General Assembly expressly states in that Code Chapter or provision that the county may not engage in such action or procedure, or unless an intent to create exclusive state regulation is clearly evinced in the legislative language and history.

We believe that the proposal the coal company has presented to the Board of Supervisors fits within the above response.

Thus we believe that, rather than demonstrating an area which the state has intended to exclusively legislate, a fair reading of the statutes including Section 306.4(2), 306.10, 306.41 and 319.14, The Code 1979, evinces a legislative intent to grant wide jurisdiction and discretion to the counties in reasonably regulating the public roads for the benefit of the public as a whole. We believe the County Home Rule Amendment can best be construed to be consistent with the laws of the General Assembly by interpreting it to grant to the Board of Supervisors the authority to grant requests such as the coal company's proposal. Therefore, it is our opinion that the county is not barred from authorizing the company's request by the third exception to the County Home Rule Amendment.

The fourth exception to the County Home Rule Amendment involves the determination of whether or not a county is engaged in a local affair. One of two analyses which address that question cited by Opinion #79-4-7 suggests four criteria to be applied in determining whether a particular act on the part of the county is a local matter:

First, does the subject matter involve an issue in which it is desirable to have state-wide uniformity. Second, does the proposed county legislation significantly affect persons living outside the county? Third, does the degree or physical nature of the problem addressed require cooperation of governments outside the county boundaries? Fourth, do the historical considerations involved traditionally relate to state, county or city affairs?

The first criterion is similar to a factor which was previously discussed. We believe the legislature has recognized a need for flexibility rather than statewide uniformity and therefore has acted to give various local governmental bodies jurisdiction of roads in Section 306.4. The second criterion concerns the effect the proposal will have on persons living outside the county. Although it cannot be said that there will be no effect upon persons from other counties, it seems clear that most of the impact of the proposal will be felt by those residing within the county. This is especially true of secondary roads as compared to primary roads and may well be one of the reasons for the legislature's delegation of jurisdiction over these roads to county Boards of Supervisors. Although it would be hard to imagine any governmental action which would not affect residents of other counties in any way, we believe proposals of this type would not significantly affect a large number of people outside the county.

The final two criteria also lead to the conclusion that the issue involved is one of local concern. Roads which have traditionally been considered

"local roads" or "county roads" and have been maintained by the county would not usually be considered statewide affairs. As we said above, exceptions to the County Home Rule Amendment should be construed narrowly.

We therefore are of the opinion that the Board of Supervisors may authorize such a proposal. In considering whether or not such a proposal should be authorized, the Board may consider the effects the proposal will have on the public's rights and the reasonableness of any interference with public travel or the use of the surface easement including the period of time necessary for the mining proposal. The Board need not grant permission for any proposal which it determines will unreasonably disturb or interfere with the public travel or surface easement. We note, however, that a part of the proposal is to maintain a detour route so that travel can in fact continue. The Board should consider this in considering the reasonableness of any interference with public rights.

As indicated in the answer to your first question, we are of the opinion that the Board is not required to grant the coal company's request as a matter of law. Each case depends upon a factual resolution which in this case is entrusted to the discretion of the Board of Supervisors. However, the Board must act reasonably and rationally in exercising its discretion in this matter. It may not deny the coal company its right to mine the underlying coal unless the public's rights will be unreasonably interfered with. Although there may be no statutory provision for an appeal from a decision of an administrative body the Supreme Court has generally allowed certiorari to test claims that the body has acted either illegally or without jurisdiction. *Bricker v. Iowa County Board of Supervisors*, 240 N.W.2d 686 (Iowa 1976). The action for certiorari will lie if the challenged action is judicial or quasi-judicial in nature. *Buechele v. Ray*, 219 N.W.2d 679 (Iowa 1974); *Lehan v. Greigg*, 257 Iowa 823, 135 N.W.2d 80 (1965). We believe that the decision to be made by the Board in this case is an instance of the exercise of a quasi-judicial function.

There is "illegality" for purposes of the issuance or granting of a writ of certiorari when the findings upon which an agency or tribunal based conclusions of law are not supported by substantial evidence in the record, *Fetters v. Degnan*, 250 N.W.2d 25, (Iowa 1977), or if the Board's action is arbitrary and capricious. *Eden Township School District v. Carroll County Board of Education*, 181 N.W.2d 158 (Iowa 1971). Therefore, whatever decision is made by the Board must be supported by substantial evidence in the record or upon challenge by certiorari proceedings the Board may be found to have acted illegally.

This brings us to the question of what record must be made by the Board to support its decision in the event of challenge. We have found no statutory requirement delineating the record-making duties of the Board in this instance. However, we note that prior to the adoption of the Iowa Administrative Procedure Act, Chapter 17A, The Code 1979, the Supreme Court had required state admiinstrative boards to make findings of fact in adjudicatory proceedings:

Although Iowa does not have an administrative procedure act to guide administrative boards, we have held such boards are required, *even without statutory mandate*, to make findings of fact on issues presented in any adjudicatory proceeding. Such findings must be sufficiently certain

to enable a reviewing court to ascertain with reasonable certainty the factual basis and legal prinicple upon which the administrative body acted. (Emphasis added.)

Erb v. Iowa State Board of Public Instruction, 216 N.W.2d 339, 342.

Recently the Supreme Court has placed the same requirement upon county Boards of Adjustment. *Citizens Against the Lewis and Clark (Mowery) Landfill v. Pottawattamie County Board of Adjustment*, 277 N.W.2d 921, 925 (Iowa 1979). The Court found that, although "[t]here is no statutory requirement that the Board do so," there are "compelling considerations which have persuaded us to adopt the rule that boards of adjustment make written findings of fact on all issues presented in any adjudicatory proceeding." 277 N.W.2d at 925. As in *Erb*, *supra*, the findings must "be sufficient to enable a reviewing court to determine with reasonable certainty the factual basis and legal principles upon which the board acted." 277 N.W.2d at 925. *But see Dunphy v. City Council of City of Creston*, 256 N.W.2d 913, 919-920 (Iowa, 1977) (city council not required to make written findings and conclusions when not required by statute.)

Another proceeding which might be brought if the Board were to act arbitrarily or capriciously in denying the coal company permission is that of mandamus to compel the granting of the permission sought by the coal company. If an action sought to be compelled is one of discretion, such as the granting or denial of the coal company's proposal, an action in mandamus to compel the Board to grant approval normally will not lie. However, an action for mandamus to compel the Board to approve the request may lie if and only if it is shown that the Board acted arbitrarily or capriciously in its denial of the proposal. *Charles Gabus Ford, Inc. v. Iowa State Highway Commission*, 224 N.W.2d 639 (Iowa 1974).

Your third request concerns the applicability of Section 306.11, The Code 1979, to the proposal made by the coal company. It is our opinion that Section 306.11 contemplates permanent road closings and is applicable only when there is an intent on the part of the Board of Supervisors to completely and permanently close a road. Where, as here, there is no such intent, we do not believe Section 306.11 is applicable. The present proposal includes the provision that the road will be "closed" (or detoured) only for the period of time necessary to mine the underlying coal, after which the road will be rebuilt to specifications required by the county engineer and will again be open to public travel as provided in the public easement for road purposes. It is our opinion that Section 306.11 is not applicable in instances such as this.

Your fourth inquiry is whether the granting of this request would be a temporary closing for construction pursuant to Section 306.41, The Code 1979. Our reading of Section 306.41 convinces us that Section 306.41 contemplates that "temporary closings" may be made pursuant to that Section only in certain specified cases. It is our opinion that a temporary closing pursuant to Section 306.41 must relate to "construction, reconstruction, maintenance or natural disaster." In this instance, we may quickly eliminate the existence of any natural disaster. We further believe that the construction, reconstruction or maintenance referred to must be construction, reconstruction or maintenance of the closed section of highway. The liability limiting provisions of Section 306.41 add weight to our interpretation of this Section:

The agency having jurisdiction over a section of highway closed in accordance with the provisions of this section, or the persons or contractors employed to carry out the *construction, reconstruction or maintenance of the closed section of highway*, shall not be liable . . . , unless the damages are caused by gross negligence of the agency or contractor. (Emphasis added.)

Therefore, since this request is not a closing for construction of the road, but rather for mining purposes, we do not believe this would be a "temporary closing for construction" pursuant to Section 306.41, The Code 1979. We do not mean to suggest, however, that the county should not take all the precautions for the public safety provided in Section 306.41.

As previously stated, we do believe the Board of Supervisors could act under its powers pursuant to the County Home Rule Amendment.

Finally, you have requested our opinion concerning any potential legal liability of the county and its Board of Supervisors if the request is granted. A comprehensive or exhaustive examination of all possible theories of governmental liability for actions such as this is not possible. Certainly one of the duties of the county is to properly maintain the secondary road system. Section 309.67, The Code 1979. Violation of that duty can result in a liability to users of the road. *Conrad v. Board of Supervisors of Lee County*, 199 N.W.2d 139 (Iowa 1972); *Harryman v. Hayles*, 257 N.W.2d 631 (Iowa 1977). Although many determinations will depend upon questions of fact and cannot be determined unless all facts are fully known, it is our opinion that the county will be required to maintain any detour route provided to reasonable standards of safety. It will not be relieved of its duties to the motoring public. Furthermore, the liability limitations of Section 306.41, The Code 1979, would not, in our opinion, be available to the county in this instance. We note that the Petition as presented to the Board of Supervisors places the duty of inspection and of specifying signing and construction requirements upon the county. No mention is made of indemnification or insurance to cover any potential risks. The $75,000 bond provided by the coal company runs to the county only to insure the successful reconstruction of the right of way to the satisfaction of the county. We believe that the Board of Supervisors should weigh these considerations as well as any potential liability to which the county may be subjecting itself when considering the coal company's proposal.

September 27, 1979

COUNTIES AND COUNTY OFFICERS: Respective duties of county engineer and county board of supervisors concerning secondary road maintenance. Sections 309.18, 309.21, and 309.67, The Code 1979. The final authority for secondary road maintenance rests with the county board of supervisors, which establishes policy for and accepts the recommendations of the county engineer. (Hyde to Priebe, State Senator and Mullins, State Representative, 9-27-79) #79-9-22

Honorable Berl E. Priebe, State Senator; Honorable Sue B. Mullins, State Representative: We have received similar requests from you for opinions concerning the respective responsibilities of a county board of supervisors and a county engineer relating to secondary road repair and maintenance.

Section 309.21, The Code 1979, sets forth the primary duties with which a county engineer is charged. "All construction and maintenance work

shall be performed under the direct and immediate supervision of the county engineer who shall be deemed responsible for the efficient, economical and good-faith performance of said work." But those duties are to be carried out under the direct supervision of the county board of supervisors. Section 309.18, The Code 1979; 1970 Op. Atty. Gen. 46, 47.

The language of §309.67, The Code 1979, indicates a joint responsibility on the part of the board of supervisors and the engineer for the construction and maintenance of secondary roads:

The county board of supervisors is charged with the duty of establishing policies and providing adequate funds to properly maintain the secondary road system. The county engineer, pursuant to section 309.21 and board policy, shall adopt such methods and recommend such personnel and equipment necessary to maintain continuously, in the best condition practicable, the entire mileage of said system.

See also Harryman v. Hayles, 257 N.W.2d 631, 638 (Iowa 1977); *Larsen v. Pottawattamie County*, 173 N.W.2d 579, 581 (Iowa 1970).

An earlier opinion of this office, 1948 Op. Atty. Gen. 150 analyzed this section as follows:

It [§309.67, The Code 1946] contemplates that the board of supervisors and the engineer will work together toward good secondary road construction and maintenance. There is no conflict of power, duty or authority. The supervisors have the power and the duty, not only to pass upon the necessity and desirability of the construction and maintenance work of such roads in their county, but also have the authority to direct the county engineer to proceed with the job. The manner and method or procedure is within the responsibility of the engineer, subject to the final inspection of the board and the engineer is responsible to the board to the extent of his efficient, economical and good-faith performance of the work directed to be done by the board of supervisors.

While the statute contemplates a cooperative relationship allowing the county board of supervisors to benefit from the county engineer's experience, knowledge and training in maintaining the secondary road system, the final authority for such maintenance clearly rests with the board. The board establishes the "policy," supervises the work product and approves the recommendations of the county engineer. The board allocates funds to allow the engineer to proceed with the work submitted to the board for approval. Sections 309.21, 309.67, The Code 1979. The responsibility to establish policy can result in very detailed involvement on the part of the board; the expertise of the county engineer should be fully utilized, however, and his or her responsibilities to adopt methods to carry out work should not be undercut. *See* 1970 Op. Atty. Gen. 46, 48.

September 27, 1979

MENTAL HEALTH: The State of Iowa has no liability and/or responsibility for payment or reimbursement for psychiatric evaluation or treatment in a private hospital for persons not having legal settlement within the state. The county of legal settlement has liability and/or responsibility for payment or reimbursement of psychiatric evaluation or treatment in a private hospital if the person having legal settlement in said county is placed in a private facility in lieu of admission or commitment to a state mental health institute. Chapter 230, §§229.11, 229.13, 229.22, 230.1, 444.12(3), 815.7, The Code 1979. (Fortney to Williams, 9-27-79) #79-9-23

Mr. Michael V. Reagan, Ph.D., Commissioner, Iowa Department of Social Services: You requested an opinion of the Attorney General relating to financial responsiiblity for psychiatric care in private facilities. You posed three situations, all of which involve the involuntary hos-

pitalization of individuals who are not residents of the committing county. Your specific questions were as follows:

1. Is the committing county responsible for payment for psychiatric evaluation for persons admitted to a private hospital in accordance with the provisions of Sections 229.11 and 229.22 regardless of the county of settlement?

2. What liability and/or responsibility does the State of Iowa have for payment or reimbursement for psychiatric evaluation of nonresident persons committed to a private hospital in accordance with the provisions of Section 229.11 and 229.22?

3. What liability and/or responsibility does a county of legal settlement or the State of Iowa have for payment or reimbursement for the cost of care of persons committed to a private hospital in accordance with the provisions of Section 229.13?

The primary statute relating to financial responsibility for the costs of psychiatric care is Ch. 230, The Code 1979. Section 230.1 provides:

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, or

2. By the state when such person has no legal settlement in this state, or when such settlement is unknown.

The legal settlement of any person found mentally ill who is a patient of any state institution shall be that existing at the time of admission thereto.

Consequently, the responsibility for care in a state facility turns on the issue of settlement, rather than on the question of which court committed the mentally ill person. However, the entire thrust of Ch. 230 relates to treatment in a state mental health institute. Your questions place the issue of financial responsibility in the context of a private facility. Attention is therefore turned to the existence of any other portions of The Code which expand state or county liability to private facilities.

An examination of the applicable portions of The Code 1979 reveals that any imposition on the state for the cost of psychiatric care is limited to care provided in public facilities. The legislature has passed no statute imposing liability on the state for private psychiatric care. Therefore, as to the second and third questions you pose, the answer is that the State of Iowa has no liability and/or responsibility for payment or reimbursement for psychiatric evaluation or treatment in a private hospital for persons not having legal settlement within the state.

Turning our attention to the liability of counties for costs of psychiatric care in a private facility, §444.12, The Code 1979, appears to expand the liability of counties under Ch. 230. Under certain circumstances a county is required to use its revenues to pay for private psychiatric care. Section 444.12(3) provides:

The board of supervisors of each county *shall* establish a county mental health and institutions fund, from which *shall* be paid:

3. The cost of care and treatment of persons placed in the county hospital, county care facility, a health care facility as defined in section 135C.1, subsection 8, *or any other public or private facility*:

a. In lieu of admission or commitment to a state mental health institute . . . . (Emphasis added)

Section 444.12(3) therefore imposes a liability for psychiatric care in a private facility.[1] It does not expressly state which county has the liability, *i.e.*, the committing county or the county of legal settlement. However, it does make clear the requirement that the person placed in a private facility is so placed in lieu of hospitalization at a state facility.

It is clear from §444.12(3) that a county is to pay for the psychiatric care contemplated. The section could be interpreted to require a county to pay for the care of those having legal settlement within the county. Such a reading would be independent of which county committed the person. Alternatively, the section could relate to those individuals who are committed by the courts of the county in question.

Chapter 230 is the legislature's most significant statement regarding financial responsibility for mental health costs. The framework designed is founded on a presumption that liability follows settlement. To reach a different conclusion if the committing facility is private would result in inconsistency. By §144.12(3), the legislature has demonstrated that private facilities are to be treated as public facilities for purposes of county liability. When §444.12(3) is read in conjunction with Ch. 230, the reasonable result is that the county of legal settlement should be responsible for the cost of care in a private psychiatric facility to which a person is committed in lieu of a state mental health institute.

This conclusion is further supported by an earlier opinion of the Attorney General to the effect that a county of legal settlement is liable for the costs of a court-ordered psychiatric evaluation at a state hospital. *See* Op. Att'y. Gen. #79-5-24. That opinion overruled an earlier opinion to the effect that the county in which the criminal proceedings were pending was responsible for the costs of evaluation. The 1979 opinion placed heavy reliance on the fact that Ch. 230 is a specific statute which sets out a detailed scheme for determining liability for the costs of services received in state hospitals. This was in contrast to §815.7, The Code 1979, which governed general investigative expenses involved in a criminal proceeding. As a result, the consistent pattern of looking to the county of legal settlement to assume financial responsibility is maintained.

As to the first and third questions you pose, the answer is that the county of legal settlement has liability and/or responsibility for payment or reimbursement of psychiatric evaluation or treatment in a private hospital if the person having legal settlement in said county is placed in a private facility in lieu of admission or commitment to a state mental health institute.

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[1] Neither §230.1 nor §444.12(3), The Code 1979, draw any distinction between an individual who is being held on an emergency basis and one who has had a full due process hearing as required by §229.13. Financial responsibility is not geared to a certain point in the legal process of commitment. Rather financial responsibility attaches according to settlement and the receipt of any services under Ch. 229.

September 27, 1979

MENTAL HEALTH: COUNTIES: Analysis of the criteria under which counties qualify for reimbursement from the state mental aid fund. Chapters 135C, 222 and 229, Sections 227.11, 227.16-18, and 229.15, Code of Iowa, 1979. (Fortney to Williams, Acting Director, Department of Social Services, 9-27-79) #79-9-24

Mr. Michael V. Reagen, Ph.D., Commissioner: You requested an opinion of the Attorney General relative to those circumstances under which a county is entitled to reimbursement from the state mental aid fund for the costs of caring for a mentally ill person. You posited two questions, to wit:

1. Is the county of legal settlement entitled to the $5 per week State Mental Aid payment for a voluntary patient discharged from a Mental Health Institute (MHI) and placed at a County Care Facility or licensed nursing facility, with the consent of such patient?

2. Would termination and discharge from commitment in accordance with Chapter 229 alter payment of the state mental aid for an individual who continues to reside in an alternative care facility if the patient involved needed further care and is chronically mentally ill as stated in Section 227.11?

The state mental aid fund, the entitlement to monies therefrom, and the procedure by which claims are filed is established and set forth in §§227.16-18, The Code, 1979.

Section 227.16 establishes the entitlement of the counties to receive reimbursement for the care of certain mental patients. The section reads as follows:

For each patient heretofore or hereafter received on transfer from a state hospital for the mentally ill under the provision of section 227.11, or placed in a county care facility by the procedure prescribed in Chapter 229, or any mentally retarded adult patient discharged or removed from the state hospital-schools and cared for and supported by the county in the county care facility or elsewhere outside a state institution for the mentally ill or mentally retarded the county shall be entitled to receive the amount of five dollars per week for each patient from the state mental aid fund hereinafter provided for.

Section 227.16 allows for reimbursement without regard to the patient's current legal status. It sets eligibility based on four criteria:

1. facility from which patient was transferred;
2. facility to which patient was transferred;
3. procedure or authority under which patient was transferred;
4. patient is supported by the county.

Section 227.16 thus permits reimbursement to a county for patients supported by that county who:

1. were transferred from a mental health institute to a county or private institution for the mentally ill, pursuant to §227.11; or

2. were transferred from a mental health institute to a county care facility pursuant to §227.11 and §229.15(4); or

3. were transferred to a county care facility from a public or private facility in which they were being treated pursuant to Chapter 229 and who are transferred under the provisions of Chapter 229; or

4. were discharged or removed from a hospital-school to a county care facility or alternative facility pursuant to Chapter 222.

It should be noted that under only the second and third categories above must the patient for whom state mental aid is claimed be residing in the county care facility. Categories one and four contemplate payment for some patients in private facilities. In this regard, an earlier Opinion of the Attorney General held that a private nursing home licensed under the provisions of Chapter 135C qualified as a "private institution for the care of the insane" pursuant to §227.11, Code 1954. (1955 Op. Atty. Gen. 95) As the critical language of §227.11 has been amended to merely substitute the language "mentally ill" for "insane", it follows from the earlier opinion that a private nursing home licensed under the provisions of Chapter 135C qualifies as a "receiving facility" under §227.11. Thus, a patient in a private nursing home would be eligible for state mental aid if the other criteria contained in §227.16 were met.

With this background, attention will be directed to the specifics of the two questions you have raised.

The first question you raised involves a voluntary patient in a mental health institute who then becomes a voluntary patient at a county care facility, or licensed nursing facility. Prior to leaving the mental health institute, the patient is first discharged. This situation therefore approaches the second category of patient for whom payment of state mental aid is authorized. The question hypothesizes a county-supported patient who was in a mental health institute and is now in a county care facility or a licensed nursing facility. However, one element of eilgibility is absent. The patient in the hypothetical has not been *transferred* to the local facility. Both §227.11 and §227.16 impose a requirement that a patient who is transferred from a mental health institute to a county care facility be transferred under the provisions of Chapter 229. That Chapter only authorizes transfer of patients who are involuntarily hospitalized. (See §229.15) No authority is granted to authorize a transfer of a voluntary patient. Consequently, the admission of the patient to the county care facility would be as a new admission, not as a transfer as required by §227.11 and §227.16.

The second question you raised posits a situation in which a patient is transferred from a mental health institute under circumstances which make the patient eligible for state mental aid. The patient is later released from commitment under Chapter 229, but remains in the facility to which he/she was transferred. You inquired whether the change in legal status to one of non-committed alters the county's entitlement to state mental aid. The answer is no. Eligibility to receive state mental aid is not conditioned on the legal status of the patient *following* admission to the alternative facility. As indicated by the response to your first question, a patient's legal status relates directly to whether the patient can be *transferred* under Chapter 229, but once said transfer is accomplished, there is no requirement under §227.16 that the committed status continue. Eligibility for state mental aid would continue regardless of legal status.

September 27, 1979

DEPARTMENT OF SOCIAL SERVICES: Subrogation Rights: §249A.6, The Code 1979, 42 U.S.C. §1396a(a)(25). The Department of Social Services is entitled to subrogation rights under §249A.6, The Code 1979, to major medical coverage provided by Blue Cross and Blue Shield. Payments made to the Department pursuant to these subrogation rights discharge Blue Cross and Blue Shield from further liability to their subscriber. (Robinson to Reagen, Commissioner, Department of Social Services, 9-27-79) #79-9-25(L)

September 28, 1979

MUNICIPALITIES: Fire Protection—§364.16, §368.20(2) and §28E.4, The Code 1979. A city has a duty to provide fire protection for all areas within its corporate limits. (Mueller to Welsh, State Representative, 9-28-79) #79-9-26(L)

September 28, 1979

STATE OFFICERS AND DEPARTMENTS: Interpretation of substance abuse department appropriation. 1979 Session, 68th G.A., H.F. 765. Monies transferred over to the general fund from the military service tax credit fund under §2 of 1979 Session, 68th G.A., H.F. 765, must be applied to the funding of substance abuse programs. The monies so transferred are to be used to satisfy the appropriation in §1 of the same act for such programs. However, the monies so transferred may not be used to fund such programs after June 30, 1981, absent future authorization by the legislature. (Haskins to Carr, State Senator, 9-28-79) #79-9-27(L)

October 2, 1979

OPEN MEETINGS — "Closed session": Sections 13.2(2), 13.9, 28A.2(2), 28A.2(3), 28A.3, 28A.4, 28A.5, 28A.6(2), 28A.6(3), 28A.6(3)(a), 28A.6(3)(b), 28A.6(3)(c), 336.2(1), 336.5, 340.9, 340A.6, Iowa Code 1979. The term "closed session" means a meeting, as defined in §28A.2(2), to which any member of the public is denied access by a governmental body. A failure to comply with the public notice requirements of §28A.4 does not render a meeting, during which all members of the public are permitted access, a "closed session." Section 28A.6(2) is limited in its application to those cases where a closed session actually has been held; it does not apply where only a notice violation is found. Section 28A.6(3)(c) does not apply where only a notice violation is found and any action taken by a governmental body during a subsequent open session cannot be voided pursuant thereto. Section 28A.6(3)(a)(1) does not apply unless a closed session actually has been held; in the absence of a closed session, a governmental body member may resort to either subsection (2) or (3) of §28A.6(3)(a) in mitigation of the assessment of damages. Reference to "attorneys fees" in §28A.6(3)(b) does not embrace compensation for the performance of official duties by either the attorney general or a county attorney; such compensation is not recoverable where either the attorney general or a county attorney successfully establishes an open meetings violation. Cook to Dooley, Johnston County Attorney, 10-2-79) #79-10-1

Mr. Jack W. Dooley, Johnson County Attorney: You have written our office seeking an opinion on various questions relating to Iowa's open meetings law, Chapter 28A, Iowa Code (1979). From your letter, we understand that a governmental body conducted a meeting without first posting a tentative agenda in accordance with §28A.4. Corrective action was subsequently taken by the concerned governmental body. However, you have submitted for our consideration the following questions which arose during your investigation of the matter:

I. What is a 'closed session?' While 'meeting,' (§28A.2[2]) and 'open session,' (§28A.2[3]) are defined, 'closed session,' the subject of sections 28A.5 and 28A.6, is not defined.

II. Does the failure to comply with the public notice requirements of Section 28A.4 render a meeting which is, in actuality, attended by members of the media and/or public a 'closed session'?

III. If your answer to II above is 'no,' does the burden of going forward remain with the party seeking judicial enforcement; or would the fact situation outlined in II above render the question of enforcement moot? If a notice violation does not turn an otherwise 'open' (accessible) meeting into a closed session, is 28A.6 applicable?

IV. Section 28A.6(3)(c) makes provision for voiding action 'taken in violation of this Act' and a public interest balancing weighs against sustaining action taken in 'closed session.' Is this remedy available to a notice violation such as ours?

V. Section 28A.6(3)(a)(1) provides that a member of a governmental body found to violate Chapter 28A shall not be assessed damages if that member voted against the closed session. Is that defense/exception available to a member for all violations? If not, for what types of violations is it available? How may a member make a satisfactory record of opposition to a meeting which is held without an agenda, and where no vote is taken on the issue of whether to proceed with the meeting in the face of the non-conformance with Section 28A.4?

VI. In the event that the Attorney General or County Attorney successfully establishes a violation of Chapter 28A, are attorney's fees recoverable? If fees are recoverable, which agency or fund is the proper recipient of same?

I.

Your first questions are closely related and may be answered together. As pointed out by your question, the term "open session" is defined in §28A.2(3) as "a meeting to which all members of the public have access." However, the term "closed session," while used extensively throughout the open meetings law, is not statutorily defined.

While the term "closed session" is not statutorily defined, we have no difficulty in ascribing to the term a meaning required by its common usage and understanding. The pertinent dictionary definition of "closed" is "not open; confined to a few (membership); excluding participation of outsiders or witnesses; conducted in strict secrecy." A "session" is defined as "a meeting or series of meetings of a body (as a court or legislature) for the transaction of business." Webster's New Collegiate Dictionary, pp. 211, 1060 (1975). In the context of the open meetings law, this definition is consistent with the intent and purpose of the law. Pursuant to §28A.3:

Meetings of governmental bodies . . . shall be held in open session unless closed sessions are expressly permitted by law. Except as provided in section 28A.5, all actions and discussions at meetings of governmental bodies . . . shall be conducted and executed in open session.

When read together with the definition of "open session," the openness requirement thus provides the right to all members of the public at large to have access to and to observe the meetings of their governmental bodies. Conversely, the law generally proscribes a denial of access to members of the public at meetings, permitting such denial only for the narrowly defined reasons in §28A.5. The ordinary dictionary definition of the term "closed session" includes the converse meaning of the term "open session" and accurately describes the gist of the intended proscription of the law. Applying the term as defined in the context of the

open meetings law, we believe the term "closed session" means a meeting, as defined in §28A.2(2), to which any member of the public is denied access by a governmental body.

Your second question in this area is closer and more difficult. Does the failure to give the public adequate notice render a meeting a "closed session," although all members of the public present at the time of the meeting are permitted access? We think not.

We recognize that the failure to provide adequate notice may effectively prevent interested members of the public from attending a meeting of a governmental body. Clearly, the notice requirements of informing the general public of a tentative agenda, the date, time and place of a meeting are important to providing meaningful access to the business of government. Nevertheless, we believe that a failure to provide proper notice should be considered conduct separate and distinct from barring public access at the time a meeting is actually held. Such denial of public access at the time of a meeting is the gravamen of a violation based upon holding a "closed session." We reiterate that the statutory definition of an "open session" is a "meeting to which all members of the public have access." If, at the time a meeting is held, it is conducted in accordance with the openness requirements and all members of the public are permitted access, we cannot say that the meeting falls outside the "open session" definition. Any notice failure which may have preceded the meeting constitutes a notice violation only and would not be tantamount to holding a closed meeting. Accordingly, it is our opinion that a failure to comply with the public notice requirements of §28A.4 does not render a meeting, during which all members of the public are permitted access, a "closed session."

Since our opinion is that a mere notice violation does not render an otherwise open meeting "closed," your next three questions, III, IV and V, relate to various issues of enforcement for a notice violation. To answer your questions, it is necessary to set out a substantial portion of §28A.6, the enforcement provisions of the open meetings law:

28A.6 Enforcement.

1. . . .

2. Once a party seeking judicial enforcement of this chapter demonstrates to the court that the body in question is subject to the requirements of this chapter and has held a closed session, the burden of going forward shall be on the body and its members to demonstrate compliance with the requirements of this chapter.

3. Upon a finding by a preponderance of the evidence that a governmental body has violated any provision of this chapter, a court:

a. Shall assess each member of the governmental body who participated in its violation damages in the amount of not more than five hundred dollars nor less than one hundred dollars. . . . A member of a governmental body found to have violated this chapter shall not be assessed such damages if that member proves that he or she did any of the following:

(1) Voted against the closed session.

(2) Had good reason to believe and in good faith believed facts which, if true, would have indicated compliance with all the requirements of this chapter.

(3) Reasonably relied upon a decision of a court or a formal opinion of the attorney general or the attorney for the governmental body.

b. Shall order the payment of all costs and reasonable attorneys fees to any party successfully establishing a violation of this chapter. The costs and fees shall be paid by those members of the governmental body who are assessed damages under paragraph 'a' of this subsection.

c. Shall void any action taken in violation of this chapter, if the suit for enforcement of this chapter is brought within six months of the violation and the court finds under the facts of the particular case that the public interest in the enforcement of the policy of this chapter outweighs the public interest in sustaining the validity of the action taken in the closed session. . . .

d. Shall issue an order removing a member of a governmental body from office if that member has engaged in two prior violations of this chapter for which damages were assessed against the member during his or her term.

e. May issue a mandatory injunction punishable by civil contempt ordering the members of the offending governmental body to refrain for one year from any future violations of this chapter.

Your first enforcement question relates to the "burden of going forward" with evidence to show compliance with the requirements of the law. Section 28A.6, subsection two, above, shifts the burden of production of evidence to a governmental body and its members to demonstrate compliance *if* there is an initial showing by the complaining party that the governmental body (1) is subject to the open meetings law, and (2) has held a closed session. Presumably, to establish the required initial showing, a complaining party would have to demonstrate that (1) a "governmental body," as defined in §28A.2(1), is involved, and (2) the body conducted a "meeting," as defined in §28A.2(2), to which any member of the public was prevented access by the body. Upon this initial showing, §28A.6(2) requires the body and its members to demonstrate, if possible, compliance with the requirements regarding the closed session held, found in §28A.5. Upon the evidence thus adduced, subsection three permits a judge to weigh the evidence and make a determination based upon the preponderance of the evidence.

It is readily apparent that subsection two is limited in its application to those cases where a closed session has actually been held. In the absence of a showing by a complaining party that a closed meeting was held, the provision is not triggered and the burden of producing evidence is not shifted to the body or its members. Thus, in a situation such as you describe where a notice violation occurs but the subsequent meeting is, in actuality, conducted in an open session, subsection two would not apply. The complaining party would have the burden of proving by a preponderance of the evidence that such notice violation occurred in accordance with subsection three.

Your next question, IV above, correctly points out that §28A.6(3)(c) provides a remedy of voiding "any action taken in violation of this chapter." You ask whether this remedy is available when only a notice violation occurs?

According to subsection (3)(c), action taken by a governmental body shall be voided if (1) the suit for enforcement is brought within six months of the violation, *and* (2) "the court finds under the facts of the

particular case that the public interest in the enforcement of the policy of this chapter outweighs the public interest in sustaining the validity of the action taken in the *closed session*" (emphasis added). The section makes it clear that any governmental body action is to be voided only if both prerequisites are met. Implicit in the second element is the requirement that a closed session actually was conducted by a governmental body. In the absence of evidence that action was taken during a closed session, there could be no judicial finding required by the operative provision of the subsection. Consequently, we conclude that §28A.6(3)(c) is not applicable and the remedy therein unavailable to a complaining party in those cases where no closed session is held. If, for example, only a notice violation is found, any action taken by the body during a subsequent open session could not be voided pursuant to subsection (3)(c).

It should be noted here that only subsection (3)(c) is rendered unavailable for a notice violation. Section 28A.6(3) clearly applies to a violation of "any provision" of the open meetings law, and includes a notice violation arising under §28A.4. Thus, while subsection (c) is unavailable for a mere notice violation, all of the remaining remedies provided for in subsection (3), including assessment of damages of not more than five hundred nor less than one hundred dollars, payment of all costs and reasonable attorneys fees, removal from office, and injunctive relief, are applicable to such a violation.

Your final enforcement question, V above, deals with §28A.6(3)(a)(1), which provides that a member of a governmental body will not be assessed damages if the member "voted against the closed session." Your question, in three parts, focuses upon whether this provision is available for all violations of the open meetings law?

As we noted above, subsection (3)(a) applies to a violation of "any provision" of the open meetings law, authorizing the assessment of damages for any such violation. Subsection (1) therein refers to only one of three possible mitigating circumstances which may be relied upon by a governmental body member to avoid the assessment of damages. Also included in subsections (2) and (3) are a good-faith belief of facts which, if true, would have indicated compliance with the open meeting provision, and reliance upon a court decision or opinion of the Attorney General or attorney for the governmental body.

Each of the circumstances in subsections (1) through (3) apply separately in the context of a concrete case for a violation. Consistent with our analysis above, we believe that subsection (1) implicitly requires that a closed session actually be held before it applies. If, for example, a violation is based upon conducting a closed session when it did not fall within the circumstances of §28A.5, a member who voted against holding a closed session can rely upon subsection (1) to avoid the assessment of damages. If, on the other hand, only a notice violation is the basis of an action, subsection (1) would not apply and the governmental body member may resort to either subsections (2) or (3) in mitigation of the assessment of damages.

IV.

Your final question, VI above, raises the matter of the recovery of attorneys fees upon the successful prosecution by the attorney general or county attorney. Are such fees recoverable?

Section 28A.6(3)(b) authorizes payment by those members of a governmental body who are assessed damages for a violation "of all costs and reasonable attorneys fees to any party successfully establishing a violation of this chapter." We do not believe that this provision encompasses the compensation of either the attorney general or a county attorney in such matters.

Initially, we note that pursuant to §28A.6(1), suits to enforce the open meeting laws may be brought by "any aggrieved person, taxpayer to, or citizen of, the state of Iowa, or the attorney general or county attorney." Pursuant to this section, if a suit is brought by an individual, other than the attorney general or a county attorney, and attorneys fees are incurred in successfully establishing a violation, §28A.6(3)(b) clearly authorizes recovery of such fees. However, neither the attorney general nor a county attorney is on the same footing as privately retained counsel regarding the collection of attorneys fees.

If either the attorney general or a county attorney undertakes to seek judicial enforcement pursuant to §28A.6(1), such action should properly be considered part of the official duties of either office. *See*, §§336.2(1) and 13.2(2), Iowa Code (1979). As such, compensation for performing such duties is provided for by law, on a budgeted, salary basis. *See*, §§340.9, 340A.6, and 13.9, Iowa Code (1979). Additionally, with respect to county attorneys, §336.5, in part provides:

> No county attorney shall accept any fee or reward from or on behalf of anyone for services rendered in any prosecution or the conduct of any official business. . . .

Accordingly, we do not believe that the reference to "attorneys fees" in §28A.6(3)(b) was intended to embrace compensation for the performance of official duties by either the attorney general or a county attorney. It necessarily follows that attorneys fees are not recoverable from a governmental body member in those cases where either the attorney general or a county attorney successfully establishes a violation.

October 3, 1979

STATE OFFICERS AND DEPARTMENTS: Code Editor, §17A.5(1)(2); §17A.6(1)(2). The Code Editor is required to keep and index all rules and not simply those that became effective after the passage of the Administrative Procedure Act in 1975. Such an index is required to be published by the Code Editor. The present "cumulative index" does not comport with the letter and spirit of the Administrative Procedure Act. (Appel to Rush, State Senator, 10-3-79) #79-10-2 (L)

October 3, 1979

COMMERCE COMMISSION: Chapter 476, 1979 Code of Iowa. The Iowa Commerce Commission has the discretion under §476.2 to provide funding for public participation in proceedings before the Commission, if it determines that funding would effect the purpose of the statute. (McFarland to Jochum, State Representative, 10-3-79) #79-10-3(L)

October 3, 1979

STATE OFFICERS AND DEPARTMENTS: Fine Arts Projects in State Buildings: Ch. 304A, §§304A.8 - 304A.14, The Code 1979. Sections 304A.8 - 304A.14 implementing a program of inclusion of fine arts in state building construction projects applies to construction of new buildings and renovation or additions to existing buildings. The amount to be allocated is a function of the total estimated cost of construction, regardless of method of finance. Total estimated cost is the cost of the construction project contained in the architect's plans approved by the legislature, including costs of real estate. (Lindebak to Keller, Fiscal Officer, Iowa Arts Council, 10-3-79) #79-10-4 (L)

October 3, 1979

HOME RULE: MUNICIPALITIES: Adoption of procedures for Uniform Landlord/Tenant Act: Article III (38A) of the Constitution of the State of Iowa, §§364.1, 364.2(2), 364.2(3), 364.3(3) and Chapter 562A, 1979 Code of Iowa. Under the doctrine of Home Rule, a municipality may adopt and establish procedure for Chapter 562A, 1979 Code of Iowa, the Uniform Residential Landlord/Tenant Act, so long as it is not irreconcilable with the state statute [§364.2(3)]. A procedural format for mediation on a voluntary basis at the municipal level may be established but it may not contravene any of the uniform rights, duties, or remedies that are guaranteed by Chapter 562A. (Ormiston to Clark, State Representative, 10-3-79) #79-10-5

Honorable Betty Jean Clark, State Representative: You have requested an opinion of the Attorney General on the following questions relating to municipal adoption and implementation of Chapter 562A of the 1979 Code of Iowa, better known as the *Iowa Residential Landlord/Tenant Act:*

1. Whether a Municipal Administrative Agency has the authority to establish an administrative procedure for exercising the provisions set forth in 562A?

2. Whether a Municipal Commission would have jurisdictional conflicts with enforcement authority if it jointly exercised provisions set forth in 562A?

3. Whether the enforcement of remedies declared in 562A are beyond the powers of a Municipal Commission?

4. Whether a Municipal Commission would have the power to issue orders and enforce its decisions under a local code similar to 562A?

In subsequent conversations, you have indicated that your chief aim is to establish a local forum for mediation of landlord/tenant complaints. This opinion is therefore cast, in part, in response to the mediational format that you contemplate.

In 1968, the Iowa legislature amended the Iowa Constitution by adopting §38A of Article III, better known as the *Home Rule Act.* It states in pertinent part:

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. . . .

The general thrust of this language is further amplified in Chapter 364, The Code, 1979. The increased authority of municipalities is set forth in the clear language of §364.1:

A city may, except as expressly limited by the Constitution, and if not inconsistent with the laws of the general assembly, exercise any power

and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents. This grant of home rule powers does not include the power to enact private or civil law governing civil relationships, except as incident to an exercise of an independent city power.

In light of this explicit language, it is obvious that the legislature of Iowa intended that cities have broad authority for exercising legitimate control over local affairs and government without additional state enabling legislation.

It is axiomatic, however, that Home Rule does not grant carte blanche power to municipal authorities. In the first place, a city may not exercise its powers in areas where the state has declared an express prohibition on municipal activities in specific subject matter areas. In order for the state to curtail the powers of a city, the legislature must clearly indicate this intent. ". . . A city may exercise its general powers subject only to limitations expressly imposed by a state or city law." [§364.2(2) of the 1979 Code of Iowa] Municipal action in the area of landlord/tenant problems is not expressly prohibited by Chapter 562A.

In the instant case, Iowa has adopted the *Iowa Uniform Residential Landlord/Tenant Act* taken from a *Uniform Residential Landlord/Tenant Act* adopted by various other states. That statute establishes its underlying purposes and policies at §562A.2(2):

a. To simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of landlord and tenant; and

b. To encourage landlord and tenant to maintain and improve the quality of housing.

c. To insure that the right to the receipt of rent is inseparable from the duty to maintain the premises.

The statute, in a comprehensive fashion, provides specific obligations, duties, and remedies for both landlord and tenant and is designed to be maintained uniformly throughout the state.

Any ordinance in the area of landlord/tenant relations passed by a municipality is subject to §364.2(3) of the Iowa Code wherein the vesting of power is set out: "An exercise of city power is not inconsistent with the state law unless it is irreconcilable with state law." Further, a caveat to this apparent wide latitude in city power is found at §364.3 (3) under "Limitations of Power."

A city may not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.

In specific answer to your first question, it would be possible for the municipality to properly adopt *Iowa's Uniform Residential Landlord/Tenant Act* and, within certain guidelines, to establish an administrative procedure for its implementation. The mediational format that you described could be implemented as a local forum for local landlords or tenants who would voluntarily wish to participate. Coincidentally, the city does have a constant input and control in its capacity to legislate building and safety codes which are formally adopted by Chapter 562A.

However, the municipal procedure and agency must not contravene the comprehensive duties, obligations, and underlying policies set forth in the state statute. Neither should it at any juncture preclude the uniform remedies established by the Act

The answer to the second question that you pose in your request is that jurisdictional conflicts may indeed arise since, under the Uniform Act, the courts of the State of Iowa are the designated forums for resolution of claims arising under the Uniform Act. As a consequence, any procedure adopted by the municipality must not run counter to the uniform procedures, obligations, duties and remedies established by the Uniform Act. Under the mediational structure, participation and acceptance of the mediator's decision would be on a voluntary basis. A resort to an Iowa court would always be appropriate.

Your third question is concerned with the enforcement of remedies declared in Chapter 562A. Since the Uniform Act itself names the courts of the State of Iowa as the source for the enforcement of most remedies, the agency established by the municipality may not usurp that role. The municipal agency may provide an alternative hearing within a mediational format, but not supplant the basic remedies guaranteed by the Uniform Act which are to be applied uniformly across the State of Iowa.

The general nature of your final question makes a precise answer impossible to present because of the level of abstraction. It may be possible for a city to adopt a landlord/tenant ordinance "similar to Chapter 562A." However, as previously set forth there are a series of considerations that must be made under the Home Rule Act, the powers granted municipalities in Chapter 364, and the delicate balance that is maintained in the Iowa Residential Landlord/Tenant Act. The primary caveat would be that any attempt to legislate on landlord and tenant relations would be viewed with careful scrutiny by any court to determine if the ordinance was irreconcilable with Chapter 562A under the stated terms of §362.2(3). The adoption of Chapter 562A that is assumed in your first question and the concomitant mediational procedure set up at the municipal level would not be irreconcilable with the Uniform Act and therefore stand as a viable law under the doctrine of Home Rule.

October 5, 1979

WEAPONS—PERMIT TO CARRY GUN OR RIFLE IN A MANNER NOT AUTHORIZED BY CODE §110.36: Sections 110.35 and 110.36, chapter 724, Code of Iowa (1979). Weapons permit provisions of chapter 724 are applicable to Code §110.36. An individual who, within the discretion of the issuing officer, can reasonably justify his or her need to carry a gun or rifle in a vehicle in a manner not authorized by Code §110.36, may obtain a permit to do so. (Cleland to Peterson, Muscatine County Attorney, 10-5-79) #79-10-6

Stephen J. Peterson, Muscatine County Attorney: You have requested an Attorney General's Opinion regarding the following question:

Does a sheriff have authority under Code §724.7 to issue a nonprofessional permit to a person to carry a gun or rifle in a manner prohibited by Code §110.36, i.e., loaded and neither broken down nor contained in a case?

The answer is yes. This result derives from an analysis of chapter 724 and sections 110.35 and 110.36, The Code 1979.

Section 724.4, The Code 1979, provides that a person commits an aggravated misdemeanor—unless he or she falls within one of the exceptions set forth ni this section—if he or she either: (1) goes armed with a dangerous weapon concealed on or about his or her person, (2) goes armed with any loaded firearm of any kind within the limits of a city, or (3) knowingly carries or transports a pistol or revolver in a vehicle. One of the exceptions involves a valid permit to carry the weapon. Section 724.4(8), The Code 1979. Thus, if a person has a valid permit authorizing him or her to carry a loaded pistol or revolver in a vehicle, he or she may do so without violating Code §724.4.

Section 110.36, The Code 1979, provides that "[n]o person, *except as permitted by law*, shall have or carry any gun in or on any public highway, unless such gun be taken down or contained in a case, and the barrels and magazines thereof be unloaded" (emphasis added). The word "gun" is defined in Code §110.35, The Code 1979, to include "every kind of gun or rifle, except a revolver or pistol, and shall include those provided with pistol mountings which are designed to shoot cartridges."

If a gun, as defined in Code §110.35, is carried in a vehicle in a manner provided for in Code §110.36, no permit is required. Furthermore, there is no violation of Code §724.4. The issue is whether a person can obtain a permit to carry a gun, as defined in Code §110.35, in a vehicle in a manner not provided for in Code §110.36.

In our opinion, the "except as provided by law" language in Code §110.36 is comparable to the permit exception provided for in Code §724.4(8). Thus, in the same way that Code §724.4(8) would allow a person to carry a loaded pistol in a vehicle if the person had a valid permit to do so, the "except as provided by law" language in Code §110.36 would allow a person to carry a loaded rifle in a vehicle if the person had a valid permit to do so.

The General Assembly could have included the provisions of Code §110.36 in Code §724.4, and if it had done so, there would be no question that the permit provisions would apply. In our opinion, the omission of the provisions of Code §110.36 from Code §724.4 should not be attributed to a legislative intent to exclude guns and rifles from the permit provisions.

In our opinion, the failure to include the provisions of Code §110.36 within Code §724.4 can be attributed—if to anything—to a desire on the part of the General Assembly to treat the prohibited acts under Code §110.36 and Code §724.4 differently for purposes of punishment. A violation of Code §110.36 is a simple misdemeanor, but a violation of Code §724.4 is an aggravated misdemeanor. A rational legislator could believe that carrying a gun or rifle in a manner prohibited by Code §110.36 is less likely to result in injury to other persons, and therefore, less culpable than a volation of Code §724.4 (carrying a concealed weapon, going armed with a loaded weapon within city limits, or carrying a pistol or revolver in a vehicle). Under this analysis, it would not violate legislative intent to apply the permit provisions of chapter 724 to Code §110.36. Moreover, this would avoid the logical inconsistency of saying that a person can obtain a permit to do the more dangerous act, i.e., carry a weapon in a manner prohibited by Code §724.4, but cannot obtain a

permit to do the less dangerous act, i.e., carry a gun or rifle in a manner prohibited by Code §110.36.

Section 724.7, The Code 1979, provides *inter alia* that: "Any person who can *reasonably justify* his or her going armed may be issued a nonprofessional permit to carry *weapons*. Such permits shall . . . state the reason for the issuance of the permit, and the limits of the authority granted by such permit." (emphasis added). "Weapon" is defined in Webster's Third New International Dictionary 2589 (1971) to include both guns and rifles. Section 724.11, The Code 1979, provides *inter alia*, that the "issuance of the permit shall be by and at the discretion of the sheriff or commissioner, who shall, before issuing the permit, determine that the requirements of sections 724.6 to 724.10 have been satisfied."

Section 724.6 deals with professional permits and is not directly pertinent to your question. Section 724.7 requires, *inter alia*, that the applicant must have a *reasonable justification* for the issuance of a permit. Section 724.8 sets forth those persons who cannot obtain either a professional or nonprofessional permit. Section 724.9 provides, *inter alia*, that "[n]o person shall be issued either a professional or nonprofessional permit unless he or she has received a certificate of completion [showing that he or she has successfully completed a training program in the safe use of firearms] or is a certified peace officer." Section 724.10 deals with the duty of the applicant to fill out an application and the information which must be included in the application. There is nothing inherent in the sections set forth above that would prohibit a sheriff from issuing a person a permit to carry a gun or rifle in a vehicle in a way not authorized by Code §110.36.

In any event, the applicant must reasonably justify his or her need to carry a gun or rifle in a vehicle in a way not authorized by Code §110.36. In our view, such a justification would rarely, if ever, exist, and applications for these permits should be carefully scrutinized. Section 110.36 clearly expresses the general legislative intent that, under normal circumstances, a person carrying a gun or rifle in a vehicle must carry that gun or rifle in a manner provided by Code §110.36. However, under §724.11, The Code 1979, the General Assembly has entrusted the process of determining the sufficiency of the applicant's justification to the sheriff of the county where the applicant resides, or in the event that the applicant is a nonresident or when the need to go armed arises out of state employment, to the commissioner of public safety. *See generally, Mathiasen v. State Conservation Commission*, 246 Iowa 905, 70 N.W.2d 158 (1955) (discretion to determine location of state parks); *State v. Strayer*, 230 Iowa 1027, 299 N.W. 912 (1941) (discretion to order abatement or nuisance).

The sheriff, or the commissioner of public safety under the proper circumstances, thus must make the determination of whether an applicant has a sufficient justification to carry a gun, as defined in Code §110.35, in a vehicle in a manner not authorized by Code §110.36. There is nothing in the law that prohibits such a permit. If a permit is issued which authorizes a person to carry a gun or rifle in a vehicle in a manner not authorized by Code §110.36, the person can carry the gun or rifle in a vehicle in a manner authorized by the permit. Under these circumstances, the manner of conveyance provided for in the permit would be *permitted* by law. Section 110.36, The Code 1979.

October 5, 1979

AGRICULTURE: Authorization of metric measures for sale of gasoline. Article I, §8, clause 5 and Article VI, ¶2, U.S. Constitution; 15 U.S.C. §§204 and 205; §§210.1, 210.5, 210.18, 213.2, 215.18, The Code 1979. The state metrologist is authorized to allow retail gasoline dealers to use pumps which state the volume of a sale in a metric measure. (Willits to Johnson, State Representative, 10-5-79) #79-10-7 (L)

October 9, 1979

MENTAL RETARDATION: PARENTAL LIABILITY: §222.78, The Code 1979, 20 U.S.C. §1412, 29 U.S.C. §701 et. seq., 29 U.S.C. §794, 42 U.S.C. §1396a, 42 C.F.R. §§435.602, 435.724(c), 45 C.F.R. §84.33(c), 45 C.F.R. §84, Appendix A, subpart D, item 23. The federal statute governing medical assistance under the Social Security Act and the relevant federal regulations both permit the state to recover from legally liable third parties for the medical assistance granted to an ICF/MR resident. The parent of a resident under age 21 is such a third party under the federal framework. However, parental liability may not be assessed if an ICF/MF resident minor is unable to receive an appropriate education in his parent's school district and the residential placement is necessitated by educational purposes. (Fortney to Reagen, Commissioner, Department of Social Services, 10-9-79) #79-10-8

Mr. Michael V. Reagen, Ph.D., Commissioner, Iowa Department of Social Services: You inquired whether parental liability as provided for in §222.78, The Code 1979, can be assessed when it is determined a minor child is eligible for care in an Intermediate Care Facility for the Mentally Retarded (ICF/MR) and payment is made from Title XIX funds. Your question arises because of an apparent conflict between §222.78 and a provision of the Medical Assistance Handbook for Institutions for the Mentally Retarded, found at page 33, which states: "There is *no* parental liability for ICF/MR care. It is illegal for either the state or counties to collect from parents." (Emphasis in original.)

Section 222.78 reads in pertinent part as follows:

The father and mother of any person admitted or committed to a hospital-school or to a special unit, as either an inpatient or an outpatient . . . shall be and remain liable for the support of such person. Such person and those legally bound for the support of the person shall be liable to the county for all sums advanced by the county to the state . . . Provided further that the father or mother of such person shall not be liable for the support of such person after such person attains the age of eighteen years . . .

Your letter indicates that the state hospital-schools referred to in §222.78, hold licenses as ICF/MR's. As a result, they are covered by the ban on parental liability contained in the Medical Assistance Handbook. The provisions of the Handbook are thus in direct conflict with the provisions of §222.78 as concerns the imposition of parental liability. In that the Handbook is developed as an administrative policy of the Department of Social Services, it is subordinate to a statute, and is invalid if it conflicts with the statute. *Iowa Department of Revenue v. Iowa Merit Employment Commission*, 243 N.W.2d 610 (1976).

The provision contained in §222.78, is therefore controlling unless it itself is in conflict with a law or rule to which it is subordinate. You indicated that payment for the minor child's care is made from Title XIX funds. It is therefore necessary to compare §222.78 to the applicable federal statute and regulations governing the provisions of medical care in an ICF/MR.

42 U.S.C. §1396a(a) states that:

A State plan for medical assistance must . . . 25) provide (A) that the State or local agency administrating such plan will take all reasonable measure to ascertain the legal liability of third parties to pay for care and services (available under the plan) . . . and (C) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability.

Pursuant to the terms of 42 U.S.C. §1396a(a), the Secretary of Health, Education and Welfare has promulgated regulations authorizing the recovery contemplated by §222.78. 42 C.F.R. §435.602 states:

Except for a spouse of an individual or a parent for a child who is under age 21 or blind or disabled, the agency must not

(a) Consider income and resources of any relative available to an individual; nor

(b) Collect reimbursement from any relative for amounts paid by the agency for services provided to an individual. (Emphasis added)

This regulation applies to both determinations of Title XIX eligibility and to the issue of recovery of assistance granted to an ICF/MR resident. However, it is not dispositive of our present question. Section 435.602 applies specifically to relatives other than a spouse or a parent of a child who is under 21 or blind or disabled. Consequently, the regulation is inapposite to the issue of spousal or parental liability under Title XIX. If the Department of Health, Education and Welfare had intended no parental of spousal liability for ICF/MR care, it would have provided express language to that effect. Therefore, the federal statute governing medical assistance under the Social Security Act and the relevant federal regulation both permit the state to recover from legally liable third parties for the medical assistance granted to an ICF/MR resident. The parent of a resident under age 21 is such a third party under the federal framework. Section 222.78 is in conformity with 42 U.S.C. §1396a(a) and 42 C.F.R. §435.602 and applies to all minor children eligible for care in an ICF/MR.[1]

Although §222.78 is in conformity with 42 U.S.C. §1396a(a) and 42 C.F.R. §435.602, parental liability may not be assessed in all cases. If an ICF/MR resident minor is unable to receive an appropriate education in his parent's school district, federal law prohibits agency assessment of parental liability for the cost of residential placement for education purposes.

The Federal Education of the Handicapped Act, 20 U.S.C. §1412, establishes a goal of providing free appropriate public education to all

[1] It should be noted that the above discussion is limited to the issue of recovery of assistance granted. It does not address the issue of whether a parent's income can be considered in determining an ICF/MR resident's eligibility to participate in a Title XIX program. Consideration of parental income in determining eligibility is prohibited after the month in which the child ceases to live with a parent or spouse of a parent unless actually contributed to the resident's support. 42 C.F.R. §435.724(c). However, even though the regulation prohibits the consideration of the parent's income in determining the child's eligibility the ban does not extend to any later attempts at recovery.

handicapped children regardless of the severity of their handicap. Furthermore, the Federal Rehabilitation Act of 1973, 29 U.S.C. §701 et. seq., prohibits discrimination on the basis of handicap and provides that state recipients of federal funds must provide equal opportunities to handicapped persons. Iowa receives funds under both statutes.

29 U.S.C. §794 of the Rehabilitation Act authorizes the Department of Health, Education and Welfare to adopt regulations implementing the statute. Particularly relevant is 45 C.F.R. §84.33(c), which provides in pertinent part:

> Free appropriate public education.
>
> (a) General. A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.
>
> (b) Appropriate education. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons . . .
>
> (c) Free education—(1) General. For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on nonhandicapped persons or their parents or guardian. . . .
>
> (3) Residential placement. If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

45 C.F.R. §84.33(c).

An appendix to the regulations contains the following explanatory material:

> If the recipient [that is, the grant receiving state] places a student, because of his or her handicap, in a program that necessitates his or her being away from home, the payments must also cover room and board and non-medical care (including custodial and supervisory care). When residential care is necessitated not by the student's handicap but by factors such as student's home conditions, the recipient is not required to pay the cost of room and board.

45 C.F.R. §84, Appendix A, Subpart D, item 23.

Under the federal framework, it is apparent that if a child is placed, because of his or her handicap, in a program that necessitates his or her being away from home, the alternative education must be at public expense. However, if the residential care is not an incident to the child's education but rather as a result of the necessity of custody, care and safekeeping, parental liability may be assessed. *Guempel v. State*, 387 A.2d 399 (N.J. 1978).

In conclusion, §222.78 is not in conflict with the federal statute and regulations governing medical assistance. To the extent that the prohibition on parental liability contained in the Medical Assistance Handbook conflicts with §222.78, the provisions of the Handbook are void. However, if a resident of a hospital-school is residing there because a free appro-

priate public education is not available in the resident's home district, application of §222.78 to that resident's parents is prohibited by federal law ensuring a free, appropriate public education to each child.

October 10, 1979

OPEN MEETINGS: Professional Teaching Practices Commission. Sections 17A.16, 28A.5(1)(f), 17A.3(2), 28A.5(3), 17A.1, 17A.23, 28A.1, 28A.4, 272A, The Code 1979; 640 - 2.10 I.A.C. The Professional Teaching Practices Commission, created and operating under the provisions of Chapter 272A, is subject to the open meetings provisions of ch. 28A, as well as the Administrative Procedure Act in ch. 17A. Final action of the Commission must be taken in open session, pursuant to §28A.5 (3). This final action occurs at the time of the written or recorded final decision in compliance with §17A.16 and 640 - 2.10 I.A.C. (Hagen to Bennett, Professional Teaching Practices Commission, 10-10-79) #79-10-9 (L)

October 18, 1979

COUNTIES AND COUNTY OFFICERS: Sections 331.21, 332.3(5), 332.3(27), 343.10 and 343.12, The Code 1979. The county board of supervisors determines the appropriate reimbursement for expenses incurred for meals and lodging provided an elected county official while attending schools of instruction sponsored by the Iowa state association of counties. The amount of reimbursement is determined in accordance with the training reimbursement policy which must be adopted by the county board of supervisors after consultation with the other elected county officials. (Hyde to Bradley, Keokuk County Attorney, 10-18-79) #79-10-10 (L)

October 19, 1979

USURY: Chapter 535, 1979 Code of Iowa. Section 535.2(4) does not affect the exemption of corporate borrowers from interest rate ceilings. The legislature's decision to protect the reasonable expectations of pre-August 3, 1978, borrowers provides a rational basis for the classification found in §535.2(4) and, therefore, §535.2(4) does not violate the equal protection clause of the Fourteenth Amendment. Lenders may charge "points" in transactions involving loans other than loans for the purchase of one or two family dwellings to the extent that the sum of the "points" and the stated interest rate on the loan does not exceed the maximum interest rate permitted by law. (McFarland to Pringle, Office of State Auditor, 10-19-79) #79-10-11

Mr. John A. Pringle, Office of State Auditor, Acting Supervisor of Savings & Loan Assoc.: You requested an opinion of the Attorney General on the following questions relating to Chapter 535 of the 1979 Code of Iowa.

1. Are transactions involving variable interest rate loans that were granted to corporate borrowers before August 3, 1978, subject to the nine percent maximum usury ceiling imposed on pre-August 3, 1978, variable rate loan transactions by §535.2(4)?

2. Do the provisions of §535.2(4) unconstitutionally violate the equal protection clause of the 14th Amendment to the United States Constitution by discriminating against lenders who entered into variable rate contracts before August 3, 1978?

3. May "points" be charged on loans not used to purchase one or two family dwellings to be occupied by the borrower? If so, are there any limitations on the amount of points that may be charged?

According to the provisions of §535.2(2), transactions involving corporate borrowers are specifically exempt from the usury ceiling imposed

by §535.2(3) and corporate borrowers may contract in writing to pay any rate of interest.

> Any domestic or foreign corporation, . . . may agree in writing to pay any rate of interest in excess of the rate permitted by this section, and no such corporation . . . so agreeing in writing shall plead or interpose the claim or defense of usury in any action or proceeding.

Prior to August 3, 1978, the maximum lawful interest rate was nine percent per year, which was not applicable to corporate borrowers because of the exemption in §535.2(2) of the 1977 Code of Iowa. Under the provisions of §535.2(4), the applicability of the pre-August 3, 1978, nine percent maximum was specifically clarified to include loan contracts with provisions for adjustment of interest rates (variable interest rate loans):

> Notwithstanding the provisions of subsection 3, with respect to any agreement which was executed prior to August 3, 1978, and which contained a provision for the adjustment of the rate of interest specified in that agreement, the maximum lawful rate of interest which may be imposed under that agreement shall be nine cents on the hundred by the year, and any excess charge shall be a violation of section 535.4.

The exemption of corporate borrowers from the nine percent usury ceiling was not affected by the language in §535.2(4), which simply clarifies the application of the pre-August 3, 1978, nine percent usury ceiling.

Next, you raised the issue of the constitutionality of §535.2(4). You noted that lenders who are parties to loan agreements executed before August 3, 1978, are limited to a nine percent interest ceiling on variable rate loans, while lenders who executed variable rate loans after that date may contract for a variable interest rate formula under which the interest charged during some months may exceed the rate that was the maximum lawful rate at the time the contract was executed.

Implicit within the state's authority to legislate, is the authority to draw classifications. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). Once the legislature decides what goal is to be accomplished by a statute, it must define parameters of the group to be reached by the legislation that are commensurate with the purpose of the statute. A violation of the 14th Amendment's equal protection clause occurs only when the classification is not founded upon a rational basis and is therefore purely arbitrary. *Id.*

Section 535.2(4) involves a time-based classification which draws a distinction between parties to variable rate loan transactions before August 3, 1978, and parties to similar transactions after that date. August 3, 1978, was the date that the floating interest rate adopted by the 1978 Session, 67th G.A., Ch. 1190, §11, went into effect. Prior to August 3, 1978, the maximum lawful interest rate was 9% and borrowers had a reasonable expectation that the interest rate on variable rate loan contracts executed before August 3, 1978, would not rise above 9%. The terms of §535.2(4) serve to protect the expectations of pre-August 3, 1978, borrowers by prohibiting the interest rate on variable rate loans executed before August 3, 1978, from exceeding 9%. The state's decision to protect the reasonable expectations of pre-August 3, 1978, borrowers provides a rational basis for the time-based classification found in

§535.2(4) and, therefore, §535.2(4) does not violate the equal protection clause of the 14th Amendment.

Finally, you inquired whether loan processing fees, commonly referred to as "points," may be charged on loans not for the purchase of owner-occupied one and two family dwellings; and if so, what limitations may exist on the amount of "points" that may be charged.

Before the enactment of §535.8 of the 1979 Code of Iowa, it was lawful to charge "points" on any loan in Iowa as long as the "points," when added to the stated interest rate on the loan, did not cause the effective interest rate (stated interest rate plus "points") to exceed the maximum rate allowed by law. In other words, a "point" is a fee that a lender receives for the loan of money that must be considered in determining the maximum interest rate that is permitted under §535.2(3).

Section 535.4, 1979 Code of Iowa, provides accordingly:

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.

Section 535.8, which was adopted by the 67th G.A. in 1978, disallowed "points" on loans secured by owner-occupied one or two family dwellings. Note that "points" were still lawful on other loans as long as the effective interest rate, including "points", did not exceed the maximum lawful rate permitted by §535.2.

Recently adopted Senate File 158 amended §535.8 by authorizing, under specific limited circumstances, the charging of "points" on loans used for the purchase of one or two family dwellings to be occupied by the borrower. Section 22.2 of S.F. 158 provides as follows:

a. A lender may collect in connection with a loan a loan processing fee which does not exceed one percent of an amount which is equal to the loan principal less twelve thousand five hundred dollars, ... A loan processing fee collected under the authority of this paragraph is compensation to the lender solely for the use of money, notwithstanding any provision of the agreement to the contrary. However, a loan processing fee collected under the authority of this paragraph shall be disregarded for purposes of determining the maximum charge permitted by section five hundred thirty-five point two (535.2) of the Code, or Acts of the Sixty-seventh General Assembly, 1978 Session, chapter one thousand one hundred ninety (1190), section thirteen (13), subsection two (2). The collection in connection with a loan of a loan origination fee, closing fee, commitment fee or similar charge other than as expressly authorized by this paragraph is prohibited.

Senate File 158 does not affect the law with regard to the charging of "points" on loans other than loans for one or two family dwellings to be occupied by the borrower. The provision of the third sentence of §22.2 of S.F. 158 stating that a loan processing fee (point) collected under that paragraph shall be disregarded in determining the maximum charge permitted by §535.2, is an exception to the general rule that "points" will be considered when determining the maximum interest charge permitted by law. Thus, the charging of "points" is lawful on loans other than those specified in §22.2 of S.F. 158, but the "points" will be considered along with the stated interest rate to assure that the resulting effective rate does not exceed the maximum interest rate permitted by law.

To summarize, three major points made in this opinion will be restated:

1. Transactions involving corporate borrowers are exempt from the usury ceiling and §535.2(4) does not affect that exemption.

2. The Legislature's decision to protect the reasonable expectations of pre-August 3, 1978, borrowers provides a rational basis for the classification found in §535.2(4) and, therefore, §535.2(4) does not violate the equal protection clause of the 14th Amendment.

3. Lenders may charge "points" in transactions involving loans other than loans for the purchase of one or two family dwellings to be occupied by the borrower, but only to the extent that the sum of the "points" and the stated interest rate on the loan does not exceed the maximum rate permitted by law under §535.2.

October 19, 1979

STATE OFFICERS AND DEPARTMENTS: Department of Substance Abuse — Funding Costs of Substance Abuse Treatment. Chapter 125; sections 229.51, 204.409, 321.281, 321.283, Code of Iowa (1979). The department of substance abuse is responsible for funding costs in facilities which have a contract with the department. The department's funding responsibility is limited to 75 per cent (or 100 per cent for persons with no legal residence in the state) of the costs of care, maintenance and treatment of a substance abuser. A non-contracted facility treating a substance abuser must seek payment from the patient, from any person, firm, corporation or insurance company bound by contract to provide payment on behalf of the substance abuser, or from the state appeal board in the case of criminal commitments. (Dallyn to Riedmann, Department of Substance Abuse, 10-19-79) #79-10-12 (L)

October 22, 1979

COUNTIES AND COUNTY OFFICERS: County Memorial Hospitals. Chapters 37, 347, 347A; Sections 37.5, 37.6, 37.7, 37.8, 37.9, 37.18, 37.28-37.30, 347.13(1), 347.13(11), 347.24, 347A.1, 347A.8, The Code 1979. Title to real property used or proposed to be used for a memorial hospital pursuant to ch. 37, The Code 1979, should be in the name of the county or city which has authorized the hospital's erection and equipment, and not in the name of the hospital commission. (Hyde to Howell, State Representative, 10-22-79) #79-10-13 (L)

October 23, 1979

MUNICIPALITIES: Housing Codes — Iowa Const. art. III, §38A; §§384.9, 413.1, 413.108, 413.109, 413.110, and 413.125, The Code 1979. Ordinances which authorize a city to abate nuisances and repair violations and charge the costs to the property owners if they fail to do so, and which establish a fund from which such costs are paid are not inconsistent with the Code. Such ordinances are constitutional if they afford the affected individuals an opportunity for a hearing prior to the governmental action. (Blumberg to Rapp, State Representative, 10-23-79) #79-10-14

The Honorable Stephen J. Rapp, State Representative: We have your opinion request of July 24, 1979, regarding the Municipal Housing Law, Chapter 413, The Code 1979. The City of Waterloo has adopted a Uniform Housing Code as its own. Chapters 11 and 15 of the Housing Code authorize the city to cause the violations to be repaired and charge the costs thereof to the property or its owner if the responsible party fails to do so, and establish a revolving fund from which the repairs are

made. You ask whether these provisions are consistent with the Iowa statutes and are constitutional.

Section 413.1 provides:

This chapter shall be known as the housing law and shall apply to every city which, by the last federal census, had a population of fifteen thousand or more, and shall apply to any dwelling in any area adjacent to and within one mile of such municipalities, except estates of real property of ten acres or more in said adjacent area, and to every city as its population shall reach fifteen thousand thereafter by a federal census.

Section 413.125 consists of the following:

All charter provisions, regulations, and ordinances of cities are hereby superseded insofar as they do not impose requirements other than the minimum requirements of this chapter, and except in case of such higher local requirements, this chapter shall in all cases govern.

Pursuant to these sections, Chapter 413 is applicable to Waterloo. However, Waterloo can adopt ordinances with higher standards than those set forth in the chapter.

Section 413.108 provides:

The owner of any dwelling, or of any building or structure upon the same lot with a dwelling, or of the said lot, where any violation of this chapter, or a nuisance as herein defined, exists who has been guilty of such violation or of creating or knowingly permitting the existence of such nuisance, and any person who shall violate or assist in violating any provision of this chapter, shall also jointly and severally for each such violation and each such nuisance be subject to a civil penalty of fifty dollars to be recovered for the use of the health department in civil action brought in the name of the municipality by the health officer. *Such persons and also said premises shall also be liable in such case for all costs, expenses, and disbursements paid or incurred by the health department, by any of the officers, agents, or employees thereof in the removal of any such nuisance or violation.* [Emphasis added]

Section 413.110 also provides that for the recovery of any expenses or disbursements, an action may be brought in any court of competent civil jurisdiction. These two sections lead us to the conclusion that a city may correct any violations or remove any nuisances if the responsible person fails to, and may charge such costs to the property or owner. Thus, that provision in Chapter 11 of the Waterloo Housing Code is not inconsistent with Chapter 413.

The next part of your question concerns the establishment of a fund, pursuant to Chapter 15 of the Waterloo Housing Code, from which the costs of repairing any violations or abating nuisances are paid. No such specific fund is set forth in Chapter 384. However, §384.9 provides that a city may establish other funds than those listed in that Chapter. Thus, the establishment of such a fund is not inconsistent with a state statute. Chapter 15 of the Housing Code provides that the fund is maintained from the general fund of the city and from any reimbursements made from the property owners. The statutory provision allowing the establishment of any number of funds by a city, together with the application of Home Rule, is a clear indication that Waterloo can establish this type of fund.

Even though these parts of the Housing Code are not inconsistent with any state statute, you still wish to know if they, in fact, are unconstitu-

tional. Because they are not inconsistent with a statute, they are not in violation of Iowa Const. art. III, §38A (Home Rule).

It has been held that Chapter 413 is an exercise of the police power. *State ex rel. Wright v. Iowa State Board of Health*, 233 Iowa 872, 10 N.W.2d 561 (1943). The same can be said of a municipal housing code. Various provisions of this Chapter have been held to be constitutional on different grounds. *See, State ex rel. Wright v. Iowa State Board of Health*, 233 Iowa 872, 10 N.W.2d 561 (1943); *Burlington & Summit Apartments v. Manolato*, 233 Iowa 15, 7 N.W.2d 26 (1943). There are no cases specifically on §§413.108 or 413.110. However, this statutory scheme is not any different than that set forth for other municipal or county matters. Pursuant to §§317.16 and 317.21, the county weed commissioner, after notice, can destroy weeds on private property when the owner has failed to do so, and can assess the costs against the property. Section 364.12(2) provides that if the city gives notice to a property owner to abate a nuisance, remove snow or dead trees, repair or dismantle a dangerous building or structure, or the like, and the owner fails to do so, the city can do it and assess the costs against the property. Assessing property owners for street improvements has been held to be constitutional, *Ft. Dodge Electric Light & Power Co. v. City of Ft. Dodge*, 115 Iowa 568, 89 N.W. 7 (1902); *Hachworth v. City of Ottumwa*, 114 Iowa 467, 87 N.W. 424 (1901), as has assessments and liens for sewer charges or solid waste disposal fees. *See*, 1973 Op. Att'y Gen. 129.

Because a housing code is an exercise of police power, it is not considered to be a taking. The constitutional provision prohibiting the taking of private property without compensation is not meant to be a limitation of police powers necessary to the tranquility of every well-ordered community nor of the general power over private property which is necessary for the orderly existence of government. 56 Am. Jur. 2d *Municipal Corporations* 459 (1971). *See also, Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), a case concerning a prohibition to alter a building protected by an historical landmark law; and, *Woodbury Cty Soil Conservation Dist. v. Ortner*, 279 N.W.2d 276 (Iowa 1979), a case dealing with a requirement that a land owner expend a considerable amount of money for soil conservation. The statutory provisions and the municipal regulations appear to be reasonably calculated to effectuate a legitimate purpose.

If the applicable provisions of the Housing Code are found to be unconstitutional either on their face or as applied, it would probably be for lack of notice or an opportunity for a hearing. Section 413.109 requires notice to the responsible party before any further actions can be taken. Chapter 11 of the Housing Code also provides for notice. Section 413.108 and 413.110 provide for court actions after the action has been taken. However, the existence of a fact question may require an opportunity to be heard prior to the time any action is taken.

In *Plato v. Roudebush*, 397 F.Supp. 1295, 1307 (D.Md. 1975), the Court reviewed the instances where the opportunity for a prior hearing was required:

During the last six years, a spate of major cases have dealt with an individual's right to a hearing before the government may withdraw or take away a significant property interest. In the leading case, *Goldberg*

v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), the Supreme Court held that before a state agency may terminate welfare payments to an individual it must accord that person a hearing. On the same day that *Goldberg* was decided, the Supreme Court announced that old-age assistance beneficiaries had a right to a pretermination hearing, as well. *Wheeler v. Montgomery*, 397 U.S. 380, 90 S.Ct. 1026, 25 L.Ed.2d 307 (1970). Since those two decisions, the Supreme Court has required pretermination hearings in several other areas of individual interests. Hearings have been required before a student may be suspended from school . . .; before a tenured teacher may be fired from a state university . . .; before property may be seized under a prejudgment writ of replevin . . .; and before a driver's license may be suspended . . . .

In addition, lower courts have recognized a right to a pretermination hearing to protect citizens from possible arbitrary deprivations of numerous other entitlements. The Fourth Circuit, for example, has held that a recipient of disability benefits is entitled to an oral hearing before such benefits may be withdrawn. . . . And, the same Court of Appeals has held that a tenant in public housing is entitled to the safeguards of a hearing prior to eviction. [Citations omitted]

In each of these, a factual dispute existed regarding some type of property right. When protected interests are at stake, there is ordinarily a right to some kind of prior hearing. *Estabrook v. Iowa Civil Rights Commission*, N.W.2d (Iowa 1979) (Filed September 19, 1979).

Escalara v. New York City Housing Authority, 425 F.2d 853 (2d. Cir. 1970), one of the cases referred to in *Plato*, concerned the constitutionality of the system by which tenants were ordered to vacate apartments. It was there held, citing to other cases, that the very nature of due process negates the concept of inflexible procedures universally applicable to every situation. Minimum procedural safeguards required by due process depend, in each situation, on the nature of the governmental function involved and the substance of the private interest which is affected. In later cases, this is termed a balancing test.

The *Escalara* Court went on to hold that notice that is more than summary in nature is required to insure the individual is adequately informed of the nature of the evidence against him so that he can effectively rebut it. Individuals affected by the governmental action should have access to all the material and evidence against them concerning the action. The individual should be able to confront and to cross-examine persons supplying information against him, and to present his side of the case. The fact that an individual may challenge the action in court at a later date is not always persuasive. Nor is the small amount of any charges against an individual a defense by which due process need not be afforded. For application of these principles or further refinements, *see, Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 285 (1970); *Case v. Weinberger*, 523 F.2d 602, 606 (2d. Cir. 1975); *Vargas v. Trainor*, 508 F.2d 485, 489 (7th Cir. 1974); *United States ex rel. Johnson v. Chairman, N.Y. St. Bd. of P.*, 500 F.2d 925, 929 (2d. Cir. 1974); *Lopez v. Henry Phipps Plaza South, Inc.*, 498 F.2d 314, 322 (4th Cir. 1973); *Burr v. New Rochelle Municipal Housing Authority*, 479 F.2d 1165 (2d Cir. 1974); *Fertile Land Ltd. v. Beame*, 445 F.Supp. 548, 551 (S.D.N.Y. 1977); *Ricker v. United States*, 417 F.Supp. 133, 139 (N.D. Maine 1976); *Stokes v. United States Immigration & Nat. Serv.*, 393 F.Supp. 24, 29 (S.D.N.Y. 1975); *Jeter v. Kerr*, 371 F.Supp. 338, 340, 341 (S.D.N.Y. 1974); *Brown v. Housing Authority of City of Milwaukee*, 340 F.Supp. 114 (E.D. Wis. 1972).

Although a hearing prior to the governmental action is the general rule, one is not necessarily required prior to the action in an emergency where it would be impractical to hold a prior hearing. *See, Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); *Fahey v. Mallonee*, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908); B. Schwartz, *Administrative Law* §74 (1976). However, a hearing should be held as soon as possible after the emergency action has been taken. In this context, grounds for serious and imminent concern for the health or safety of tenants, would warrant making repairs prior to the hearing. A hearing should then be afforded prior to charging the owner for repairs.

As can be seen from the above discussion, an opportunity for a hearing prior to the governmental action should be afforded to the affected individuals. The hearing need not always be formal, but it should allow the individual the opportunity to present his side of the issue and question the evidence against him where there exists disputed questions of fact.

Although we have not found a case concerning the constitutionality of charging a property owner for work done by a city to abate a nuisance or correct a violation, there are cases indicating that it is a proper function of a city. *See, Kaynor v. Dist. Court of Black Hawk County*, 178 Iowa 1055, 1059, 148 N.W. 557 (1916); *Harvey v. City of Fort Dodge*, 103 Iowa 573, 72 N.W. 756 (1897); *The City of Independence v. Purdy*, 46 Iowa 202 (1877); *City of Philadelphia v. Philadelphia Auth. For I.D.*, 230 Pa. Super. 226, 326 A.2d 502 (1975). In *Kaynor*, it was stated that the ordinance requiring the property owner to make repairs and authorizing the city to do so and assess the owner if the owner failed to do so was "a valid ordinance, and within the power of the city to adopt." In the Philadelphia case it was held (326 A.2d at 504):

On the other hand, there is ample authority that a city may properly regulate and police the condition of its sidewalks, and require abutting landowners to make repairs when necessary: *City of Philadelphia v. Monument Cemetery Co.*, 147 Pa. Super. 170 (1892). If the landowner fails to comply with that order, the city may contract for the work to be done and assess the cost to the landowner: *City of Philadelphia v. Subin*, 86 Pa. Super. 126 (1925).

Accordingly, we are of the opinion that an ordinance requiring property owners to abate nuisances or repair violations, and giving the city the right to do so and charge the property owner for the costs if the owner fails to do so is within the power of a city to adopt, and not inconsistent with Chapter 413, The Code 1979. The same result is reached with an ordinance establishing a fund from which costs are paid for the city's work. Neither type of ordinance is unconstitutional if an opportunity for hearing is afforded the individual affected by the governmental action.

October 24, 1979

ENVIRONMENTAL PROTECTION — State Implementation Plan Permit Requirements — Federal Clean Air Act. Sections 455B.12(10), 455B.13(3), The Code 1979; 42 U.S.C. §7401, *et seq.*; 400 I.A.C. §3.1 (455B). Current Iowa Statutes and rules do not require a permit from the Department of Environmental Quality prior to construction of portions of a stationary source of air pollution other than equipment

which causes pollution and related pollution control equipment. At present the Department does not have the statutory authority to modify its rules to require such a permit. (Ovrom to Crane, Iowa Department of Environmental Quality, 10-24-79) #79-10-15(L)

October 25, 1979

COUNTIES AND COUNTY OFFICERS: County Hospitals. Ch. 347A; §§347A.1, 347A.6, The Code 1979. The board of trustees of a county public hospital organized and operating under ch. 347A, The Code 1979, is not prohibited from employing independent legal counsel. (Hyde to Larson, Winneshiek County Attorney, 10-25-79) #79-10-16(L)

October 25, 1979

CRIMINAL LAW WEAPON'S PERMIT: Sections 724.4, 724.5, 724.6, The Code, 1979. Staff members, including correctional officers, of the division of adult corrections must obtain a permit to carry weapons. The $5.00 fee required for such permits may be paid from the division's appropriated funds. (Cleland to Farrier, Director, Division of Adult Corrections, 10-25-79) #79-10-17(L)

October 25, 1979

CRIMINAL LAW, COUNTY ATTORNEYS, TRIAL INFORMATIONS: Sections 801.4(1) and 801.4(3), (The Code 1979), Iowa R.Crim.P. 5(1). Assistant county attorney has same authority as county attorney to file trial information. Attorney General or assistant attorney general may only file a trial information when requested to do so by a county attorney or assistant county attorney. (Cleland to Schenck, Assistant Shelby County Attorney and Swanson, Assistant Montgomery County Attorney, 10-25-79) #79-10-18

Mr. Richard C. Schenck, Assistant Shelby County Attorney; Mr. Mark D. Swanson, Assistant Montgomery County Attorney: You each have requested an Attorney General's Opinion regarding the following question:

Who else besides a county attorney has authority under Iowa R.Crim.P. 5(1) to file a trial information?

An assistant county attorney may file a trial information. In addition, the Attorney General or any of his assistants have limited authority to file a trial information.

This result derives from an analysis of §§801.4(1) and 801.4(3), The Code 1979, and Iowa R.Crim.P. 5(1).

Rule 5(1) provides, in relevant part, that "the county attorney shall have the authority to file such a trial information except as herein provided unless that authority is specifically granted to other prosecuting attorneys by statute." "County attorney" is defined in §801.4(3), The Code 1979, as including an authorized assistant. The flush language of §801.4, The Code 1979, provides that the definitions set forth in that section apply to titles XXXV to XXXVII of the Iowa Code. Title XXXVI includes chapter 748 through 821. The Iowa Rules of Criminal Procedure appear in chapter 813. Therefore, the definition of "county attorney" in Code §801.4(3) applies to rule 5(1).

County attorneys are authorized to file trial informations. However, it is our opinion that Code §801.4(3) extends that authorization to assistant county attorneys.

It should also be noted that rule 5(1) was amended, effective July 1, 1979. The following section has been added:

The attorney general, unless otherwise authorized by law, shall have the authority to file such a trial information upon the request of the county attorney and the determination of the attorney general that a criminal prosecution is warranted.

"Attorney general" is defined in §801.4(1), The Code 1979, as including an authorized assistant. In addition, rule 5(1) no longer provides that the county attorney has the "sole" authority to file a trial information.

The plain meaning of rule 5(1), as amended, is that the Attorney General or any of his assistants now have limited authority to file trial informations. However, this authority is limited. The Attorney General or his authorized assistant may file a trial information under rule 5(1) only (1) upon request of a county attorney and (2) after "the determination of the attorney general that a criminal prosecution is warranted". The crux is that the Attorney General's Office lacks independent authority to file trial informations.

In conclusion, an assistant county attorney has the same authority as a county attorney in filing trial informations. On the other hand, the Attorney General or assistant attorney general may only file a trial information when requested to do so by a county attorney or assistant county attorney.

October 25, 1979

STATE OFFICERS AND DEPARTMENTS; BRIBERY: First Amendment, U. S. Constitution, §722.1, The Code 1979. Receipt of inexpensive newsletters and magazines with political content by state legislators does not violate Iowa's bribery law where the items offered have no significant value outside their communicative content. (Appel to Johnson, State Representative, 10-25-79) #79-10-19

Honorable Robert M. L. Johnson, State Representative: We are in receipt of your opinion request inquiring whether it is unlawful for an elected official to accept publications from organized groups if there is a charge to the general public for said publications. Specifically, you ask whether the receipt without charge by state legislators of publications such as the Iowa Conservationist (published by the Iowa Conservation Commission with a subscription price of $2.00 per year), the Iowa AFL-CIO News (published by the Iowa AFL-CIO with a subscription price of $2.00 annually) and the ISEA Communique (published by the Iowa State Education Association with a subscription cost of $2.00 annually) violates Iowa's bribery statute.

We conclude that where the value of the publications is small and where the publications contain political expression that may aid a state legislator in the exercise of his or her responsibiilties, no violation of Iowa's bribery statute is present.

Iowa's bribery statute, §722.1, The Code 1979, states that:

A person who offers, promises, or gives anything 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 . . . with intent to influence the act, vote, opinion, judgment, or exercise of discretion of such person with respect to his or her services in such capacity, commits a class "D" felony.

Broadly construed, it could be argued that even receipt of a political newsletter is "anything of value" and that if it is offered in order to influence the legislature, bribery occurs.

Such an interpretation, however, would impinge on established First Amendment rights to petition the government for redress of grievances. It is fundamental in a representative democracy that various groups have full opportunity to make their views on topics of interest known to elected officials. Inexpensive newsletters and magazines are a convenient method of informing elected officials of the general concerns of such groups. Such political expression lies at the very core of the First Amendment.

If §722.1 proscribed such communication with state legislators, serious constitutional problems would be present. We therefore believe that §722.1 should be construed to avoid the difficulty. This can be done in a principled fashion by construing "anything of value" to mean only things that have no intrinsic speech value and amount to collateral benefits offered a public official in order to influence official action.

We wish to emphasize, however, the narrowness of our opinion. If, for instance, a person or organization offered an original folio of Locke for the purpose of giving a legislator philosophical guidance, such an item, in addition to having communication value, would have collateral material value because of its unusual character. But, where political communication of de minimus value is offered to a state official, no collateral benefit exists outside the message conveyed. Newsletters, for instance, cannot generally be collected and sold at a profit by a legislator. Their only value lies in the worth of the idea expressed therein. In our view, receipt of such communication is outside the scope of §722.1.

October 30, 1979

COUNTIES: Sections 306.21, 358A.3, 358A.4, 358A.5, 358A.6, 358A.12, 409.4, 409.5, 409.6, 409.7. When a submitted plat request meets all state, county and municipal subdivision regulations, the county board of supervisors has a duty to approve the plat. (Hagen to Criswell, Warren County Attorney, 10-30-79) #79-10-20 (L)

October 30, 1979

COUNTIES: County Attorney. §§20.3(7), 20.4(3), 20.17(2), 332.61, and 336.2(11). Chapters 20 and 336, The Code 1979, do not require a county attorney to negotiate with public employees and otherwise act as agent for the county in Chapter 20 proceedings and, therefore, a part-time county attorney could contract to provide such services and receive extra compensation for those services. (Mueller to Neas, Audubon County Attorney, 10-30-79) #79-10-21 (L)

October 30, 1979

LIQUOR, BEER AND CIGARETTES: Highways; §§123.46, 313.2, 321.1 (48), The Code 1979. The words "upon the public streets or highways" do not include areas of a roadside park beyond the highway right of way consisting of areas for vehicular traffic, parking and sidewalks because penal statutes must be strictly construed. Moreover, the word "upon" cannot be construed to mean "near" so that the phrase "upon the public streets or highways" includes a roadside park. Thus, the consumption of beer in areas of a state roadside park beyond the highway right of way is not prohibited under the first phrase of §123.46. (Mull to Knuth, Jones County Attorney, 10-30-79) #79-10-22 (L)

October 31, 1979

MUNICIPALITIES: Conflicts of Interests. §39.3(1), 362.5, 362.6, 376.4, and Chapter 20, The Code 1979; §386A.22, The Code 1975. A business agent for a municipal union is not precluded from running for city council. If elected, this union business agent should not take part in any questions before the council relating to labor/management relations in general and any matters relating to his union in particular; however, contracts between these parties would not necessarily be void under §362.5, The Code 1979. (Mueller to Jesse, State Representative, 10-31-79) #79-10-23(L)

October 31, 1979

CONSTITUTIONAL LAW: First Amendment, U.S. Constitution, Fourteenth Amendment, U.S. Constitution. Bill prohibiting assessors from taking "an active part in a political campaign" cannot generally be constitutionally applied to nonpartisan political activity and may be unconstitutionally vague as applied to limited kinds of partisan political involvement. Bill prohibiting voluntary financial contributions by local assessors is probably unconstitutional in both partisan and nonpartisan applications. (Appel to Miller, State Senator, Clark, State Representative and Norland, State Representative, 10-31-79) #79-10-24

The Honorable Alvin V. Miller, State Senator; The Honorable Betty Jean Clark, State Representative; The Honorable Lowell E. Norland, State Representative: We are in receipt of your opinion request concerning the constitutionality of S.F. 466, an act which would prohibit county assessors and their deputies from contributing "money or anything of value to a candidate or candidate's agent or personal representative, for nomination or election to any office, or contribute to a political campaign or political committee, or take an active part in a political campaign except to cast a vote, or to express personal opinions." Under the proposed bill, a violator would be guilty of a simple misdemeanor.[1]

1. Limitations on Political Activity.

S. F. 466 would prohibit assessors and their deputies from taking "an active part in a political campaign, except to cast a vote or express a personal opinion." The key United States Supreme Court cases considering the validity of similar restrictions are *United States Civil Service Comm. v. National Association of Letter Carriers*, 413 U.S. 548, 37 L.Ed.2d 796, 93 S.Ct. 2880 (1973), and *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). In *Letter Carriers*, the Court upheld the section of the Hatch Act, 5 U.S.C. 67324(a)(2), which prohibits certain federal employees from taking "an active part in political management or in political campaigns." In *Broadrick*, the Court upheld Oklahoma's "Little Hatch Act," *inter alia*, from attack on the grounds that the statutory prohibitions were so vague as to offend due process.

A. First Amendment Considerations.

Generally speaking, the Supreme Court has held that limitations of First Amendment rights of public employees can be sustained only if

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[1] A similar provision, formerly §441.53, The Code, was repealed by the General Assembly in 1977. *See* Acts, 66th G.A., ch. 1245, ch. 4, §525. No authoritative court or attorney general's opinion exists interpreting this statutory precursor to S.F. 466.

necessary to further substantial or important, if not compelling, governmental interests, *Letter Carriers, supra*, 413 U.S. 564, 96 S.Ct. 2890, 37 L.Ed.2d 808. In *Letter Carriers*, the Court identified four governmental interests that it found sufficiently weighty to preserve the validity of the Hatch Act from attack under the First Amendment. First, the Court found that in order to promote "impartial execution of the laws," it is "essential that federal employees not, for example, take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets." Second, the Court noted that "it is critical that [government employees] appear to the public to be avoiding [practicing political justice], if confidence in the system of representative government is not to be eroded to a disastrous extent." Third, the Court observed that the government interest in insuring that "the expanding government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine." Finally, the Court noted that the government sought to insure that "employment and advancement in the government service not depend on political performance," 413 U.S. at 565-66, 93 S.Ct. at 2890, 37 L.Ed.2d at 808.

All these governmental interests seem equally present in the case of local assessors when they engage in partisan political activity. However, the same analysis does not seem applicable to nonpartisan political activity. Indeed, the Supreme Court carefully emphasized in *Letter Carriers* that nonpartisan activity is expressly exempted from the Hatch Act prohibitions, 413 U.S. at 576, 93 S.Ct. at 2896, 37 L.Ed.2d at 895.

Where nonpartisan activities are concerned, the governmental interests are generally less substantial. Powerful machines are rarely built around nonpartisan ballot questions since the sands of issue-oriented coalitions shift from issue to issue. And, the appearance of impropriety is usually unlikely to result from participation in nonpartisan issue-oriented politics since personal or affiliative loyalties are not overtly invoked. Even when candidates are involved, the lack of identifiable party labels makes it difficult to create coherent, long term political alliances that could improperly influence government bureaucracies.

The post *Letter Carriers* case law, though scant,, finds the distinction between partisan and nonpartisan activities constitutionally significant. For instance, in *Alderman v. Philadelphia Housing Authority*, 496 F.2d 164 (2d Cir. 1974), the Court states that:

> *Broadrick* and *Letter Carriers*, properly viewed, carve out carefully circumscribed exceptions to the sweeping injunction of the First Amendment exceptions allowing a legislature—Congress or state lawmakers—to inhibit *only* 'partisan political activity' and not all political 'discussion.'
>
> 496 F.2d at 172

Accord, Phillips v. City of Flint, 225 N.W.2d 780, 57 Mich.App. 394 (1974). Given this case law and the less weighty government interests, we believe Iowa courts would find S.F. 466 unconstitutional to the extent that it proscribes nonpartisan political activity.[2]

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[2] If partisan style politics pervades nominally nonpartisan elections in a given instance, restrictions on nonpartisan activity might be sustainable. *See Magill v. Lynch*, 560 F.2d 22, 26 (1st Cir. 1977).

B. Due Process.

In addition to a First Amendment attack, S.F. 466 could also be challenged as applied in a criminal prosecution on the ground that its proscriptions are so vague that their enforcement on an unsuspecting assessor would violate constitutional notions of fairness inherent in the due process clause. Any citizen is entitled to reasonable notice of what kind of conduct is proscribed, particularly when, as here, criminal sanctions are involved.

In *Letter Carriers*, the Court considered whether the term "active part in political management or in political campaigns" was unconstitutionally vague as applied to persons who allegedly sought to run for public and partisan office, write letters on political subjects to newspapers, work at polls, and engage in door to door campaigning. In concluding that it was not, the Court noted that (a) the statute contained numerous express exceptions and (b) the Civil Service Commission had promulgated extensive regulations. These exceptions and regulations gave the parties in *Letter Carriers* fair notice that their conduct was prohibited. "It is to these regulations purporting to construe §7324 as actually applied in practice, as well as to the statute itself, with its various exclusions, that we address ourselves in rejecting the claim that the Act is unconstitutionally vague and overbroad," 413 U.S. at 575, 93 S.Ct. at 2895, 37 L.Ed.2d at 814.

But S.F. 466 has on similar laundry list of exceptions and no regulations have been promulgated under the bill that might further define its scope. In addition, in considering the vagueness question, the Court noted that it was also important that the Commission had established "a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the Commission itself is concerned." 413 U.S. at 580, 93 S.Ct. at 2897-98, 37 L.Ed.2d at 817. No such procedure is present in S.F. 466.

Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), a companion case with *Letter Carriers*, is arguably somewhat less demanding with respect to required statutory precision. In this case, the Court refused to enjoin application of Oklahoma's "Little Hatch Act" as applied against state employees to work in a political campaign, who solicited financial contributions from co-workers, and who distributed campaign posters in bulk. The applicable section of the state statute declared:

[7] No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.

The Court, quoting from *Letter Carriers*, noted that "although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can understand and comply with, without sacrifice to the public

interest." 413 U.S. at 608, 93 S.Ct. 2914, 37 L.Ed.2d at 837. But the Court also, in a footnote to this quotation, observed:

It is significant in this respect to note that §818 does not create a regulatory maze where those uncertain may be hopelessly lost (citation omitted). Rather, the State Personnel Board is available to rule in advance on the permissibility of particular conduct under the explicit standards set out in and under §818.

Obviously, §818(7) of the Oklahoma Little Hatch Act is at least somewhat more explicit than S.F. 466. There is no question under §818(7), for instance, that becoming a member of a partisan committee or club is proscribed, or being a candidate for public office, or taking part in the management of a political campaign is proscribed. To this extent, the Oklahoma statute is less vague than S.F. 466. However, §818(7) does prohibit employees in the classified service from taking part "in the . . . affairs of any political party or in any political campaign." This section of the statute seems no more precise than similar provisions of S.F. 466. But, as noted above, an advance ruling could be obtained from the state agency responsible for the statute's enforcement under §818(7); S.F. 466 has no similar provision.

Because of the lack of more detailed exceptions and regulations and an absence of a declaratory mechanism, we believe that if S.F. 466 were enacted into law as presently written, it could not be constitutionally applied against assessors who engaged in comparatively limited political activity because of its vagueness. While a due process attack on enforcement of the bill's proscriptions would be unsuccessful where "hard core conduct" like that in *Broadrick* is involved (conduct which, regardless of how the other boundaries of the statute are established, is clearly proscribed), the statute does not appear to be sufficiently precise to allow criminal prosecution for lesser political involvement, such as participation in a partisan political caucus. The statute could be rescued from potential due process limitations, however, by more explicit delineation of the proscribed activity (*see*, i.e., the Appendix to *Letter Carriers*, 413 U.S. 581-96, 93 S.Ct. 2898-2905, 37 L.Ed.2d 818-26) and by establishing a mechanism for advance declaratory rulings by a bureaucracy responsible for statutory enforcement.

II. Financial Contributions.

Senate File 466 also prohibits financial contributions by assessors and their deputies to *any* candidates for political office and to *any* political campaign or committee. This sweeping provision would prevent a deputy assessor from contributing to a candidate for national as well as local office. It would also apparently prevent an assessor from contributing to committees supporting various referenda or bond issues.

In *Buckley v. Valeo*, the Supreme Court has recognized that contribution limitations "operate in an area of the most fundamental First Amendment activities, 424 U.S. 1, 14, 96 S.Ct. 612, 632, 46 L.Ed.2d 659, 685 (1976). The Court explained in *Buckley* that the primary First Amendment problem with contribution limitations is their restriction of one aspect of the contributor's freedom of political association. The Court noted that its decisions involving associational freedoms "establish that the right of association is a basic constitutional freedom." However, the Court observed that "even a 'significant interference' with protected

rights of political association" may be sustained if the state demonstrates "a sufficiently important interest and employee means closely drawn to avoid unnecessary abridgment of associational freedoms." *See* 424 U.S. at 25, 96 S.Ct. at 638, 46 L.Ed.2d at 691.

In *Buckley*, the Court noted that the campaign contribution limitations were justified because the regulations only affected large contributions where the actuality and potential for corruption have been clearly identified, 424 U.S. 28, 96 S.Ct. 39, 46 L.Ed.2d 693. But the Court also contrasted limitations on the amount of financial contributions with prohibitions on contributions altogether:

> The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.
>
> 424 U.S. 21, 96 S.Ct. 635-36, 46 L.Ed.2d 689.

We think the above-quoted passage suggests the Supreme Court would be very reluctant to sustain a total ban on any financial contributions because of the qualitative symbolism inherent in offering financial support to a candidate or ballot issue.

A. Nonpartisan Political Contributions.

In a pre *Letter Carriers* and *Buckley* case, *Mancuso v. Taft*, 341 F. Supp. 574 (D.R.I. 1972), a police officer ran for public office without resigning in violation of a city charter provision forbidding city employees from running for public office and prohibiting "any contributions to the campaign funds of any political organization or candidate for office." In analyzing this provision, the Court noted:

> In addition to its other faults, the section does not limit itself to partisan political activity . . . While it may be permissible to restrict political activities such as using official authority for partisan political purposes, political coercion of subordinates, or noncompliance with the merit system in promotion, the shotgun approach taken here, is impermissible.
>
> *Id.* at 582.

A similar approach to *Mancuso* was taken in *Gray v. City of Toledo*, 323 F.Supp. 1281 (N.D. Ohio 1971). In that case, the Court held unconstitutional a city charter provision which prohibited "soliciting or receiving any assessment, subscription, or contribution for any political party or purpose." The Court noted:

> The phrase 'political purpose,' which is presented in the disjunctive, is not limited to conduct regarding partisan officers and issues but relates equally to all candidates and questions, whether or not they are identifiable with a political party (citations omitted). The latter activity, of course, is protected speech. Its bearing upon the efficiency and integrity of the public service is dubious at best and is violative of plaintiffs' first and fourteenth amendment rights.

Id. at 1287.

See also, Lecci v. Cahn, 360 F.Supp. 759 (E.D. N.Y. 1973), *vacated on other grounds*, 493 F.2d 826 (2d Cir. 1974) (proscription of nonpartisan activity by police officers held unconstitutional abridgment of First Amendment), *Alderman v. Philadelphia Housing Authority*, 496 F.2d 164, *cert. denied* 419 U.S. 844 (1974) (3rd Cir. 1974), *Magill v. Lynch*, 400 F.Supp. 84 (D.R.I. 1975), 560 F.2d 22 (1st Cir. 1977).

In addition to this authority, it is difficult to see how a contribution by an assessor or deputy assessor to a nonpartisan committee—for example, those supporting or opposing the Iowa Equal Rights Amendment—could impair the efficiency or integrity of the property tax system. And, as mentioned above, nonpartisan candidate elections generally do not spawn the abuses to which Hatch Act style legislation is addressed. Given the leery approach in *Buckley*, we think it highly likely that an Iowa court would find S.F. 466 unconstitutional to the extent it prohibits contributions for nonpartisan purposes.

B. Partisan Contributions.

Senate File 466 proscribes financial contributions by assessors and deputy assessors in support of any candidate for public office. The proscription on its face applies to all candidates for local, state, or federal office.

We think it clear that a statute prohibiting an assessor from *soliciting* a political contribution from a property taxpayer would pass constitutional muster. *Ex parte Curtiss*, 106 U.S. 371, 1 S.Ct. 381, 27 L.Ed. 232 (1883). The state may, if it chooses, enact such a statute to insure that assessors do not use their public position to subtly tease or brutally coerce contributions from otherwise unwilling taxpayers. In this context, the government interest in limiting the political activities of local assessors is plainly sufficiently compelling to override the First Amendment interests in associations that are affected by the regulation.

But S.F. 466 is much broader. It prohibits assessors and their deputies, as citizens, from making voluntary, unsolicited political contributions to candidates of their choice. The statute is not limited to on the job activity or off the job actions where the actor expressly or impliedly invokes his governmental authority in an improper manner.

We have discovered no case upholding such a sweeping proscription of voluntary financial contributions to partisan candidates. One case, *Schillen Park Colonial Inn, Inc., v. Berg*, 349 N.E.2d 61, 63 Ill.2d 499 (1976), does uphold a similar restriction which was applicable to holders of liquor licenses, but even if this case is good law—which is doubtful, *see, Adams v. Sutton*, 212 Co.2d 1 (Fla. 1968)—the factual context is clearly distinguishable. In the case of liquor licensees, contributors seek to expand or maintain a scarce government benefit—authorization to sell popular intoxicating spirits. Licensees therefore have a peculiar tangible interest which they may corruptly seek to promote by making financial contributions to political candidates. Local assessors, however, have no similar interest that might distinguish themselves from governmental employees generally. Since assessors do not have a special interest in influencing the political system, we do not believe the state has a sufficient interest in preserving the system from overreaching assessors to sustain S.F. 466 from First Amendment attack.

It could also be argued that the purpose of the statute is not to prevent assessors from obtaining corrupt influence, but to protect them from being coerced by a local political boss into giving involuntary campaign contributions as the price for continued employment. It should be noted, however, that the Code generally provides that assessors and their deputies must first qualify by examination, *see*, §441.5, The Code, 1979, and that after appointment they may not be fired preemptorily by their superiors, but are entitled to notice and hearing at which misconduct, nonfeasance, malfeasance, or misfeasance in office must be shown, *see*, §441.9, The Code, 1979. Thus, alternative means exist to protect assessors from extortive political influence. Moreover, if these merit-oriented personnel practices are deemed to provide insufficient protection to assessors, a narrowly crafted statute which prohibits any person from *soliciting* a contribution from an assessor would provide additional insurance against undue political influence. Given the presence and availability of these less drastic alternatives, we believe Iowa courts would strike down S.F. 466 on First Amendment grounds even if its purpose was to protect assessors from improper external political pressure.

III. Summary.

In our view, S.F. 466 is constitutionally deficient in several respects. First, its restriction on nonpartisan political activity too deeply intrudes on established First Amendment rights of assessors and their deputies without the presence of a sufficiently weighty governmental interest. To the extent S.F. 466 prohibits particisan political activity, it would probably be found unconstitutionally vague in cases where the alleged conduct is not clearly within the obvious scope of the statute. Second, the restrictions on voluntary financial contributions by assessors and their deputies do not appear to be necessary in order to protect a compelling governmental interest. Given the existence of alternative avenues to protect against corruption or undue influence, the limitations on voluntary financial contributions are an unconstitutional invasion of the First Amendment rights of county assessors and their deputies.

November 2, 1979

AGRICULTURE: CONSTITUTIONAL LAW: Nonresident Aliens Restricted From Acquiring Agricultural Land: H.F. 148 (1979 Session, 68th G.A., ch. 133), Chapter 567, 1979 Code of Iowa, Art. 1, §22; Art. 1, §6; Art. III, §1, Iowa Constitution; 5th and 14th Amendments, United States Constitution; Immigration and Nationality Act, 8 U.S.C. §1101, **et seq.** Act preventing nonresident aliens, foreign businesses and foreign governments from acquiring interests in agricultural land except if by devise or descent or if less than 320 acres to be converted to a nonfarm use within five years is constitutional under both the Iowa and United States Constitutions. The Act represents a proper use of the state's police power to define and control property rights and to protect an owner-controlled agricultural political community. The Act does not violate Art. 1, §22 of the Iowa Constitution which protects the rights of resident aliens to buy property or improperly delegate Iowa legislative power to Congress. If equal protection applies, the state could satisfy the applicable rational basis test. Procedures for escheat and divestiture do not violate due process. The Act is not an improper intrusion into the foreign relations power of the federal government and is not pre-empted by existing federal law. Existing treaty obligations may override the Act if the purchase of agricultural land is allowed; if not, the Act controls. The Act does not improperly interfere with foreign commerce. (Miller and Hamilton to Sen. Murray, 11-2-79) #79-11-1

Mr. John S. Murray, State Senator: You have asked for an opinion of the Attorney General concerning the constitutionality of H.F. 148, 1979 Session, 68th G.A., Ch. 133, [hereinafter H.F. 148] which makes a number of changes in the Iowa law relative to the rights of nonresident aliens to acquire, hold, and transfer agricultural land in this state. Specifically, you asked for an opinion on two issues:

1. Does H.F. 148 violate the provisions of the Iowa Constitution, in particular Article 1, §22, which provides that "[f]oreigners who are or may hereafter become residents of this state, shall enjoy the same rights in respect to the possession, enjoyment and descent of property, as native born citizens"?

2. Does H.F. 148 violate the provisions of the United States Constitution, in particular, Amendment XIV, §1 or other provisions of federal law?

The nature of the questions and the number and extent of the issues involved in this matter dictate that the analysis of your request be somewhat lengthy. This legislation touches on a great number of significant constitutional issues including equal protection, preemption, federal supremacy in foreign relations, due process, and the treaty power. In addition, the operation of the statute is complex and it will take some space to explain and outline its functioning.

The development and discussion of each of the constitutional issues raised by H.F. 148 under both the federal and state constitutions is set forth below. For clarity, however, we should at the outset advise that it is the opinion of the Attorney General that H.F. 148 as it now reads is constitutional and should withstand challenge in the courts. While there are no simple answers to the issues presented it is our opinion that such legislation is a valid exercise of the state's power to define and control the ownership of real property and to protect and promote an owner-controlled, agricultural-based political community.

I. THE LEGISLATION AND ITS OPERATION

House File 148, which becomes effective January 1, 1980, is a bill principally aimed at limiting nonresident aliens' ability to purchase or acquire agricultural land in the State of Iowa. The law was passed unanimously by both houses of the Iowa Legislature and sent to the Governor, who signed it into law on June 10, 1979.

When the Act becomes effective January 1, 1980 it will repeal Chapter 567 of The Code, which contains a number of previously enacted restrictions, some dating back to 1885, dealing with the ownership of land in the state by nonresident aliens. The provisions of Ch. 567 include:

1. A general restriction on nonresident aliens, corporations incorporated under the laws of a foreign country, and corporations organized in this country one-half of the stock of which is owned or controlled by nonresident aliens from owning land in the state, except as otherwise provided.

2. A provision authorizing nonresident aliens to acquire or hold title to up to 640 acres outside the corporate limits of a city, and unlimited holdings inside city limits.

3. Provisions relating to inheritance by aliens.

4. Rules for the escheat of real estate held or acquired in violation of the Code.

5. Annual reporting requirements for nonresident aliens owning or leasing agricultural land or engaged in farming outside the corporate limits of any city.

6. Detailed definitions of "nonresident alien" and "beneficial ownership".

The enactment of H.F. 148 altered the law of this state as applied to nonresident aliens in several respects. The major points of the new law are the following:

1. It is unlawful for a nonresident alien, foreign business or foreign government, as defined, to purchase or otherwise acquire agricultural land, except that they may acquire up to 320 acres for conversion to a nonfarm use within five years.

2. Land acquired prior to the effective date of the law is exempted, but these landholders may not obtain any additional land.

3. Divestiture within two years may be required if a landholders' status changes to that of a nonresident alien or foreign business and, in limited circumstances, if the land was obtained between July 1, 1979 and January 1, 1980 and is being inherited by another nonresident alien.

4. Nonresident aliens are defined by reference to federal laws dealing with immigration.

5. All owners or purchasers of land subject to the Act must file a one-time registration with the Secretary of State within either sixty days of the purchase of the land or of the effective date of the Act, whichever is later.

6. Parties purchasing land for conversion to a nonfarm use must file annual reports with the Secretary of State on the status of the change in use.

7. Penalties are provided for failure to register or report and escheat is provided for violations of the restrictions on acquiring or converting farm land.

Since the changes made by H.F. 148 are very significant, it is important to consider several sections of the new law in greater detail. The major provision of the law is set forth in §3 which provides:

ALIEN RIGHTS. A nonresident alien, foreign business or foreign government may acquire, by grant, purchase, devise or descent, real property, except agricultural land or any interest in agricultural land in this state, and may own, hold, devise or alienate the real property, and shall incur the same duties and liabilities in relation thereto as a citizen of the United States.

This section sets forth the general ban on nonresident aliens purchasing or otherwise acquiring an interest in agricultural land in the state. It does, however, allow these individuals to obtain interests in all other types of real property. Since the acquisition of a leasehold interest in land results in the acquisition of an interest in land, H.F. 148 would apply to leases of agricultural land as well as outright purchases or other forms of conveyances. *See* §558.1, The Code 1979. *See also* Burley, *Real Property*, §45, p. 116 (1965).

Section 2 of the Act contains the definitions which establish who is subject to the Act. A "nonresident alien" is defined as:

an individual who is not a citizen of the United States and who has not been classified as a permanent resident alien by the United States immigration and naturalization service.

A "foreign business" is defined as:

a corporation incorporated under the laws of a foreign country, or a business entity whether or not incorporated, in which a majority interest is owned directly or indirectly by nonresident aliens. Legal entities, including but not limited to trusts, holding companies, multiple corporations and other business arrangements, do not affect the determination of ownership or control of a foreign business.

A "foreign government" is defined as:

a government other than the government of the United States, its states, territories, or possessions.

Section 4 of the Act sets forth other restrictions on nonresident alien agricultural land holdings, but also contains the major exception to the Act. The section reads:

RESTRICTION ON AGRICULTURAL LAND HOLDINGS.

1. A nonresident alien, foreign business or foreign government, or an agent, trustee or fiduciary thereof, shall not purchase or otherwise acquire agricultural land in this state. A nonresident alien, foreign business or foreign government, or an agent, trustee or fiduciary thereof, which owns or holds agricultural land in this state on the effective date of this Act may continue to own or hold the land, but shall not purchase or otherwise acquire additional agricultural land in this state.

2. A person who acquires agricultural land in violation of this Act or who fails to convert the land to the purpose other than farming within five years as provided for in this Act, remains in violation of this Act for as long as the person holds an interest in the land.

3. The restriction set forth in subsection one (1) of this section does not apply to agricultural land acquired by devise or descent nor shall it apply to an interest in agricultural land, not to exceed three hundred twenty acres, acquired by a nonresident alien, foreign business or foreign government, or an agent, trustee or fiduciary thereof for an immediate or pending use other than farming. However, a nonresident alien, foreign business or foreign government, or an agent, trustee or fiduciary thereof, who lawfully owns over three hundred twenty acres on the effective date of this Act, may continue to own or hold the land, but shall not purchase or otherwise acquire additional agricultural land in this state except by devise or descent from a nonresident alien. Pending the development of the agricultural land for another purpose other than farming, the land shall not be used for farming except under lease to an individual, trust, corporation, partnership or other business entity not subject to the restriction on the increase in agricultural land holdings imposed by section one hundred seventy-two C point four (172C.4) of the Code.

4. A nonresident alien, foreign business or foreign government, or an agent, trustee or fiduciary thereof shall not transfer title to or interest in agricultural land to a nonresident alien, foreign business or foreign government, or an agent, trustee or fiduciary thereof except by devise or descent.

Section 4 provides that a nonresident alien, foreign business or foreign government shall not purchase or otherwise acquire agricultural land in the state. Those who already own or hold more than 320 acres of

agricultural land on the effective date of the Act may continue to do so, but may not acquire or purchase additional agricultural land.

The major exception to the restrictions in H.F. 148 is found in subsection 3 of Section 4, which provides that the restriction in subsection 1 of Section 4 does not apply to agricultural land which is acquired by devise or descent, or to an interest in agricultural land not to exceed three hundred twenty acres if acquired for an immediate or pending use other than farming. Thus, under this provision a nonresident alien, foreign business, or foreign government can acquire agricultural land, but the land has to be converted to a nonfarm use within five years. Pending the development of the land to a nonfarm use, it can only be farmed under lease to an individual, trust, corporation, partnership or other business entity that is not subject to the restriction on the increase in agricultural land holdings that is imposed by §172C.4, The Code 1979.[1] It is a violation of the Act to fail to convert the land to a nonfarm use within five years.

In addition to the restriction in section 4, sections 6 and 7 provide for divestiture of land in limited circumstances. These provisions are discussed in detail later. The statute also establishes a one-time registration system for alien land holdings and requires annual reports from those availing themselves of the exception for conversion to a nonfarm use in five years. The Act also contains several other provisions meant to enhance its enforceability. For instance, Section 10 provides for an escheat procedure whereby the Secretary of State and the Attorney General working together in the District Court may have land that was acquired or retained in violation of the Act escheated to the state. If this occurs the real estate is to be sold in the manner provided for the foreclosure of real estate mortgages on default. The proceeds are to be used to pay court costs and to pay the person from whom the property was escheated. However, the person cannot be paid an amount exceeding the actual cost of the property. Any proceeds that remain after this payment are then to be placed in the general fund of the county. Section 12 of H.F. 148 provides that any nonresident alien, foreign business, or foreign government who fails to register as required by Section 8 or fails to file a report as required by Section 9 is punishable by a fine of not more than $2,000.

That, in essence, is H.F. 148. In concept, it is similar to statutes passed by several other midwestern states in the last two years. All of the statutes have the same basic purpose, i.e., to provide some protection for the family farm system from the pressures of foreign investors. *See e.g.* Minn. Stat Ann §500.221 (Supp. 78), Mo. Rev. Stat. §452.560. House file 148 plainly reflects legislative concern about the effects of nonresident alien ownership of farm land. The state has enacted various reporting requirements designed to provide accurate information on the extent of alien land holdings. *See*, Chs. 567 and 172C. The Code 1979. In the judgment of the legislature H.F. 148 was necessary to further address the problem of nonresident alien ownership of farm land. The legislature's decision must carry a great deal of weight in the analysis

[1] The use of the word "lease" would appear to require that nonresident aliens enter into farm leases for their property, rather than using custom operators to provide the necessary tillage operations.

of the constitutionality of H.F. 148. Section 4.4(1), The Code 1979, provides that by enacting a statute, it is presumed that "compliance with the Constitutions of the state and of the United States is intended." The Iowa Supreme Court recently reaffirmed the strength of this presumption in *Woodbury County Soil Conservation District v. Ortner*, 279 N.W. 2d 276, 277 (Iowa 1979). The Court said, "[i]n considering the constitutionality of legislative enactments, we accord them every presumption of validity and find them unconstitutional only upon a showing that they clearly infringe on constitutional rights and only if every reasonable basis for support is negated." *See also, Bryon v. City of Des Moines*, 261 N.W.2d 685, 687-88 (Iowa 1978) and the cases cited therein.

II. ISSUES CONSIDERED

The analysis of H.F. 148 encompasses many significant questions of constitutional doctrine. While it is not realistic to presume that this opinion can resolve every nuance of each possible constitutional question, the most significant questions raised by H.F. 148 are addressed. The constitutional issues discussed herein include:

1. Does the restriction on land holdings by nonresident aliens violate Art. 1, §22, of the Iowa Constitution?

2. Does the reliance on federal law to define "nonresident alien" constitute an unlawful delegation of Iowa legislative power?

3. Does the classification created by H.F. 148 violate the equal protection clause of either the 14th Amendment of the United States Constitution or Art. 1, §6, of the Iowa Constitution?

4. Do the restrictions of H.F. 148 violate the due process clauses of either the 5th and 14th Amendments of the United States Constitution or Art. III, §1, of the Iowa Constitution?

5. Is H.F. 148 an improper intrusion by the State of Iowa upon the foreign relations power of the federal government?

6. Is H.F. 148 limited by treaty obligations made between the United States and other nation-states?

7. Is H.F. 148 preempted by existing federal law thus making it an improper subject for state legislation?

8. Is H.F. 148 an infringement on the federal power to regulate commerce with foreign nations?

In order to address the specific state and federal constitutional questions concerning H.F. 148, it is important to first clarify exactly what classification is made by the statute. While H.F. 148 places limits on the ability of a nonresident alien to own agricultural land, the classification is not one of simply distinguishing between all aliens and U.S. citizens. Such an alienage classification would entail the type of discrimination against lawful-resident aliens that the U.S. Supreme Court has found to be subject to the increased level of scrutiny under equal protection analysis which one commentator has described as "strict in theory and fatal in fact".

Instead, the Iowa law distinguishes between citizens and aliens classified as "permanent resident aliens" by the Immigration and Naturaliza-

tion Service on the one hand, and nonresident aliens on the other hand. By using this definition, the Iowa law attempts to distinguish between U.S. citizens and resident aliens who are actually in the United States with an intention of remaining here on a permanent basis, and those aliens who are nonresidents. Thus, the classification is made within the class of aliens based on nonresidency in the United States.

One concern with the Iowa definition of nonresident aliens though is that by using federal law to define nonresident alien there are, in effect, two types of nonresident aliens. This is true because under the Immigration and Nationality Act of 1952, 8 U.S.C. §1101, *et seq.*, the process of being classified as a permanent resident alien is equivalent to that of being classified as an immigrant. Section 1101(a)(20) provides that the term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Section 1101(a)(15) defines "immigrant" to mean "every alien except an alien who is within one of the following classes of nonimmigrant aliens."[2]

Section 1184(b) provides that "[e]very alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer . . . that he is entitled to nonimmigrant status under 8 U.S.C. §1101(a)(15) of this title". Due to the distinction made by the federal law the Iowa definition of "nonresident alien" creates a classification containing two types of nonresident aliens, the first being those aliens who reside in foreign countries and are not present in the United States, and the second being those aliens who may be present in the United States but who are of "nonimmigrant" status. The significance of this classification is not immediately clear, but it poses questions under both Article 1, §22, of the Iowa Constitution and under the equal protection clause of the Federal and Iowa Constitutions.

III. IOWA CONSTITUTIONAL PROTECTION FOR RESIDENT ALIENS

The first question you pose concerns whether the H.F. 148 restrictions on the power of "nonresident aliens" to hold agricultural land violate Art. 1, §22, of the Iowa Constitution. Article 1, §22, provides that:

> Foreigners who are or may hereafter become residents of this state, shall enjoy the same rights in respect to the possession, enjoyment and descent of property, as native born citizens.

This provision was adopted in the first Iowa Constitution during a time when waves of foreigners were immigrating to Iowa to settle the land and to farm in the state. It was designed to ease the common law restrictions which had traditionally barred aliens from acquiring interests in property, either by purchase, descent, or devise. *Stemple v. Herminghouser*, 3 Greene 408 (Iowa 1852).

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[2] That section defines twelve classes of nonimmigrant aliens which, including subclasses, describes seventeen types of nonimmigrants. These classes include such groups of aliens as temporary visitors, foreign students here on student visas, and diplomats, their employees and families. *See* 8 U.S.C. §1101(a) 15(A)-(L).

But, the Iowa Supreme Court in *Stemple* construed the effect of Art. 1, §22, narrowly, saying:

> Here is a material change in favor of the foreigner. It being a part of the wise policy of our government to encourage the immigration and settlement of foreigners; to place them as nearly as possible upon an equal footing with native born citizens, to secure to them the possession and inheritance of real property, this wholesome provision was engrafted into the fundamental law of the state. But it will be observed that this applies only to *resident* foreigners, and those who may become *resident* . . . so far as *non-resident aliens* are concerned, while they remain such, the common law is unchanged. If they become residents of Iowa, they then enjoy the same rights of property as native born citizens". [emphasis in the original] 3 Greene at 410-411.

The basic holding of *Stemple* still stands as the definitive Iowa decision interpreting the meaning of Art. 1, §22, of the Constitution. Note, "Property Rights of Aliens Under Iowa and Federal Law", 47 Iowa L.Rev. 105, 106 n. 9 (1961). The rule is that Art. 1, §22, protects only aliens who are actually *resident* in the state.

While the term resident is not expressly defined in either Art. 1, §22, or *Stemple* the term appears to mean being physically present with a good faith intention to make a permanent home in the state. The Iowa Court has recognized that "resident" is an elastic word with varied statutory meaning depending on the context of the statute in which it is used and the purpose and object to be attained. *Pittsburg-Des Moines Steel Co. v. Clive*, 249 Iowa 346, 91 N.W.2d 602 (Iowa 1958). One can infer from the date of passage that Art. 1, §22, was intended to benefit foreigners who came to the state to settle permanently, to aid them in their ability to acquire property. The provision was not intended to allow nonresident foreigners to purchase land in Iowa. The common law barred this and the constitutional provision did not explicitly remove this restraint.

For this reason Art. 1, §22, offers no solace to nonresident aliens living abroad who are prevented by H.F. 148 from purchasing Iowa farm land. The question then is whether Art. 1, §22, offers some protection to those nonimmigrant aliens who may be present in the state but who are under the restraint of H.F. 148.

Since Art. 1, §22, was intended to aid only those foreigners who moved to Iowa to take up permanent residence, it is reasonable that the provision was not intended to protect those foreigners who may be present in the state temporarily as nonimmigrant visitors. In the context of Art. 1, §22, the term "resident" is a form of bona fide residence requirement, whereby the state attempts to determine if a foreigner *is* a resident of the state, in contrast to a durational residence requirement which considers whether a party *has been* a resident. This decision is usually based on a measure of subjective attachment to a community. For the most part, bona fide residency is determined by a party's intentions. As H.F. 148 relates to Art. 1, §22, the legislature was considering nonresident aliens' subjective attachments to the community. By enacting a statute to prevent this form of absentee ownership of agricultural land, the legislature tried to identify those individuals who have a basic subjective permanent relationship to the community. For this reason the legislature decided to allow immigrants to own farm land but not nonimmigrants. Nonimmigrants do not have the same subjective intention to

permanently remain in the community as do those classified as permanent resident aliens. Therefore, to say that nonimmigrants are residents for the purpose of Art. 1, §22, would violate the basic intent of the provision and extend its protection beyond its natural dimension.

We recently issued an opinion supporting a classification that distinguished between individuals based on their subjective attachment to the community. In Op. Att'y. Gen. #79-6-12 (Appel to Murray) the question was whether a nonresident alien student is a resident for the purpose of receiving free medical care. The Attorney General stated that aliens present in Iowa on student visas are not entitled to free medical care under Ch. 255, The Code 1979, citing 1930 Op. Att'y Gen. 154 which said:

"legal resident of Iowa" . . . in our opinion should be defined as a residence in the county with the good faith intention of making a home in said county coupled with the physical facts showing such intention. That is, the residence must not be for a temporary purpose only but must be with present good faith intention of making it a home without any present intention of removing therefrom.

In the foreign student situation the applicable United States immigration laws require that a student admitted to this country be "an alien having a residence in a foreign country which he has no intention of abandoning", 8 U.S.C. §1101(a)(15)(j), and that he return to his country for a period of two years before being eligible to apply for permanent residence in the U.S. For this reason, we felt that foreign students were disabled from being treated as "legal residents" of the State of Iowa for the purpose of Ch. 255, because while "legal resident" is interpreted as requiring an intention to remain, a student visa is inherently temporary.

The situation with free medical treatment to legal residents under Ch. 255 is analogous to granting rights to buy property to "resident" foreigners in that one aspect of "residency" is the permanency of the relationship. In each case, the purpose is forwarded by requiring an aspect of permanency in the relationship between the person and the state.

The definition "nonresident alien" in H.F. 148, restricts only those foreigners who are not physically present in the state, or those nonimmigrants who although present in the state are not "residents" for the purpose of Art. 1, §22. Therefore it is the opinion of the Attorney General that H.F. 148 does not infringe on the rights guaranteed certain resident foreigners under Art. 1, §22, of the Iowa Constitution.

IV. DELEGATION OF LEGISLATIVE POWER

Another question that arises under the Iowa Constitution is whether the reliance on the federal definition of "permanent resident alien" to define a "nonresident alien" in H.F. 148, is an unconstitutional delegation of legislative power. Art. III, §1, of the Iowa Constitution provides:

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

The concern is that the reliance on the definition of "permanent resident alien" as provided by the Congress and set forth at 8 U.S.C. §1101 (a) (20), may violate the principle of Art. III, §1. The general rule in Iowa is that the legislative function may be delegated to another branch of government only if adequate guidelines for its exercise accompany the delegation. *Elk Run Telephone Co. v. General Telephone Co.*, 160 N.W.2d 311, 317 (Iowa 1968). *See generally*, Note, "Safeguards, Standards and Necessity: Permissible Parameters for Legislation Delegation in Iowa", 58 Iowa L.Rev. 974 (1973). Although it may appear that H.F. 148 creates a question of delegation there is a difference between an unconstitutional delegation of legislative authority and the mere adoption by reference of a definition established by another body, in this case Congress. Arguably if the legislature had said that the limit on nonresident alien purchases of land applied to those people who Congress at some future date define as nonresident aliens that would be impermissible. An opinion of this office, 1967 Op. Att'y Gen. 169, said that the legislature "can not adopt, as guide lines, such standards which do not already exist or which may hereafter be promulgated. And, it can not even adopt, as the bill specifically attempts to do, "subsequent amendments" to the Federal Act itself". *See* 16 Am.Jur.2d Con. Law §245.

But that same opinion states that "[T]he legislature can adopt by reference the Secretary's uniform standards promulgated under the Federal law as its own guidelines, if they are in existence when the bill is enacted." In this situation, the legislature chose, in its good judgment, to use the Congressional definition of a "permanent resident alien" to determine who is a nonresident alien. It is our opinion that the adoption of the Congressional standard as the state standard is not a delegation of power, but rather is the selection of an existing standard.

A strong argument can be made that the legislature acted properly, perhaps even by necessity in relying on the Federal law to define nonresident alien. This is true because the U.S. Supreme Court has held that matters of immigration and naturalization are reserved solely to the Federal government under the supremacy doctrine. A sure way for a state to cross the line into unconstitutionality is to attempt to legislate in the area if immigration and naturalization. *See Hines v. Davidowitz*, 312 U.S. 52, 85 L.Ed. 581, 61 S.Ct. 399 (1941), and discussion *infra* at p. 27.

The real question concerning the legislature's adoption of federal law to aid in defining "nonresident alien" is whether that adoption is specific enough to provide a sufficient standard under the delegation doctrine. The problem arises from the fact that the legislature did not set forth the year or the specific code section on which it relied. Although it can easily be determined that the legislature was referring to 8 U.S.C. §1101 (a) (2), United States Code, the question is if this is a sufficient standard for delegation purposes.

The 1967 Attorney General's opinion cited above established that the legislature could not prospectively adopt a subsequent amendment to a Federal act. For that reason, the definition of "permanent resident alien" is frozen in time to the definition that existed when H.F. 148 was passed. That definition as noted above, is set forth at §1101(a)(20) of the United States Code. Since the legislature did not refer to a specific

definition of "permanent resident alien" that predated H.F. 148 it is entirely logical to assume that they were referring to the current definition. This is particularly true since the definition of "permanent resident alien" contained in the U.S. Code has remained unchanged since enacted in the Immigration and Nationality Act of 1952. Based on this theory, the definition of "permanent resident alien" that was relied on by the legislature can be seen as being that set forth in 8 U.S.C. §1101 (a) (20) of the United States Code. It is our opinion that this definition is the one intended by the legislature and that it is a sufficient standard for delegation purposes.

V. EQUAL PROTECTION AND RESTRICTIONS ON NONRESIDENT ALIENS

The 14th Amendment of the United States Constitution provides that:

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The Iowa Constitution contains a similar protection in Art. 1, §6, which says in pertinent part:

All laws of a general nature shall have a uniform operation . . . .

It is well-settled law in this state that Art. 1, §6 of the state constitution places substantially the same limitations on state legislation as does the equal protection clause of the 14th Amendment of the Federal Constitution. *City of Waterloo v. Selden*, 251 N.W.2d 506 (Iowa 1977). Therefore, the discussion of the constitutionality of H.F. 148 as ti concerns equal protection will be treated in one section. So, while the analysis of equal protection is couched in terms of the federal equal protection clause, the analysis is applicable to the concerns under the equal protection clause of the Iowa Constitution.

H.F. 148 contains a classification that distinguishes between 1) citizens and resident aliens and 2) nonresident aliens, for the purposes of acquiring agricultural land in the state. The main issue presented by the Act is whether this classification violates the equal protection clause of the 14th Amendment and Art. 1, §6. This issue can best be resolved by addressing the three subissues it spawns:

1. Would "nonresident aliens", as defined by H.F. 148, be entitled to invoke the equal protection clause?

2. If so, would a reviewing court apply the same strict scrutiny applicable to classifications distinguishing between citizens and resident aliens to this classification?

3. If not, would this classification survive review under a rational basis standard?

The question of whether nonresident aliens are entitled to invoke the equal protection clause depends on the meaning given to the phrase "within its jurisdiction". There are several varying points of view on this matter.

First, there are a number of courts and commentators that believe nonresident aliens are not protected by the equal protection clause. This theory stems from a narrow reading of the "within its jurisdiction"

provision of the 14th Amendment, which premises that since nonresident aliens are not present in the United States and thus not "within" the jurisdiction of the state, equal protection does not apply.[3] The Fifth Circuit, in *DeTenerio v. McGowan*, 510 Fd.2d 92, 101, *cert. denied* 423 U.S. 877 (1975), stated that "it is equally obvious that the Fourteenth Amendment, by its own terms, has no application to aliens not within the jurisdiction of the United States". In *Shames v. State of Nebraska*, 323 F.Supp. 1321, 1333 (D.Ct. Neb. 1971), *affr mem.* 408 U.S. 901 (1972) the author of the majority opinion, speaking alone said that "this Court concludes that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution has no application to the nonresident alien plaintiffs appearing in this case". The court reasoned that, "while aliens residing within a state are clearly entitled to" the equal protection of its laws, the same is not true of nonresident aliens and a state is not constitutionally required to accord the equal protection of its laws to this latter group of aliens".

However, there are other authorities who argue that nonresident aliens are entitled to some level of equal protection. Several commentators, who have been joined by at least one court, believe that the "within its jurisdiction" provision of the equal protection clause means more than mere physical presence, reasoning that a nonresident alien is in fact subjected to the state's jurisdiction by the implementation of the prohibition on land purchases. Moreover they reason a nonresident alien admitted to the United States, perhaps as a tourist, could personally appear in the adjudicatory tribunal and thus be subject to the state's jurisdiction. *See* Morrison, "Limitation on Alien Investment in American Real Estate," 60 Minn. L.Rev. 621, 642 (1976), *see also* Note, "Property Rights of Aliens Under Iowa and Federal law", 47 Iowa L.Rev., 105, 115 (1961). Thus, a statute which prohibited a person from buying land while present in the state on the basis that he was not a resident of the state or the United States would fall within the equal protection clause. Fisch, "State Regulation of Alien Land Ownership", 43 Mo. L.R. 407, 414 (1978). Under this theory a nonresident alien is entitled to some level of equal protection, that level being dependent on the interest that is restricted by the state statute.

At this time, we need not resolve the issue of whether nonresident aliens are entitled to equal protection, but if they were not then the issue would be moot. Assuming that equal protection would apply to those aliens restricted by H.F. 148, the question becomes what test a reviewing court would apply.

As to the test to be used, the Supreme Court has established a continuum of tests, which vary depending on the interest affected and the classification involved. These tests are:

1. A low-level rational basis test which is applicable to most legislative enactments. *Dandridge v. Williams*, 397 U.S. 471 25 L.Ed.2d 491, 90 S.Ct. 1153 (1970).

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[3] *See*, Liebman and Levine, "Foreign Investors and Equal Protection", 27 Mercer L.R. 615 (1976), who after discussing the two theories of equal protection coverage for nonresident aliens stat that there has been little extension of the equal protection clause to nonresident aliens.

2. An intermediate rational basis-with-bite test which is applicable to certain types of gender-based classifications. *Craig v. Boren*, 429 U.S. 190, 50 L.Ed.2d 393, 97 S.Ct. 451 (1976).

3. The highest level test of strict scrutiny, which is applied to classifications involving fundamental rights or suspect classifications. *See e.g. Graham v. Richardson*, 403 U.S. 365 29 L.Ed.2d 534, 91 S.Ct. 1848 (1971).

For a classification to be invalid it must fail to pass the level of scrutiny that is applied to the interest or class in question.

Any challenger to H.F. 148 would likely contend that the classification is based on alienage and thus is subject to the compelling state interest test, i.e., that the classification involves a suspect class and must be subject to strict scrutiny. The classification could then only be sustained if it were shown to serve a compelling governmental interest. It is this test that Gunther has referred to as "strict in fact but fatal in effect". Gunther, "Foreward—In Search of Evolving Doctrine as a Changing Court: A Model for a Newer Equal Protection", 86 Harv. L.Rev. 1, 8 (1972).

The contention that H.F. 148 should be judged under strict scrutiny is based on the following theory. The statute creates a classification based on alienage. Recent Supreme Court cases show that classifications based on alienage are inherently suspect. *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973) and *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848 29 L.Ed.2d 534 (1971). Classifications that are inherently suspect are subject to the compelling governmental interest test. Therefore H.F. 148 is subject to strict scrutiny. If this theory were indeed persuasive, then it is probable that H.F. 148 could not survive equal protection scrutiny since the test of strict scrutiny is so severe. But, for a number of reasons, we are of the opinion that H.F. 148 would not be subject to strict scrutiny.

First, H.F. 148 does not make a classification that is based on alienage. While the statute deals with aliens, the classification is made between classes of aliens based on their nonresidency in the United States. This is different from distinguishing between all citizens and all aliens. Those who are citizens or permanent resident aliens are not subject to the restriction of H.F. 148. It is only those aliens who are nonresidents of the United States that are subject to the restriction of H.F. 148.[4]

This distinction is critical, because although the Supreme Court may apply strict scrutiny to classifications involving resident aliens,[5] the Court has never held that nonresident aliens are a suspect class.

The Wisconsin Supreme Court in *Lehndorff Geneva, Inc. v. Warren*, 246 N.W.2d 815, 820, (Wis. 1976), when considering what effect the U.S. Supreme Court's alienage holdings would have on a statute quite similar to H.F. 148, summed up the present state of the law very accurately when it stated:

As noted earlier, some aliens actually present in the United States may be subject to the restrictions of H.F. 148. We do not believe that this fact adversely affects the validity of the Act because the Supreme Court has never held that nonimmigrant aliens are a suspect class for equal

In considering the applicability of these decisions to nonresident aliens, two points emerge. The first is that these cases deal only with resident aliens; second, the question of whether nonresident aliens constitute a suspect class has not been decided either in these opinions or in any other jurisdiction.

The Wisconsin Supreme Court in *Lehndorff Geneva, Inc. v. Warren*, 246 N.W.2d at 821 was faced with the question that we are when it was "called on to decide whether nonresident aliens have the same rights as resident aliens with respect to the purchase of real property". It concluded that "the plaintiffs do not possess the characteristics which warrant heightened judicial solicitude and the state has acted in an area traditionally within its province". 246 N.W.2d at 824.

The *Lehndorff* court reached this conclusion after reviewing the cases which called for heightened judicial solicitude towards aliens. The court noted the cases always involved resident aliens, who like citizens, bore the burdens imposed by society but not the sought-after benefits. The Wisconsin Court noted the language from *In Re Griffiths*, 413 U.S. at 722 (1973), that:

Resident aliens, like citizens pay taxes, support the economy, serve the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities.

The *Lehndorff* Court then said:

None of these considerations appears in the instant case, in which foreign nationals who reside outside our boundaries have voluntarily associated with each other simply to have an investment vehicle here. The duties and burdens shared by the resident alien in common with the citizen entitles him to most of the benefits enjoyed by citizens. But burden sharing, except for payment of taxes in connection with the ownership or development of the land, is lacking in the case of nonresident aliens in the case before us. 246 N.W.2d at 822.

The logic of the Wisconsin Supreme Court's analysis is persuasive because H.F. 148 is designed to prevent the same type of nonresident alien investment in farm land as does the Wisconsin statute. Nonresident aliens do not bear the same characteristics that have made the courts view resident aliens as a suspect class. Nonresident aliens have only a

(Footnote Cont'd)

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protection purposes. The Court may soon get an opportunity to do so in a case which arises from the Maryland Board of Regents decision to refuse to grant "in state" status for tuition purposes to nonimmigrant alien students, who are dependents of parents who hold G-4 visas i.e. a nonimmigrant visa granted to all officers or employees of international treaty organizations and members of their families. For a discussion of that case and its implications, *see*, Comment, "Immigration Law: Domicile—*Elkins v. Moreno*, 435 U.S. 647 (1978)", 19 Harv. Int. L.J. 1031 (1979). Until the Court should make such an extension of equal protection strict scrutiny protection, we are not prepared to do so.

It is possible that the vigilance extended to resident aliens may be on the wane. Compare *Sugarman v. Dougall*, *supra* and *In Re Griffiths*: 413 U.S. 717, 32 L.Ed.2d 910, 95 S.Ct. 2851 (1973), with the recent holdings in *Ambach v. Norwick*, 99 S.Ct. 1589 (1979) and *Foley v. Connelie*, 435 U.S. 291, 55 L.Ed.2d 287, 98 S.Ct. 1067 (1978) *see also*, Comment "Constitutional Law — Equal Protection Discrimination v. Aliens", 24 NYLS L.R. 790 (1979).

limited involvement with the state, the taxation and regulation of their land. Beyond that, all of their loyalties and ties remain with their home nation. While resident aliens can not participate in the political process, the normal avenue of redress for citizens, nonresident aliens have their home government to provide some countervailing diplomatic support.

Although the nonresident alien may be a member of a minority, he is not part of an isolated minority that would merit special judicial protection. Morrison, *supra* at 643. Indeed, as one commentator has put it, it is hard to see how a class which includes over ninety percent of the world's population can be a "discrete and insular minority for whom heightened judicial solitude is appropriate". Fisch, *supra* at 417.

If strict scrutiny does not apply the question is can the state satisfy a rational basis test for H.F. 148. That is, can it demonstrate a reasonable basis for the Act. In Iowa this test means that if there is any reasonable ground for which the classification in the statute is used and it operates equally upon all that are put into the same class, there is uniformity in the constitutional sense and no violation of any provision of the Iowa Constitution. *Dickinson v. Porter*, 240 Iowa 393, 35 N.W.2d 66, 72 (1948); *Ia. Motor Vehicle Ass'n. v. Brd. of R. R. Comm'ns*, 207 Iowa 461, 468, *affirmed* 280 U.S. 529. It is our opinion that a reasonable ground for H.F. 148 does exist for H.F. 148 and that it would survive equal protection scrutiny, if indeed equal protection would apply.

The states have a traditional prerogative concerning the regulation and definition of property rights, *see State Land Bd. v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 50 L.Ed. 550, 97 S.Ct. 582 (1977), *see also Blythe v. Hinckley*, 180 U.S. 333, 45 L.Ed. 557, 21 St. Ct. 390 (1901), *Haunstein v. Lynham*, 100 U.S. 483, 484, 25 L.Ed. 628 (1880), and in particular have a long history of special regulation of alien landholders. *See Terrace v. Thompson*, 263 U.S. 197, 68 L.Ed. 255, 44 S.Ct. 15 (1923); *Porterfield v. Webb*, 263 U.S. 225, 68 L.Ed. 278, 44 S.Ct. 21 (1923); *Webb v. O'Brien*, 263 U.S. 313, 68 L.Ed. 318, 44 St. Ct. 112 (1923); *French v. Webb*, 263 U.S. 326, 68 L.Ed. 323, 44 S.Ct. 115 (1923), The right of the sovereign state to restrict land ownership by aliens is deeply imbedded in our law. *See Stemple v. Herminghouser*, 3 Greene 408 (Iowa 1852). *See also*, Note, *supra* 47 Iowa L.Rev. 105 (1961).

Iowa, by its constitution, Art. 1, §22, and by legislation, (present Ch. 567 and H.F. 148) has sought to extend the rights of aliens, both resident and nonresident, to buy property in this state. When H.F. 148 becomes effective on January 1, 1980, it will remain as the sole state restriction on alien ownership of land. As was noted above, that restriction is limited in application to only agricultural land which is to be held by nonresident aliens for the purpose of farming. That the legislature could and did have a reasonable, nonarbitrary basis for the classification established by H.F. 148 is beyond question.

This basis is reflected in the concerns which gave rise to the passage of H.F. 148. One concern is that absentee ownership of land can be potentially harmful to the welfare of the community in which the land is located because persons who are neither citizens nor residents are less likely to be concerned with the welfare of the local community. Since absentee ownership of the land solely as an economic investment is in

large part premised on obtaining as high an economic return as possible from the land, another concern is for the welfare of the land itself. Finally, and perhaps most important in the Iowa experience, there is the concern that an influx of foreign investment into the market for farm land is in part responsible for the ever increasing land values which have made it extremely difficult for new and beginning farmers, the lifeblood of the continued vitality of the state's farm economy, to acquire the land resource essential for them to enter agriculture."

Each of these concerns standing alone would be sufficient for H.F. 148 to satisfy the applicable rational basis test. When considered together, these concerns make a very reasonable basis for the classification established in H.F. 148. Indeed, commentators who have studied restrictions on alien land holdings conclude they would be valid given the proper justification. Professor Morrison, when discussing the severe limitations the constitution places on such laws, concluded that restrictions on ownership of agricultural land would be the most easily defensible, *see* Morrison, *supra* at 666. It is our opinion that the restrictions of H.F. 148 are reasonably justified.

It is possible that critics of H.F. 148 would argue that while the concerns about the effect of absentee ownership are real, since H.F. 148 does not prevent absentee ownership by an American citizen living in another state, which may be just as harmful, the distinction based on nonresident alienage is therefore unreasonable. We admit that both situations can reasonably be viewed as potentially harmful in that any form of absentee ownership might result in agricultural land-use decisions inimical to the local community and to the land itself. But the potential for harm is greater in the H.F. 148 situation because a nonresident alien does not have even the minimal interest in the welfare of this country that a citizen or resident alien would have. It also must be remembered that a state is prevented from enacting a provision discriminating against citizens of another state by the privileges and immunity clause of the 14th Amendment of the U.S. Constitution.

Furthermore, the fact that the statute does not cover all possible sources of evil does not render it violative of equal protection. The Iowa Supreme Court has never held that if the legislature is to regulate that it must do so in all embracing manner. Such an argument is based on what the legislature should do, not what it can do, the question before us today. In effect, the argument is an invocation of the "least drastic means" standard which is one aspect of the compelling governmental interest test, a test which we have said does not apply in this situation. *See Dunn v. Blumstein*, 405 U.S. 330, 342-43, 92 S.Ct. 995, 1003, 31 L.Ed. 2d 274 (1972).

The welfare of agriculture is of paramount importance to this state. Our state constitution contains the express mandate, that "[t]he General

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" For a more thorough discussion of the legislature concerns about foreign investment in farm land, see Davidson, J. "Report: Agricultural Foreign Investment Act of 1978", 1 Ag.Law J. 228, 231-35 (1979). See also Comment, "Alien Ownership of South Dakota Farm Land: A Menace to the Family Farm?" 23 S.D.L.R. 735 (1978).

Assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement," Art. IX, 2d div., sec. 3. As the Iowa Supreme Court in *Dickinson v. Porter*, 35 N.W.2d at 76, (1948) said:

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. We are not convinced the legislature might not fairly conclude this law in its practical operation will both benefit and encourage agriculture.

The Attorney General reaches a similar conclusion as to the reasonableness of H.F. 148;[7] that the legislature might fairly conclude that H.F. 148 in its operation will benefit agriculture.

Based on Iowa law and the appropriate test to be applied it is the opinion of the Attorney General that:

1. While it is questionable whether nonresident aliens are within the protection of the equal protection clause, assuming they are, nonresident aliens are not a suspect class and thus the appropriate test is a rational basis test.

2. Since the state can readily meet a rational basis test for H.F. 148, the Act therefore does not violate the equal protection clause of either the Iowa or United States Constitutions.

VI. DUE PROCESS

An associated constitutional concern about H.F. 148 is the effect of the due process clauses of the 5th and 14th Amendments of the Federal Constitution and of Art. 1, §9, of the Iowa Constitution.[8] The specific concerns are first the propriety of the limited divestiture provisions of section 6 and section 7 which require divestiture within two years for an interest in agricultural land if it was:

a) acquired after January 1, 1980, by a nonresident alien, foreign business or foreign government, by devise or descent, from another nonresident alien, foreign business or foreign government that had acquired the land between July 1, 1979, and January 1, 1980, or

2) held by a person who acquired the land, other than by devise or descent after the effective date of the act, but whose status later changes to that of a foreign business or nonresident alien subject to the Act.

The second issue is the propriety of the escheat procedure set forth in section 11, which provides that land acquired in violation of the Act and land not converted to a non-farm use within five years shall be escheated to the state. Once the land escheats it is to be sold like land subject to a mortgage default with the sales proceeds used first to cover

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[7] The most exhaustive study done on the earlier Iowa law, Ch. 567, reached a similar conclusion when it said, "the Iowa statutes do not constitute an obvious violation of the equal protection clause." *See* Note, "Property Rights of Aliens Under Iowa and Federal Law", 47 Iowa L.Rev. 105, 116 (1961).

[8] As with equal protection, the wording and thus the scope of the state and federal due process clauses are coterminous. Thus, the analysis here covers both provisions. *See Davenport Water Co. v. Iowa State Commerce Commission*, 190 N.W. 2d 583 (Iowa 1971).

costs, then to pay the escheated party the purchase price, with the remaining funds going to the general fund of the county in which the property was located.

The essentials of due process of law in this context are notice and an opportunity to be heard. *Gottschalk v. Sueppel*, 258 Iowa 1173, 140 N.W. 2d 866 (1966). *Blew v. Powers*, 257 Iowa 112, 136 N.W.2d 273 (1965). Property is always held subject to the police power. *Faller v. City of Council Bluffs*, 246 Iowa 202, 66 N.W.2d 113 (1954). The use of the police power as it relates to property is particularly prevalent in the field of zoning. Counties and local governments use the police power to zone so as to protect and promote the public interest. The Supreme Court has firmly held that the right to zone property does not violate the due process rights of citizens. *See Euclid v. Amber Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114, (1926), and numerous cases since. Only if the zoning operates to effectively deny all use or value of the property so that the regulation is in effect a taking, does the state have to provide just compensation under the 5th Amendment. House File 148 is similar to zoning in that it is an exercise of the state police power to influence the ownership, control, and use of the agricultural property within the state. This opinion demonstrates that this function, in the context of H.F. 148, is a proper one for the state.

The due process concern is that the statute does not operate so as to deny people property without due process. Specifically, the issue is whether the statute gives nonresident aliens a sufficient opportunity to realize the value of their property. Both divestiture sections provide a two year period for the party to sell the property. Since the market for farm land in this state is such that agricultural property can easily be sold within such a period, H.F. 148 in no way operates to deny these individuals the opportunity to recapture the value of their property.

The Supreme Court decision in *Asbury Hospital v. Cass Co., North Dakota*, 326 U.S. 207, 90 L.Ed. 6, 66 S.Ct. 61 (1945) supports our interpretation. In that case, the Court faced a challenge to a North Dakota statute that barred the corporate ownership of rural land suitable for farming or agriculture and required divestiture of the land within ten years. The Court held that the state could properly ban corporate ownership of farm land and that the ten year divestiture provisions did not violate due process. The Court, 326 U.S. at 212, said:

> The due process clause does not guarantee that a foreign corporation when lawfully excluded as such from ownership of land in the state shall recapture its cost. It is enough that the corporation in complying with the lawful command of the state to part with ownership, is afforded a fair opportunity to realize the value of the land.

Clearly in our situation, the provision of a two year time period in which to sell the property affords nonresident aliens "a fair opportunity to realize the value of their land."

Another important question concerning H.F. 148, is whether the state can lawfully require the escheat of the property under section 11, returning to the party only their original purchase price of the land. The holding of *Asbury* would indicate that due process does not guarantee one a right to profit on the land. This is especially true in the escheat situation where the land would either be acquired in violation of the law,

(e.g. a nonresident alien purchasing more than 320 acres) or retained in bad faith (e.g. holding the land for five years without converting it to a nonfarm use as required). In essence, the escheat procedure is a penalty provision. In fact, it is the only penalty established for a violation of the restrictions on purchasing agricultural land; the other penalties in the Act are for failure to report. The statute allows the nonresident alien, foreign business, or foreign government to recapture the original investment, but keeps any unearned increase in the value of the land for the county. It is reasonable for the legislature to use the escheat procedure in such a manner, especially since all people are on notice that escheat is the penalty that will acompany violation of the statute.

Finally, the removal of nonresident aliens as a potential group of purchasers, in no way violates due process. While a person is protected in the right to dispose of their property in any lawful manner, there is no right to sell property in violation of the law. It is on this theory that courts have upheld the state and local governments' right to use the police power to zone and otherwise regulate the use of property. The fact that one cannot sell property zoned residential for use as landfill does not violate due process, it being the wisdom of the legislature to use the police power to protect and promote the interests of the property holders by zoning the property to certain uses.

VII. H.F. 148 AND THE FEDERAL FOREIGN RELATIONS POWER

The preceding sections of this opinion have dealt with the relationship of H.F. 148 and individual rights. A second important area of analysis is the effect of H.F. 148 on the relationship between the state and the federal government. The most significant issue in this context concerns foreign relations. The U.S. Constitution, Article 1, §10, establishes that the foreign relations of the United States are to be conducted solely by the federal government. No state may conduct an independent foreign policy. For this reason, states may not enter into treaties, independent negotiations or other types of agreements with foreign nations. The question that stems from the foreign relations clause is whether H.F. 148, which limits the rights of nonresident aliens to purchase land within the state, is somehow an infringement on the foreign relations power reserved to the federal government.

Most of the cases that have dealt with state restrictions of property rights and the foreign relations powers of the federal government have dealt with statutes concerning inheritance. While H.F. 148 is only tangentially involved with an alien's ability to inherit Iowa property, the cases that have interpreted inheritance statutes are important both for what they do and for what they fail to do. The Supreme Court dealt with the question of a state restriction on alien property rights and alien inheritance rights in *Clark v. Allen*, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947). In that opinion, Justice Douglas said that a state could condition inheritance on the reciprocity that foreign governments granted to United States individuals to inherit property. The theory in the opinion was that since states could control alien rights to own property, once the property rights where given, the rights could also be conditioned or removed by the state. The general premise of *Clark v. Allen*, that reciprocity requirements are constitutional, still stands although more recent Supreme Court decisions have created some uncertainty in the area.

The Supreme Court in *Zschernig v. Miller*, 389 U.S. 429, 432, 88 S.Ct. 664, 19 L.Ed. 2d 683 (1968), for the first time said that a state law could be struck down solely because of its "intrusion by the State into the field of foreign affairs". While the Court did not disturb the holding of *Clark*, the facts in *Zschernig*, lead the Court to find that the actions of the Oregon courts in applying the Oregon reciprocity statute were an injudicious and undiplomatic interference with the United States' foreign relation power. The facts of *Zschernig* were quite different from the usual foreign relation case reviewed by the Court, and involved the so called Iron Curtain laws.[9] The fact that the Court's holding was specifically limited to the facts involved has subsequently lead state and lower federal courts cases to interpret *Zschernig* to a close reading on its facts.

One recent federal case directly considering the application of *Zschernig* to legislation such as H.F. 148 is the case of *Shames v. State of Nebraska*, 323 F.Supp. 1321 (1971). In that case, two members of a three-judge panel held that a Nebraska statute which outlawed alien inheritance of property situated more than three miles from an incorporated town was not an infringement on the foreign relations' power. *See* Neb. Rev. Stat. §§76-401, *et. seq.* Judge Robinson made a detailed analysis of *Zschernig* and cases subsequent to it, saying, "a careful reading of the entire *Zschernig* opinion and cases decided pursuant to that decision as cited herein, convinces this panel that the sole basis for striking down the Oregon escheat statute was the manner in which the said statute was being applied." 323 F. Supp. at 1332. Since the Nebraska statute in question left no room for judicial comment of any kind about foreign governments and simply provided that no nonresident alien could inherit Nebraska land which is outside three miles of the corporate limits of any city or town such an absolute limitation was not discriminatory towards foreign nationals on any basis.

The statute in question in this opinion, H.F. 148, is like that in *Shames* in that it does not require the state court to inquire into the policies of the foreign country. Nor does the statute somehow provide favoritism to the citizens of one country over those of another. Instead, H.F. 148 calls for the mechanical application of a single rule which says that persons who are nonresident aliens of the United States are not able to buy agricultural land in this state for the purpose of holding it as agricultural land. Such a prohibition can clearly be applied by the Iowa courts without intruding into the actions of foreign countries. While realistically the Iowa statute may have an incidental effect on foreign relations, as the Court noted in *Shames*, that effect is not at cross purposes with the holding of *Zschernig*.

VIII. RESTRICTIONS ON NONRESIDENT ALIENS AND TREATY OBLIGATIONS

Another area of federal law that must be considered in reviewing the constitutionality of H.F. 148 is the effect that treaties negotiated by the

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[9] *See*, the U.S. Supreme Courts discussion in *Zschernig*, 389 U.S. at 437-8, *see also* Heyman, "The Nonresident Alien's Right to Succession Under the 'Iron Curtain' Rule", 52 N.W.U.L. Rev. 221 (1957).

federal government with foreign countries have on the efficacy of the Act. Article 6, §2, of the United States Constitution establishes that treaties are the supreme law of the land. In this regard properly negotiated treaties override inconsistent state legislation. *Haunstein v. Lynham*, 100 U.S. 483 (1880). The law of the State of Iowa recognizes that Art. 6, §2, makes federal treaties with foreign countries the supreme law of the land notwithstanding anything in the constitution or laws of the state to the contrary. Thus, federal treaties which give the subjects of a foreign country a qualified right to take by inheritance in the United States must prevail over a state law prohibiting aliens from taking land by descent. *Opel v. Shoup*, 100 Iowa 407, 69 N.W. 560 (1896). In addition, valid treaties supercede state laws even in areas which are traditionally left to the state. *Missouri v. Holland*, 252 U.S. 416, 64 L.Ed. 641 40 S.Ct. 382 (1920). Thus in our consideration of H.F. 148 we must determine what effect the treaty obligations entered into by the federal government may have on its operation.

In determining the effect of treaties entered into by the United States, it is important to consider the type of treaties that have been entered into by our nation. Treaty obligations of the United States fall into two general types. The first are the bilateral Friendship Navigation and Commerce (FNC) type of treaty that has been entered into with approximately forty different nations. The second type are multilaterial obligations such as the Organization for Economic Cooperation and Development (OECD), and other mutual assistance type arrangements. This second type of treaty is generally not concerned with property rights so the most important treaties in this consideration are the Friendship Commerce and Navigation treaties.

The general purpose of most FNC treaties is to regulate private and commercial rights rather than political rights between the two countries. Since each treaty is independently negotiated, these treaties do not have a generic effect on state law. Instead, the specific provisions of each treaty must be analyzed to see whether they contain limitations on the state power to regulate alien activities.

Of particular importance in analyzing the effect of FNC treaties on state property law is a general provision found in most FNC treaties, which restricts alien rights to exploit natural resources. In the case of *Lehndorff Geneva, Inc. v. Warren*, 246 N.W.2d at 818-819, the Wisconsin Supreme Court considered the effect of a FNC treaty on a statute much like H.F. 148. The court's holding in that case is of particular importance in the Iowa situation because the treaty considered was a treaty between the United States and West Germany, 7 U.S.T. 1839 (1956). This treaty is important in Iowa because most of the nonresident alien land acquisitions uncovered within the state have been by West German citizens. Article 7, §2, of the treaty states:

Each Party reserves the right to limit the extent to which aliens may establish, acquire interests in, or carry on enterprises engaged within its territories in communications, air or water transport, taking and administering trusts, banking involving depository functions, or the exploitation of land or other natural resources. . . .

The Wisconsin Court viewed this as the controlling provision of the treaty analysis. Since "exploit" is defined as turning a natural resource to economic account the court felt that this would certainly be true of any

nonresident alien's contemplated use of land for an agricultural purpose. The court, 246 N.W.2d at 819, held that the treaty does not require that nonresident aliens be allowed to acquire land, saying:

Obviously our statute is designed to limit land exploitation by nonresident aliens. There is no provision in the treaty giving nonresident nationals of West Germany the right to purchase and hold land contrary to existing state law on the subject. The only right given to West German nationals is the right to lease land for certain specified and limited economic activities. Agriculture is not one of those enterprises.

The holding of the *Lehndorff* court has considerable bearing in the consideration of H.F. 148. While H.F. 148 is subject to the operation of FNC treaties that have been duly ratified, these treaties do not have a generic effect on the Iowa law. In any case, a treaty with a specific nation would only render H.F. 148 *pro tanto* unconstitutional. So, in each situation, one must determine whether an existing treaty would prevent the operation of H.F. 148. Since the provision of the West German treaty discussed in *Lehndorff* is fairly typical of the natural resource exploitation clause found in most FNC treaties, it would appear that the typical FNC treaty does not present a serious restriction on the state's power to pass legislation such as H.F. 148. In light of the general law dealing with treaties and the *Lehndorff* opinion, it is the opinion of the Attorney General that the operation of H.F. 148 is clearly limited by any treaty which specifically covers foreign investment in agricultural land but if such restriction can not be found H.F. 148 would be operative.

IX. H.F. 148 AND LEGISLATIVE PREEMPTION

One other constitutional question concerning H.F. 148 is the issue of preemption. Although related to supremacy, with preemption the concern is the effect of existing federal legislation which prevents states from regulating in the same area. The standards for judging federal preemption in the legislative field were set forth in a line of Supreme Court cases, the most significant of which was *Hines v. Davidowitz*, 312 U.S. 52, 85 L.Ed. 581, 61 S.Ct. 399 (1941). *Hines, supra*, 312 U.S. at 70, set out a three-pronged test:

The nature of the power exerted by Congress, the objectives to be obtained, and the character of the obligations imposed by the law, are all important in considering . . . whether supreme federal enactments preclude enforcement of state laws on the same subject.

This same test was restated somewhat differently by Chief Justice Warren in *Pennsylvania v. Nelson*, 350 U.S. 497, 502-510, 100 L.Ed. 640, 75 S.Ct. 477 (1956).

As preemption relates to H.F. 148, there are three different areas of federal law that must be considered. These are: 1) immigration laws, 2) legislation dealing with enemy aliens, and 3) federal reporting laws for alien land holdings.

In the context of immigration, Congress clearly has the sole power to regulate and control immigration and admission of aliens to the United States. U.S. Const. Art. 1, §8 clause 3. The courts have held that states may not impose their own immigration controls or attempt to exclude aliens who the federal government has chosen to admit. *Hines v. Davidowitz*, 312 U.S. 52 (1941). Since states are not able to implement their own immigration controls, there is concern that if states may exclude

resident aliens from certain economic rights then they may defeat the privilege of free admission that was granted to these aliens by the federal government. Thus, as to resident aliens, states may not attempt to control their admission or registration within the states and may not deny to them the basic economic rights offered to citizens. These rights are fairly equivalent to what is protected by the equal protection clause as discussed above.

As preemption relates to state regulation of nonresident aliens, there is not nearly as clear guidance on what states may do without infringing on the power of the federal government to control immigration. This is true because nonresident aliens have not come into the country and thus have not been subjected to federal laws relating to immigration and admission. The fact that the federal government regulates the immigration and admission of aliens does not limit a state's power to regulate nonresident aliens activities within their boundaries.

The second area in which federal law may preempt state law relating to aliens is that of trading with enemy and hostile aliens. In this area affirmative federal legislation has long displaced state law. This law is found in the Trading With The Enemy Act, 50 U.S.C. App. §1, *et. seq.* (1970), and two sets of regulations which have been developed under it, 1) the Alien Property Custodian Regulations, 8 C.F.R. parts 501-510 (1976) and 2) the Foreign Assets Control Regulations, 31 C.F.R. part 500 (1975). The Alien Property Custodian Regulations take effect during a declared war and permit the alien property custodian to vest in himself all rights and titles of enemy alien property in the United States thereby superseding any contrary state law on the basis of supremacy. The Foreign Assets Control Regulations are used in the absence of an actual declared war, and operate to freeze or block the assets of citizens of listed countries. Since the list of countries may vary by publication of an amended regulation these regulations provide a great deal more flexibility.

The question of whether these two sets of regulations are somehow sufficient to preempt state legislation dealing with alien property rights has not been the subject of recent litigation. Under the test of *Hines v. Davidowitz*, 312 U.S. at 70, they do not appear to do so. *See* Morrison, *supra*, at 655. This is true because 1) the regulations date back to the time of World War I when state regulations on alien land holdings were prevalent, 2) the legislation is not so pervasive as to preempt state legislation, in fact the subject matter is limited, and 3) there appears to be little problem of meshing the federal regulations with the state laws which may control other aspects of nonresident alien property holdings.

A third area of concern under the preemption doctrine concerns recent federal legislation dealing with the registration of foreign owned land holdings. Congress on October 14, 1978, passed the Agricultural Foreign Investment Disclosure Act of 1978, 7 U.S.C. §3501 *et. seq.* This statute established a registration procedure for land held by foreign persons. [10]

[10] For a general discussion of the operation of that statute *see* Davidson, J., "Report: Agricultural Foreign Investment Disclosure Act of 1978", 1 Ag. Law J. 228, (1979); *see also*, Comment, "Foreign Investment — The Agricultural Investment Disclosure Act of 1978," 19 Harv. Int. L.J. 1026 (1979).

The concern that arises in light of the Act is whether it preempts state laws dealing with restrictions on alien land holdings. Under the *Hines* test, it is our opinion that this Act does not do so. In effect the new federal reporting law is quite similar to reporting laws that Iowa and several other states have enacted. The statute does not go farther than to require registration of land holdings. In fact, the law seems to contemplate the existence of state restrictions on alien land holdings since once the federal reports are received they are to be sent to the states for possible action under applicable state laws.

One concern is whether the recent Congressional action indicates that a federal prohibition on alien land holdings may be forthcoming. While this is possible, until that time the present reporting act is not preemptive of state laws restricting alien land holdings. Even if Congress were to pass legislation dealing with alien land holdings, it is possible that the law would not preempt state legislation. For instance the 96th Congress is now considering a bill called the Agricultural Farm Investment Control Act of 1979, which was introduced by Senator George McGovern, 125 Cong. Rec. §434 (Jan. 23, 1979). This Act, would limit foreign land holdings to amounts equivalent to family farm size holdings but provides for the continuing existence of state control on alien land holdings.

In summary, it is our opinion that the Agricultural Foreign Investment Disclosure Act of 1978 or other federal laws are not preemptive of H.F. 148. As one commentator has said in speaking of a Missouri law quite similar to H.F. 148, "limitations on nonresident aliens do not appear to invade the immigration and naturalization field directly or otherwise to conflict with current federal law, which contain no comprehensive regulation of foreign investment." *See* Fisch, *supra* at p. 424.

X. FEDERAL POWER TO REGULATE FOREIGN COMMERCE

One other source of constitutional concern regarding H.F. 148 is the foreign commerce clause. Article 1, §8, Clause 3 of the United States Constitution reads:

The Congress shall have the power to . . . regulate commerce with foreign nations.

While the federal power over interstate commerce may override state law, the existence of the federal power over commerce between nations may equally affect state law. The question to be asked is whether a restriction such as H.F. 148, which would prevent certain nonresident aliens from purchasing land in the United States, is an unconstitutional state restriction on foreign commerce. While H.F. 148 may possibly affect commerce that is foreign in nature, it is the opinion of the Attorney General that H.F. 148 is not an improper restriction on foreign commerce.

We reach this conclusion for two basic reasons. First, the treaties that were discussed above give tacit approval to state restrictions on alien rights to own property, and thus seem to sanitize restrictions such as those found in H.F. 148. Secondly, courts in this country have been very reluctant to invalidate legislation in areas traditionally left to state regulation, such as restriction on the ownership of property, solely on the basis of the negative implications of the commerce clause. In other words,

if a state is properly regulating a matter under its police power a court will hesitate to say that it is improper simply because it might interfere with a future federal regulation. Thus, even when the subject of state regulation may be within the scope of foreign commerce protections, for legislation such as H.F. 148 to be seen as an unconstitutional interference with foreign commerce, it would require federal legislation that more clearly preempted the restriction or state involvement in a matter not traditionally in the sphere of the exercise of state police power.

XI. SUMMARY

The preceding analysis has achieved several things. First, it vividly demonstrates the complexity of the constitutional issues concomitant with legislation such as H.F. 148 whereby states attempt to address major structural issues from the perspective of the state's best interests even though these issues engender more wide ranging ramifications in the national perspective. That aside, the analysis also demonstrates to our satisfaction that the state, given its specific justification here, can address through legislation the problem of foreign ownership and investment in agricultural land. House File 148 sets forth its mandate in a fashion that we believe to be free of fatal flaws. Specifically, to summarize the diverse findings of this opinion, we have concluded that:

1. House File 148 does ont violate the spirit of Art. 1, §22, of the Iowa Constitution or create an unconstitutional delegation of legislative power.

2. House File 148 survives the appropriate level of equal protection scrutiny, assuming that is an issue.

3. The divestiture and escheat provisions of H.F. 148 withstand due process challenge.

4. House File 148 is not an improper intrusion into the federal foreign relations power.

5. Other federal concerns such as the effect of treaty obligations, the foreign commerce clause, and legislative preemption do not bar the enactment of H.F. 148.

November 7, 1979

COUNTIES AND COUNTY OFFICERS: County Hospital: Sections 562.4, 347.7 and 347.13(14), The Code 1979. By holding over after the expiration of a written lease to operate the Dubuque County Nursing Home the Dubuque County Board of Supervisors would be considered a tenant at will and such holding over is presumed to be on the same terms as the last written lease. Operating costs are a part of maintenance expenses and may be paid from the fund provided by the tax levy. (Bennett to Curnan, Dubuque County Attorney, 11-7-79) #79-11-2 (L)

November 7, 1979

COURTS: JUVENILE COURT COSTS: Chapter 252, Sections 4.7, 4.8, 232.141, 625.1, 625.14, The Code 1979. Costs cannot be taxed at common law. It is necessary to have specfic statutory authority before costs can be taxed. Likewise, attorneys' fees cannot be taxed in the absence of specific authority. Sections 625.1 and 625.14 do not provide authority for a clerk of court to tax juvenile court costs against the juvenile. Section 232.141(1) assesses these costs against the county. (Fortney to Polking, Carroll County Attorney, 11-7-79) #79-11-3

Mr. William G. Polking, Carroll County Attorney: You requested an Opinion of the Attorney General as to whether court costs in a juvenile proceeding can be taxed by the clerk of court against the juvenile. It is our opinion that such costs cannot be taxed.

"Costs" are statutory allowances to a party to an action for his expenses incurred in the action. *LaRue v. Burns*, 268 N.W.2d 639 (1978); *Forbes v. Chicago, R. I. & P.R. Co.*, 129 N.W. 810, 150 Iowa 177 (1911). At common law costs were unknown and were not recoverable as such by either party in any action, real, personal, or mixed. *Harris v. Short*, 115 N.W.2d 865, 253 Iowa 1206 (1962); *City of Ottumwa v. Taylor*, 102 N.W.2d 376, 251 Iowa 618 (1960).

Consequently, the right to recover costs exists only by virtue of statutory authority or a rule of court authorized by statute. Costs are thus "the creatures of statute". Courts have no inherent power to award costs. They have no power to award costs on merely equitable grounds or as an incident of their power over the parties or the subject matter of the litigation. A party claiming a judgment for costs against his adversary must bring himself within the operation of some statutory provision. 20 Am.Jur.2d *Costs* §5.

The analysis used by the courts in dealing with the issue of taxing costs has been equally applied to the issue of attorney fees. Cost statutes are generally strictly construed as in derogation of common law. *City of Ottumwa v. Taylor*, 102 N.W.2d 376, 251 Iowa 618 (1960). The term "costs" or "expenses" as used in a statute is not understood ordinarily to include attorneys' fees. *Turner v. Zip Motors, Inc.*, 65 N.W.2d 427, 245 Iowa 1191 (1954). The right to recover attorneys' fees from one's opponent in litigation as a part of the costs thereof does not exist at common law. Such an item of expense is not allowable in the absence of a statute or rule of court or in the absence of some agreement expressly authorizing the taxing of attorneys' fees in addition to the ordinary statutory costs. *Glatstein v. Grund*, 51 N.W.2d 162, 243 Iowa 541 (1952).

Juvenile proceedings which could result in an adjudication of delinquency have been termed quasi-criminal, with many of the same legal rights attaching for the juvenile's benefit. *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Iowa has not strayed from following the rules set forth above regardless of the context being a criminal rather than a civil proceeding. The Iowa Supreme Court has held that costs in criminal prosecutions are unknown at common law; their recovery in any criminal case depends wholly upon statutory provisions therefor. In the absence of such statutory authorization, a court has no power to award costs against a defendant on conviction. *Woodbury County v. Anderson*, 164 N.W.2d 129 (Iowa).

In summation, costs cannot be taxed at common law. It is necessary to have specific statutory authority before costs can be taxed. Likewise, attorneys' fees cannot be taxed in the absence of specfic authority.

Turning then to the specific question you have posed, there exists no statute which specifically authorizes the taxing of costs or attorneys' fees in a juvenile court proceeding. Rather, The Code 1979, makes specific provision for charging most costs to the county in which the juvenile court proceeding is held. Section 232.141(1), The Code 1979, reads as follows:

1. The following expenses upon certification of the judge or upon such other authorization as provided by law are a charge upon the county in which the proceedings are held to the extent provided in subsection 4.

a. The fees and mileage of witnesses and the expenses and mileage of officers serving notices and subpoenas.

b. The expenses of transporting a child to a place designated by a child placing agency for the care of a child if the court transfers legal custody to a child placing agency.

c. The expense of transporting a child to or from a place designated by the court.

d. Reasonable compensation for an attorney appointed by the court to serve as counsel or guardian ad litem.

e. The expense of treatment or care ordered by the court under an authority of subsection 2.

Section 232.141(3) allows that county to seek reimbursement, not from the juvenile or his family, but from the county of legal settlement pursuant to Chapter 252.

The general statute authorizing the taxing of costs is found at §625.1, The Code 1979. It reads: "Costs shall be recovered by the successful against the losing party." Those costs which the clerk is to tax are summarized in §625.14, to wit:

The clerk shall tax in favor of the party recovering costs the allowance of his witnesses, the fees of officers, the compensation of referees, the necessary expenses of taking depositions by commission or otherwise, and any further sum for any other matter which the court may have awarded as costs in the progress of the action, or may allow.

If the provisions of §232.141(1) are compared to the provisions of §625.14, it would appear that the legislature intended that the very costs generally taxed under Chapter 625 against a losing party be assessed against the county when in the context of a juvenile matter. Section 232.141(1) is a specific statute dealing with liability for costs in juvenlie matters. Additionally, it is a statute adopted more recently in time than the older and more general statute found at §§625.1 and 625.14. As such, §232.141(1) should control. Sections 4.7 and 4.8, The Code 1979.

There is no authority for a clerk of court to tax juvenile court costs against the juvenile. Section 232.141(1) assesses these costs to the subject county.

November 9, 1979

CITIES AND TOWNS: Airport Commissions: Administrative Crimes. §§330.17, 333.21, 364.1, The Code 1979. The source of the Cedar Rapids Airport Commission's powers is §330.21, The Code 1979, which incorporates and delegates to the commission all of the powers expressly granted to a "city" in chapter 330 plus all of the City of Cedar Rapids' home rule airport powers *except* those which would be limited by the Constitution or inconsistent with a state law if exercised by the commission. The commission's resolution purporting to declare violations of certain of its airport rules to be crimes punishable by fine or imprisonment is an act beyond the scope of its delegated powers, and hence *ultra vires* and void. For purposes of enforcement of airport rules, the City of Cedar Rapids may adopt a particular commission rule by ordinance and provide criminal penalties for the violation thereof, or it may provide by ordinance for uniform criminal sanctions for any and every violation of any rule of the airport commission. (Dallyn to Kopecky, Linn County Attorney, 11-9-79) #79-11-4

Mr. Eugene J. Kopecky, Linn County Attorney: You have requested an Attorney General's Opinion concerning the power of the Cedar Rapids Airport Commission to establish by resolution criminal penalties for the violation of certain of its designated rules and regulations. Specifically, you pose the following questions:

(1) Does a city airport commission established under chapter 330.17 of the Code derive its power from chapter 392 or chapter 330, The Code 1979?

(2) Does the Cedar Rapids Airport Commission have power to enact and enforce criminal penalties for purposes of enforcing its rules and regulations?

(3) For purposes of affixing criminal penalties, should the rules and regulations instead be enacted by the City Council in the form of an ordinance providing the standard criminal penalties authorized for ordinance violations?

(4) Can the Cedar Rapids Airport Commission prosecute and file complaints in its name for purposes of enforcing such penalties?

(5) For purposes of enacting criminal penalties, what procedure does the Cedar Rapids Airport Commission have to follow? May they pass these by resolution at an airport commission meeting, or, must they follow a more formal procedure, such as that necessary for enacting city ordinances?

From your letter, it appears that the Cedar Rapids Airport Commission was created by the City of Cedar Rapids in the mid-1940's to operate and manage the Cedar Rapids Airport pursuant to Chapter 330 of the Iowa Code. The commission has periodically adopted certain rules and regulations governing the use, control and maintenance of the airport. To provide for enforcement of a limited, designated number of these rules, the commission recently passed a resolution purporting to make the violation of a designated rule a misdemeanor punishable by a fine of not more than One Hundred Dollars ($100.00) or imprisonment of not more than thirty (30) days (Resolution No. 9-4-79, adopted 4-12-79, attached hereto).

Your first question raises the issue of the source of the airport commission's power. That is, whether the commission, as a "city administrative agency," derives its powers to control, supervise and operate the airport by delegation directly from the City of Cedar Rapids pursuant to Chapter 392 of the Code, or whether the commission, as an "independent agency," derives its powers solely by express legislative delegation of those limited statutory powers enumerated in chapter 330, The Code 1979.

Chapter 330 of the Code is divided roughly into two parts. Sections 330.1 through 330.16 generally authorize counties and townships to acquire and operate airports, promulgate rules for the control thereof, and to fund the maintenance thereof by collecting charges and issuing bonds. Prior to the enactment of the "Home Rule Act," 1972 Second Session, 64th G.A., ch. 1088 (effective July 1, 1975), these same sections provided similar authorization for cities and towns. However, the advent of municipal home rule obviated the necessity for any such express statutory authorization for municipalities, and the legislature reflected this by amending and removing most references to municipalities (cities and towns) in chapter 330. 1972 Second Session, 64th G.A., ch. 1088,

§§262-272. These 1972 amendments simultaneously added the references to "counties and townships" contained in enabling provisions in the present chapter 330. Cities clearly retain present powers to acquire, operate and control airports, but the source of these powers is now municipal home rule. *See, e.g.*, Iowa Const. Art. III, §38A; §§364.1, 364.4, 384.25-27, The Code 1979.

Sections 330.17 through 330.24 govern the establishment and authority of airport commissions to manage and control airports owned or acquired by cities, counties or townships. *See* §330.17, The Code 1979. In contrast to the language of the first sixteen sections, the 64th General Assembly chose *not* to delete the references to "cities" in these latter sections with the passage of the Home Rule Act. Rather, the legislature elected to establish comprehensive statutory guidelines governing any generic "airport commission" operating under the provisions of §§330.17-24, The Code 1979. While a city may own and operate an airport independently of the enabling provisions of §§330.2 through 330.16 (except for §§330.4, 330.9 and 330.13), once it decides to create an airport commission pursuant to §330.17, the establishment and control of the commission are governed by chapter 330.

The initial effect of this plenary control of a city airport commission is a pre-emption by the state of the control of what may otherwise have been a city "administrative agency" established pursuant to §392.1, The Code 1979. The control of a city airport commission by state law excepts it from the definition of a city "administrative agency" in §362.2(23), The Code 1979, and hence from municipal control pursuant to chapter 392 of the Code. Section 330.21 delegates all of the powers (except power to sell the airport) granted to cities, counties *and* townships *under chapter 330* to an airport commission once established thereunder. Such a statutory analysis might suggest that the source and scope of a city airport commission's powers derive solely from, and are limited by, the express statutory provisions of §330.21, to the exclusion of any delegation of extrastatutory municipal home rule powers held by the city.

The Iowa Supreme Court, however, recently declined to so limit the source and scope of a city airport commission's powers in the case of *Airport Commission for the City of Cedar Rapids v. Schade*, 257 N.W.2d 500 (Iowa 1977). Faced with the issue of whether the airport commission's establishment of an airport safety force was in irreconcilable conflict with chapters 400 and 411 of the Code (relating to policemen and firemen), the Court began with an analysis of the powers of an airport commission outlined in §330.21 of the Code. Being of the opinion that an airport commission has (with the exception of selling the airport) the same powers regarding the airport as would be the city's if there were no airport commission, the Court read §330.21 as automatically incorporating and delegating to a city airport commission all of the powers expressly granted to a "city" in chapter 330 *plus* all of the city's home rule airport powers (which would include all remaining powers in chapter 330 expressly granted to a "county or township," *see* Op. Att'y Gen. #77-2-4), *except* those which would be limited by the Constitution or inconsistent with a state law if exercised by the commission. 257 N.W.2d at 505. *See* §364.1, The Code 1979.

This conclusion by the Court is necessarily controlling as to the resolution of your first question. The source of the Cedar Rapids Airport

Commission's powers is §330.21, The Code 1979; however, the scope of these powers has been read broadly to include both the powers granted to Cedar Rapids in chapter 330 and Cedar Rapids' home rule airport powers, except where limited by statute or Constitution.

Your second inquiry raises the question of whether the Cedar Rapids Airport Commission's resolution purporting to make the violation of certain airport rules a misdemeanor punishable by fine or imprisonment is limited by the Constitution or is inconsistent with a state law, and therefore beyond the scope of its delegated powers under §330.21, The Code 1979.

There is no qnestion but that a city airport commission is an administrative body, created as a local public agency by the legislature, exercising both executive and legislative powers that otherwise would be reposited in the state sovereignty or in an appropriate local governing body.[1] *See Greensboro-High Point Airport Authority v. Johnson*, 226 N.C. 1, 36 S.E.2d 803, 809-810 (1946); Op. Att'y Gen. #78-5-1. For analytical purposes, a state delegation of legislative power directly to a local agency or official (vertical delegation) is conceptually equivalent to a "lateral delegation" from the legislature to an executive agency within the same level of government, and issues of undue delegation or articulable standards in vertical delegations have been treated similarly to those in lateral delegations by the few courts or commentators who have addressed the problem. *See* Payne, *Delegation Doctrine in the Reform of Local Law*, 29 Rut.L.Rev. 803, 823 (1976).

Section 330.21, as interpreted by the Iowa Supreme Court, represents a delegation by the General Assembly of, *inter alia*, broad legislative powers to a city airport commission, including the power to make and enforce rules for the control, supervision and operation of an airport. *See Airport Commission v. Schade*, 257 N.W.2d 500, 505 (1977); §§330.23, 364.1, The Code 1979. However, an outer boundary of these delegated powers exists at the point where the exercise of a particular power by an administrative body such as an airport commission would be beyond the scope of its enabling statute or would contravene the Constitution or state law. An administrative body purporting to exercise by rule or regulation such an inconsistent power is acting beyond the scope of its statutorily delegated powers, and the action is void under the doctrine of *ultra vires*. *See, Iowa Dept. of Rev. v. Iowa Merit Employ. Com'n*, 243 N.W.2d 610, 614-616 (Iowa 1976). The regulation in question (Resolution No. 9-4-79) purports, in effect, to administratively declare certain acts to be crimes and to provide criminal sanctions for the commission of the proscribed acts.

Initially, it is clear that nowhere *in chapter 330* does the legislature expressly delegate to airport commissions (or to local governing bodies)

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[1] It is clear that a city such as Cedar Rapids would have the delegated power to enforce its airport rules with criminal penalties through its ordinance-making procedure if there were no airport commission. *See* Iowa Const. art. III, §38A; §§364.1, 364.3-.4, The Code 1979; Annot., 174 A.L.R. 1343 (1948).

the power to make violations of their rules criminal offenses punishable by fine or imprisonment. Nor does the legislature itself provide by statute for criminal sanctions for violations of administrative rules of airport commissions. Any attempt to read chapter 330 as penal in nature must be strictly construed and not broadened beyond the clear and express intent of the legislature. *See State v. Watts*, 186 N.W.2d 611, 614 (Iowa 1971). Therefore, the negative implication of the legislative silence regarding penal sanctions in chapter 330 must be that no power to legislate criminal offenses and sanctions was intended to be delegated to airport commissions on the face of chapter 330.

Similarly, it appears untenable to conclude that a city airport commission may exercise such power through the incorporation and delegation of independent municipal home rule powers pursuant to chapter 330.21, The Code 1979. In Iowa, as in other jurisdictions, the ultimate power to declare an act to be a crime and to determine its punishment is one restricted to the legislature which may not be delegated to a nonelective administrative body. *State v. Watts*, 186 N.W.2d 611, 614-616 (Iowa 1971); *State v. Ronek*, 176 N.W.2d 153, 155 (1970).

In *State v. Watts*, the Supreme Court was faced with an undue delegation attack on a statute which provided that a violation of any rule or condition of parole promulgated by the board of parole was a felony punishable by up to five years' imprisonment. The Court upheld the constitutionality of the statute on the grounds that (1) while the board in effect did define the body of an act constituting a crime by later-enacted rules, there existed adequate safeguards surrounding the exercise of this rule-making power, and (2) the *statute* both provided that violations of parole board rules would be punishable as crimes and set the applicable punishment. 186 N.W.2d at 616. Clearly implicit in the Court's emphasis on the latter factor is that in the absence of statutory setting of penalties *and* legislative recognition that violations of rules would constitute crimes, any exercise of crime-making power solely by the board of parole would have been invalid. *See United States v. Grimaud*, 220 U.S. 506 (1911); *People v. Grant*, 242 App.Div. 310, 275 N.Y.S. 74 (1934), *aff'd per curiam*, 267 N.Y. 508, 196 N.E. 553 (1935).

As one leading commentator has noted, "The power to prescribe [criminal] penalties by rule may not be conferred upon administrative officials; any penalties for disobedience of rules and regulations must be fixed by the legislature itself." Schwartz, *Administrative Law* §29 (1976). *See* Gellhorn, *Administrative Prescription and Imposition of Penalties*, 1970 Wash.U.L.Q. 265, 266-268. This position fairly reflects the prevailing state of the law in Iowa. Any attempt by an administrative body to declare by rule that any violation of its rules is a crime punishable by fine or imprisonment would be a violation of the separation of powers concept contained in section one, article III of the Iowa Constitution. *See* Abrahams and Snowden, *Separation of Powers and Administrative Crimes*, 1976 So.Illn.U.L.J. 1, 111-114.

In light of this conclusion, the power to designate certain acts as crimes and to prescribe punishment could not be delegated to the Cedar Rapids Airport Commission without contravening the Iowa Constitution. Therefore, this power clearly has not been delegated to the commission through the provisions of §330.21, The Code 1979. The commission's act

in question, Resolution No. 9-4-79 (adopted 4-12-79), is beyond the scope of its delegated powers, *ultra vires* and therefore involid. *See Iowa Dept. of Rev. v. Iowa Merit Employ. Com'n.* 243 N.W.2d 610, 616 (Iowa 1976).

The resolution of the above two questions obviates the necessity of answering your remaining questions, at least to the extent they assume the existence of the commission's crime-making power discussed above. However, in the context of possible alternative enforcement of the airport commission's rules, a discussion of your third question on the city's legislative power in this area may well be appropriate.

It has been determined that the Cedar Rapids Airport Commission has no power to legislate crimes and punishment. In the absence of an airport commission, the City of Cedar Rapids clearly could adopt ordinances enforced by criminal penalties governing the control and operation of its airport. Moreover, it seems reasonable to conclude that, even with the existence of the airport commission, the City of Cedar Rapids may provide by ordinance for criminal enforcement of airport rules.

Even though the State has entered the field of airport management and control with the provisions of chapter 330 establishing airport commissions, it does not necessarily follow that the city is thereby totally precluded from acting in this field. The city may not exercise a home rule power which would be inconsistent with the laws of the general assembly. Section 364.1, The Code 1979. This limitation can be termed one of "preemption" whereby the State, by broad and comprehensive legislation, has intended to exclusively regulate a particular subject to the exclusion of any local government regulation. Op. Att'y Gen. #79-4-7, p. 9.

By the language of §§330.17 and 330.21, The Code 1979, the legislature's apparent intent is that once an airport commission is created, it alone shall exercise the power to operate, manage and control the airport, to the exclusion of the local governing body. *See Airport Commission v. Schade*, 257 N.W.2d 500, 505 (Iowa 1977). Thus, ti is only after an election discontinuing an airport commission that "the power to maintain and operate such airport shall revert to such city, county or township," none of which presumably had such power during the existence of the commission. Section 330.17, The Code 1979.

In light of this analysis, it seems clear that the City of Cedar Rapids would be precluded from enacting ordinances purporting to establish *substantive* rules for the operation, management or control of the airport. This would be inconsistent with chapter 330 which defines such rulemaking as an exclusive function of the airport commission.

It is not clear, however, that Cedar Rapids would be precluded from acting in the area of *enforcement* of duly-promulgated rules of the airport commission. Not every subject area relevant to an airport has been preempted by state law and committed to the authority of the airport commission. For example, the power to sell the airport remains exclusively with the city, exercisable with the consent or approval of the existing airport commission. Op. Att'y Gen. #78-5-1. *See* §330.21, The Code 1979; *Airport Commission v. Schade*, 257 N.W.2d 500, 505 (Iowa 1977).

Similarly, it seems logical that the power of a city to provide for criminal sanctions in the form of fine or imprisonment for the violation of its ordinances may be exercised consistently with state law for the enforcement of airport commission rules. The airport commission cannot exercise this power. The city's power to enforce by ordinance valid airport commission rules is not expressly limited by statute. Nor is there evidence (similar to the limitation vis-a-vis airport management contained in §330.17) in chapter 330 that exclusive authority to *enforce* airport rules is to be vested in the airport commission. Thus, it would appear reasonable to conclude that the City of Cedar Rapids may provide for criminal enforcement of duly-promulgated airport rules, with the consent and approval of the airport commission. *See Bryan v. City of Des Moines*, 261 N.W.2d 685, 687 (Iowa 1978). (*Cf. State v. Berberian*, 216 A.2d 507, 510-511 (R.L. 1966) (statute delegating power to city council to establish traffic agency by ordinance, with no specfic authorization for prescribing penalties by ordinance for violation of agency rules, *held* to intend the concurrent exercise of independent city ordinance power prescribing such penalties).

The city may provide for such enforcement in two ways. One, it may, by ordinance, adopt a particular commission rule and provide for a criminal penalty for the violation of the adopted rule not to exceed a One Hundred Dollar ($100.00) fine or thirty (30) days imprisonment. *Cr.* §392.1, The Code 1979 (outlining similar enforcement procedure for city administrative agency rules). Or, two, the City may provide by ordinance that any and every violation of any duly-promulgated airport commission rule shall be enforced by uniformly applicable criminal penalties. *See, State v. Watts*, 186 N.W.2d 611, 616 (Iowa 1971). However, the city may not delegate by ordinance to the commission the power to pick and choose which of its rules shall come within the ambit of the ordinance's penal sanctions; this again would violate the constitutional proscription (discussed earlier) against the exercise of such legislative crime-making power by an administrative commission. *See People v. Grant*, 242 App.Div. 310, 275 N.Y.S. 74 (1934), *aff'd per curiam*, 267 N.Y. 508, 196 N.E. 553 (1935).

In summary, the source of the Cedar Rapids Airport Commission's powers is §330.21, The Code 1979, which incorporates and delegates to the commission all of the powers expressly granted to a "city" in chapter 330 plus all of the City of Cedar Rapids' home rule airport powers *except* those which would be limited by the Constitution or inconsistent with a state law if exercised by the commission. The commission's resolution purporting to declare violations of certain of its airport rules to be crimes punishable by fine or imprisonment is an act beyond the scope of its delegated powers, and hence *ultra vires* and void. For purposes of enforcement of airport rules, the City of Cedar Rapids may adopt a particular commission rule by ordinance and provide criminal penalties for the violation thereof, or it may provide by ordinance for uniform criminal sanctions for any and every violation of any rule of the airport commission.

November 9, 1979

COUNTIES: Supervisors, §§69.2, 331.26, Code of Iowa, 1979, Supervisor elected at-large in county where members of the board of supervisors are required to reside one to each district (§§331.26(2), Code of Iowa, 1979) is elected "for" the district in which he resides and a vacancy is created under §69.2 if he moves from that district during his term of office. (Appel to Cochran, State Representative, 11-9-79) #79-11-5

The Honorable Dale M. Cochran, State Representative: You have requested an opinion of the Attorney General as to whether a vacancy in the office of county supervisor exists when a county supervisor is elected to represent a given district within a county and then moves his residence out of that district. Additionally, if the answer to this question is in the affirmative, you have inquired as to the proper procedure for removing this official from office and appointing another person to fill that position. It is our opinion that such a county supervisor would indeed vacate his office by moving from the district in which he was elected to represent.

Section 69.2, The Code 1979, provides in relevant part:

Every civil office shall be vacant upon the happening of either of the following events . . . 3. The incumbent ceasing to be a resident of the . . . district . . . by or for which he was elected or appointed, or in which the duties of his office are to be exercised. This subsection shall not apply to appointed city officers.

Section 331.8, The Code 1979, relates specifically to supervisor districts. It authorizes the adoption of one of three county plans. Plan "one" provides for election at large; plan "two" provides for election at large from equal population districts; plan "three" provides for election from equal population districts.

Your question refers to a county supervisor elected to represent a specific district within a county. Hence, we are presented with either a plan "two" or a plan "three" factual situation.

Section 331.26(2), The Code 1979, refers to plan "two", and states as follows:

Members of the county board *shall be required to reside one to each supervisor* district but shall be elected by the electors of the county at large. Election ballots shall be prepared to specify the district which each candidate seeks to represent and each elector may cast a vote for one candidate from each district for which a supervisor is to be chosen in the general election. (emphasis added)

This office has previously discussed the interrelationship between §§69.2 and 331.26(2), The Code 1979. In a 1975 Opinion we were presented with a factual situation quite similar to the one involved here. 1975 Op. Att'y Gen. 123. One of three supervisors, elected at large but representing a specific district within a county, moved from the district in which he had been elected for a specific supervisor district and accordingly had vacated the office when he moved from the district. We see no reason to now deviate from that conclusion.

Section 331.8(c), The Code 1979, refers to plan "three" and states in relevant part:

. . . electors of each district shall elect one member *who shall be required to reside in that district.* (emphasis added)

In addition, §331.27, The Code 1979, provides that:

If plan "three" is selected pursuant to section 8 . . . *members* of the county board *shall be elected as provided in section 331.26* . . . (emphasis added)

A county supervisor elected pursuant to §331.26, Code of Iowa 1979, is elected for the district in which he resides and a vacancy will exist if he moves from that district during his term of office. 1975 Op. Att'y Gen. 123.

It is clear from the quoted language in §§69.2, 331.8(c) and 331.27, The Code 1979, that a supervisor elected pursuant to plan "three", is elected to represent a specific supervisor district and that district during his term of office. Accordingly, if a county supervisor is elected to represent a given district in a county, he will have vacated his office if he subsequently moves his residence out of that district.

Since we have answered your first question in the affirmative, we will respond to your second question relating to the proper procedure for removing the elected supervisor and appointing another person to that position.

The procedure for filling vacancies in the membership of the board of supervisors is set forth in §§69.8 and 69.13, The Code 1979. Section 69.8 states in relevant part:

Vacancies shall be filled by the officer or board named, and in the manner, and under the conditions, following: . . . 5. In the membership of the board of supervisors, by the clerk of the district court, auditor, and recorder . . . .

Section 69.13(2) states in relevant part:

If a vacancy occurs in the office of county supervisor . . . sixty or more days prior to a general election, and the unexpired term in which the vacancy exists has more than seventy days to run after the date of that general election, the vacancy shall be filled for the balance of the unexpired term at that general election and the person elected to fill the vacancy shall assume office as soon as a certificate of election has been issued and the person qualified.

If the vacancy occurs within the time frame established in §69.13(2), The Code 1979, and the unexpired term extends more than seventy days beyond the date of the next general election, the vacancy must be filled through the general election. However, if the vacancy does not fall within the time frame established in §69.13(2), The Code 1979, or if the term of office expires less than seventy days after the date of the next general election, the vacancy may be filled by appointment pursuant to §69.8(5), The Code 1979.

November 13, 1979

COUNTIES: County Board of Supervisors, Iowa Const. art. III, §39A; The Code 1979, §341.1, §341.3, §341.7, §341.8. A county board of supervisors has the power to pass a resolution freezing the hiring of new, full-time personnel which would increase the size of any department. (Hagen to Neighbor, Jasper County Attorney, 11-13-79) #79-11-6

Charles G. Neighbor, Jasper County Attorney: You have asked an opinion of this office as to a county board of supervisors' power to pass a resolution freezing the hiring of *new* full-time personnel which would increase the size of any department.

Chapter 341, The Code 1979, gives the county board of supervisors express authority to determine the number of deputies, assistants and clerks for each office by recorded resolution.[1] §341.1. This statutory provision, coupled with the County Home Rule Amendment, would indicate that the county board of supervisors could regulate this number by imposition of a freeze on new hiring. Article III, §39A, Iowa Constitution.

There are other express provisions covering certain county personnel which may escape this freezing power. Section 341.7 allows the county attorney to procure assistants in the *trial* of a person charged with a felony with the approval of a judge of the district court. The county board of supervisors shall, upon presentation of certification for services rendered, fix reasonable compensation for this assistance. Section 341.8 provides that a county auditor may be compelled to employ *temporary* assistants on account of the pressure of business in his office if there is no other appointed deputy. These provisions speak to temporary personnel and specific situations, not to permanent additions to a department.

As your request indicated, the resolution in question did not give the county board of supervisors the power to terminate any employment as a method of controlling department size. Such power would be in conflict with §341.3, which gives revocation of appointment power to the office making an appointment.[2] Neither did this resolution set employment prerequisites that are beyond a county board of supervisors' authority.[3]

Based on the power expressly given by statute to deal with county government size determination and the expanded authority granted by County Home Rule, our opinion in this matter is that a resolution by a county board of supervisors that freezes the hiring of new full-time personnel which would increase the size of any department is within the board's power.

November 13, 1979

ELECTIONS: Absentee Ballots, §§53.46, 53.49, 47.7, The Code 1979; 42 U.S.C. §1973dd-1. Persons temporarily absent from Iowa who are unable to state that they have a home in Iowa "with intent to remain there permanently, or for a definite or indefinite or undeterminable length of time" may not vote in state and local elections by absentee ballot. In federal elections, however, persons who are "uncertain" whether they will return to the state are entitled to vote pursuant to 42 U.S.C. §1973dd-1 if they meet all other qualifications. Persons who intend to remain abroad permanently may not vote in either state or federal elections. Envelopes, under §53.46, The Code 1979, should be provided to all qualified absentee voters. (Appel to Synhorst, 11-13-79) #79-11-7

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[1] *See* Op. Atty. Gen. 1934, page 65; Op. Atty. Gen. 1932, page 1; and Op. Atty. Gen. 1930, page 379.

[2] *See* Op. Atty. Gen. 1942, page 29.

[3] *See McMurry v. Board of Supervisors*, 261 N.W.2d 688 (Iowa 1978), where a two-year experience prerequisite to employment was struck down by the Court as being beyond the board's statutory power. This case was heard before the County Home Rule Amendment went into effect.

The Honorable Melvin D. Synhorst, Secretary of State: You have requested an opinion of the Attorney General regarding the impact of the Overseas Citizens' Voting Rights Act of 1975 (OCVRA), and its 1978 amendments on §53.49, The Code 1979. Specifically, you have asked the following questions:

(1) Does the federal law supersede paragraph 2 of §53.49, The Code 1979, in regard to citizens residing "temporarily" overseas?

(2) Can the state commissioner of elections (Secretary of State) instruct the county commissioners (county auditors) to honor ballot requests from *all* overseas Iowa citizens, both *permanent* and *temporary*?

(3) Can the envelopes provided for in §53.46, The Code 1979, be printed so as to include *all* overseas Iowa citizens?

I.

Section 53.49, The Code 1979, provides as follows:

The provisions of this division as to absent voting shall apply only to absent voters in the armed forces of the United States as defined for the purpose of absentee voting in §53.37. The provisions of §§53.1 to 53.36, shall apply to all other qualified voters not members of the armed forces of the United States.

However, *citizens of the United States temporarily residing outside the territorial limits of the United States* and the District of Columbia and their spouses and dependents when residing with or accompanying them *shall be accorded the privilege of absentee voting* in the same manner as members of the armed forces. [Emphasis supplied]

The federal counterpart to §53.49, The Code 1979, is somewhat broader in application. 42 U.S.C.A. §1973dd-1 (Supp. 1979) provides that:

Each citizen residing outside the United States shall have the right to register absentee for, and to vote by, an absentee ballot in any Federal election in the State, or any election district of such State, in which he was last domiciled immediately prior to his departure from the United States and in which he could have met all qualifications (except any qualification relating to minimum voting age) to vote in Federal elections under any present law, *even though while residing outside the United States* he does not have a place of abode or other address in such State or district, and *his intent to return to such State or district may be uncertain*, if — [Emphasis supplied]

(1) he has complied with all applicable State or district qualifications and requirements, which are consistent with this subchapter, concerning absentee registration for, and voting by, absentee ballots;

(2) he does not maintain a domicile, is not registered to vote, and is not voting in any other State or election district of a State or territory or in any territory or possession of the United States; and

(3) he has a valid passport or card of identity and registration issued under the authority of the Secretary of State or, in lieu thereof, an alternative form of identification consistent with this subchapter and applicable State or district requirements, if a citizen does not possess a valid passport or card of identity and registration.

In addition, 42 U.S.C.A. §1973dd-2 (Supp. 1979) states that:

(a) Each state shall provide by law for the absentee registration or other means of absentee qualification of all citizens residing outside the United States and entitled to vote in a Federal election in such State pursuant to section 1973dd-1 of this title whose application to vote in such election is received by the appropriate election official of such State not later than thirty days immediately prior to any such election.

(b) Each State shall provide by law for the casting of absentee ballots for Federal elections by all citizens residing outside the United States who—

(1) (are entitled to vote in such State pursuant to section 1973dd-1 of this title;

(2) have registered or otherwise qualified to vote under subsection (a) of this section; and

(3) have returned such ballots to the appropriate election official of such State in sufficient time so that such ballot is received by such election official not later than the time of closing of the polls in such State on the day of such election.

It is clear pursuant to §53.49, the state may deny voting privileges to the citizens who intend permanently to remain outside the United States. A question arises, however, whether persons "uncertain" as to whether they will return to Iowa may vote as absentees under §53.49. The general voter qualification provisions of the Code provide guidance on this question. Section 47.7(1) provides that a person must be a resident of Iowa in order to be an eligible elector. Section 47.7(4) defines residence as "the place which he declares is his home with intent to remain there permanently, or for a definite or indefinite or undeterminable length of time." A person living abroad who is unable to declare that he intends to remain in a residence in Iowa permanently or for a definite or undeterminable length of time does not qualify as an elector under §47.7(4). We cannot believe that the absentee ballot provisions were intended to expand the franchise beyond the general qualifications of Chapter 47. Therefore, if a person is temporarily absent from the state and is unable to declare that he or she intends to remain in Iowa for a "definite, indefinite, or undeterminable length of time," that person may not vote by absentee ballot.

In contrast, under OCVRA, a citizen is entitled to an absentee ballot in federal elections if the person a) intends to return to the United States, or b) is uncertain at the time he or she initiates the absentee process. The statute provides that "Each citizen residing outside the United States shall have the right to register absentee for, and to vote by, an absentee ballot in any Federal election . . . even though his intent to return to such State or district may be uncertain . . .". 42 U.S.C.A. §1973dd-1 (Supp. 1979). We think it clear that OCVRA does not extend the franchise in federal elections to those who intend to permanently remain overseas. Such citizens would have little direct interest in participating in the electoral process. However, OCVRA grants the franchise to absent voters in *federal elections* who are uncertain as to their future plans, but who cannot expressly declare that they intend to remain in Iowa for a period of time. Thus, while OCVRA provides that persons uncertain whether they will return to the state may vote in Iowa federal elections, Iowa law seems *contra*.

To the extent they are inconsistent, the federal law must prevail with respect to national elections. The Supreme Court of the United States has held that the Congress has the power through regulations to control the federal franchise, *Oregon v. Mitchell*, 400 U.S. 112, 134, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970). We therefore conclude that while persons who are "uncertain" about whether they intend to return may not vote in state and local elections, they are entitled to vote in federal elections pursuant to OCVRA.

II.

Your second question concerned whether the state commissioners of elections could instruct the county commissioners to honor ballot requests from all overseas Iowa citizens, both permanent and temporary. On the basis of our analysis in Part I of this opinion, we conclude that the county commissioners need not honor requests from overseas Iowa citizens intending to permanently reside abroad. Section 53.49, The Code 1979, and 42 U.S.C.A. §1973dd-1 (Supp. 1979) do not extend absentee voting privileges to these citizens. However, to be in compliance with the OCVRA, the county commissioners must honor any federal election ballot requests from those overseas Iowa citizens who are yet uncertain whether they will return to the United States.

III.

Your final question was in reference to whether the envelopes provided for in §53.46, The Code 1979, may be printed so as to include all overseas Iowa citizens. Section 53.46 provides in relevant part:

The state commissioner is authorized and empowered:

. . .

2. To prescribe and direct the preparation of specially printed ballots, envelopes and other papers of different size and weight to be used in connection with absent voting by voters in the armed forces of the United States, if, in the discretion of the state commissioner, he shall determine that such a special ballot and other papers will facilitate voting by such voters; provided that the content of any such specially printed matter shall be the same as that used for absent voters generally in the particular precinct in which said serviceman's ballot is to be cast, and provided further that such ballots, envelopes and other papers shall be substantially uniform in size and weight throughout the state; and provided further that the provisions of section 49.56, establishing the maximum cost of printing ballots, shall apply to the cost of printing any such specially printed ballots by the several counties; . . .

Section 53.49 requires that Iowa citizens temporarily residing overseas are to be "accorded the privilege of absentee voting in the same manner as members of the armed forces." Section 53.46(2), The Code 1979, is the applicable guideline for the printing of envelopes to be used by those Iowa citizens falling within the scope of §53.49.

Neither §53.49, The Code 1979, nor 42 U.S.C.A. §1973dd-1 (Supp. 1979) requires that citizens intending to permanently reside overseas be granted absentee voting privileges. Therefore, the specially printed ballots and envelopes provided for in §53.46 should not be printed so as to include all Iowa citizens residing overseas. These ballots and envelopes are to be printed only as to include all Iowa citizens temporarily residing overseas who are qualified to vote in any federal, state or local election. However, to comply with 42 U.S.C.A. §1973dd-1 (Supp. 1979), ballots and envelopes must be printed so as to allow those overseas citizens uncertain of their intent to return to the United States, the privilege of voting absentee in federal elections.

November 13, 1979

CRIMINAL LAW: BRIBERY; GIFTS AND GRATUITIES; PUBLIC OFFICIALS. §§722.1, 2, The Code 1979. A public official who attends an opening of a new facility such as a bank and consumes free food, beverages, or receives mementos commemorating the event probably does not violate Iowa's bribery statutes where the value of the food and drink or memento is small, the public relations benefits obvious, and the general public is invited. As the value of the gift increases and the focus on public officials becomes more intense, however, the risk of potential liability under Iowa's bribery statutes increases. Consumption of a free meal at an event where the official is the speaker probably does not violate bribery laws because the requisite intent to influence is not likely present. Whether acceptance of free registration at a seminar is violative of the bribery laws depends on the facts and circumstances of each case. (Appel to Holden, State Senator, 11-13-79) #79-11-8

The Honorable Edgar H. Holden, State Senator: We are in receipt of your opinion request concerning the application of Iowa's bribery statute. Section 722.1, The Code 1979, states:

A person who offers, promises or gives anything 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, including any public officer or employee, any referee, juror or venireman, or any witness in any judicial or arbitration hearing 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.

In particular, you ask whether this statute is violated when:

1. a public official attends an opening of a new facility such as a bank, etc., and consumes free food, beverages, or receives mementos commemorating the event;

2. a public official speaks before an annual meeting of various groups, such as a chamber of commerce, trade union, or farm organization, and consumes a meal;

3. a public official receives free registration at a seminar held by a group or association.

I.

Whether acceptance of free food and beverages at an open house comprises bribery depends on the character of the transaction. For instance, we recently held that where public officials receive small gifts (such as pencils or calendars) given to a large group of people and not exclusively to the public, and have obvious advertising benefits, we think it highly unlikely that a jury or judge would find the requisite intent to influence required under Iowa's bribery statutes. (1979 Op. Atty. Gen. #79-4-27).

We think the same approach would apply to consumption of food and beverages at open houses where members of the public are invited, where the value of the food and drink is small, and where the public relations benefits are obvious. For instance, we doubt that bribery occurs when a public official consumes punch at the opening of a branch bank facility when the general public is invited and the official attends as a current or prospective customer rather than as a government representative. As the value of the gift increases and the focus on public officials becomes

more intense, however, the risk of potential liability under Iowa's bribery statutes increases.

In order to avoid any difficulties with the bribery statutes, some organizations sell tickets to public officials or place contribution receptacles on tables so that officials can voluntarily pay for the approximate cost of the food consumed or gifts received. Such practices serve to limit any potential risk to donors and donees alike. In areas of doubt, we encourage organizations and the legislature to follow one of the above practices.

II.

Second, you ask whether bribery occurs when a government official speaks before an annual meeting of various groups, such as a chamber of commerce, trade union, or farm organization, and consumes a free meal. Again, we doubt that a judge or jury would find the intent to influence required to support a conviction of bribery under these circumstances. Where a public official is a speaker, the fried chicken and mashed potatoes are not generally offered to influence a public official in the exercise of his or her governmental responsibilities but as a modest accommodation for taking the trouble to appear before a group. In contrast, the requisite intent to influence may well be present when an interest group that is promoting legislation offers a lavish meal to public officials who are not part of the program. But, where the value of the meal is small, is the same as that offered to nonofficial participants, and where the official is the speaker, we doubt that even a zealous prosecutor would believe that bribery occurs under the circumstances.

III.

Finally, you ask whether bribery occurs when a public official accepts free registration at a seminar held by a group or association. This depends primarily upon the character of the seminar.

Where the purpose of the semniar is educational only and is not designed implicitly or explicitly to promote a particular policy, we doubt that bribery occurs when an official attends without paying a registration fee. For instance, free attendance at a seminar on various legislative procedures used in promoting exchange of views and not interested in passing particular legislation would not be within the scope of bribery laws because of the lack of intent to influence legislators in their official capacity.[1] *Cf.* Op. Atty. Gen. #77-7-16.

The analysis is somewhat different, however, when the purpose of the seminar is to promote specific legislation or public policy goals. Because of First Amendment considerations, we think legislators may audit such seminar sessions as observers without charge and may also receive free materials with political expression where the materials have no collateral value outside its communicative value. *See* Op. Atty. Gen. #79-10-19.

[1] A previous opinion of the Attorney General has held that reimbursement for expenses resulting from such conference attendance, does not violate Iowa's gift law, §68B.5, The Code 1979, since such reimbursement does not threaten to affect independence of judgment or appear to have been intended to influence legislative action. *See* 1976 Op. Atty. Gen. 704.

However, meals, lodging and other miscellaneous services may not be accepted without running the risk of offending Iowa's bribery laws since receipt of such benefits does not have First Amendment dimension.

November 13, 1979

TAXATION: Military Service Tax Exemption: Servicemen entitled to the Vietnam Veteran's Bonus: section 35C.1 and 35C.2, The Code 1977 and section 427.3(4), The Code 1979. A person who qualifies for the Vietnam Veteran's Bonus under section 35C.1 would not be entitled to take the military service tax exemption under section 427.3(4) when he or she had not served on active duty as defined in section 35C.2, between August 5, 1964 and June 30, 1973, both dates inclusive, or where said person has never been honorably separated from such active duty. (Price to Shirley, Dallas County Attorney, 11-13-79) #79-11-9(L)

November 13, 1979

TAXATION: Interplay of Property Tax Levels of Assessment and the Railroad Revitalization and Regulatory Reform Act, U.S. Const. Amend. 14; Iowa Const. art. I, §6 and art. III, §30; 49 U.S.C. §11503; Section 441.21, The Code 1979. In the event that the six percent growth limits in section 441.21 were legislatively extended to commercial property, the extension of the same percentage limit to railroad property would not satisfy the requirements of the 4-R Act. If the legislature lowered the level of assessment of commercial property below full market value, the 4-R Act would minimally require railroad property to be assessed at a level of assessment not higher than the commercial property level. If the legislature lowers the level of assessment of commercial property and, also, of railroad property in compliance with the 4-R Act, it is not constitutionally required to lower the levels of assessment of public utility property and industrial property. (Griger to Bair, Director of Revenue, 11-13-79) #79-11-10

Mr. Gerald D. Bair, Director of Revenue: You have requested an opinion of the Attorney General in your recent letter as follows:

Section 306 of the U.S. Railroad Revitalization and Recovery Act provides that a state may not assess transportation property at a higher ratio of market value than that at which all other commercial and industrial property is assessed, nor can transportation property be taxed at a rate greater than that applied to commercial and industrial property. Section 306 defines transportation property to include railroads which, in Iowa, are assessed annually by the Director of Revenue.

In view of the provisions of this Act, I request an Opinion of the Attorney General on the following questions:

1. If the limits on assessment increases for residential and agricultural realty provided for in Section 441.21 of the Code are extended to commercial realty, would the same percentage limit on assessment increases for railroad property satisfy the provisions of the Railroad Revitalization and Recovery Act?

2. If as a result of limiting increases in commercial assessments, commercial realty will be assessed at a level below market value, must railroad property also be assessed at the same level of assessment?

3. Assuming that railroads must be assessed at the same level of assessment as commercial realty, or limited to the same percentage increase in assessments as commercial realty, must the same treatment also be given to other properties assessed by the Director of Revenue and to industrial realty which is assessed locally?

The Railroad Revitalization and Regulatory Reform Act (hereinafter referred to as the 4-R Act) was enacted by Congress in 1976, effective

on and after February 5, 1979. Public Law 94-210, 90 Stat. 54. The Revised Interstate Commerce Act of 1978 revised and recodified the statutory provisions of the Interstate Commerce Act, including section 306 of the 4-R Act, but no substantive changes were made thereto. *See* Public Law 95-473, 92 Stat. 1445, 49 U.S.C. §11503. As you point out in your letter, one of the purposes of the 4-R Act was to prohibit unequal tax treatment by the states and their political subdivisions of "railroad transportation property" in the rate of assessed valuation in comparison with commercial and industrial property. Or to put it another way, when the 4-R Act became effective, a state and its political subdivisions were prohibited from assessing railroad transportation property at a higher rate of valuation (also known as level of assessment) than the rates established by the state and its political subdivisions for commercial and industrial properties. In this regard, 49 U.S.C. §11503(b)(1) states:

The following acts unreasonably burden and discriminate against interstate commerce, and a state, subdivision of a state, or authority acting for a state or subdivision of a state may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

Pursuant to Iowa property tax statutory provisions, as contained in section 441.21, The Code 1979, as amended by 1979 Session, 68th G.A., Ch. 25, §§3-6, commercial and industrial property are subject to property tax on the basis of the full fair and reasonable market value of such property. Railroad property is, likewise, pursuant to section 434.15. The Code 1979, subject to property tax on the full market value standard. Therefore, Iowa law, on its face, now requires the same level of assessment for commercial, industrial, and railroad property, and this tax treatment is consistent with the aforementioned conditions set forth in the 4-R Act.

Residential and agricultural properties may not be taxed at full actual value which for residential property is equivalent to fair and reasonable market value and for agricultural property equals a value determined on the basis of productivity and net earning capacity, all as set forth in section 441.21. Section 441.21 requires the Director of Revenue to "rollback" the actual values of residential and agricultural property, on a statewide basis, if the growth rate of such class of property in the current year exceeds six percent over the values for that class established in the prior year. In essence, a determination by the Director that the actual values for each of these two classes of properties exceed such six percent growth triggers the application by the Director of complex formulae for ascertaining a uniform percentage to be applied to all residential property and a separate uniform percentage to be applied to agricultural property in Iowa. The utilization of this formulaic approach to ascertain final taxable values for the assessment year 1978 resulted in a rollback of actual value of each residential assessment to seventy-eight percent of the actual value as previously determined by local assessing officials and a rollback of agricultural property values to ninety-six percent of established actual value. In 1979, this rollback scheme resulted in the establishment of the taxable value of residential property at sixty-four percent of market value and the establishment of the taxable value

of agricultural property at ninety-four percent of actual value i.e. productivity and earning capacity value. All of the above percentages were represented to the undersigned by your staff.

Your first question concerns the legality of a situation whereby the growth limits of six percent previously mentioned for residential and agricultural property actual values would be extended to commercial property so that the taxable values of the latter class would be rolled back to a uniform statewide percentage of market value. Could this same six percent growth limitation standard be applied to railroad property, for rollback purposes, and satisfy the provisions of the 4-R Act requiring the level of assessment for railroad property to be no higher than that established for commercial property? The answer is clearly no because it cannot be presumed that railroad property and commercial property would increase or decrease in value by the same percentage increment. Suppose commercial property as a class increased in market value by more than six percent but railroad property did not. In such a circumstance, a rollback of commercial property actual values to something less than full market value would be required, but there would be no rollback of railroad property values with the result that, unlike commercial property, railroad property would carry taxable values equivalent to full market value — the exact result proscribed by the 4-R Act. Moreover, even if both commercial property and railroad property had growth rates in excess of six percent, there is no guarantee such growth rates would be equal. Thus, for example, if commercial property values increase by fifteen percent and railroad property values increase by eight percent, the rollbacks would be triggered, but the net effect would be a greater rollback for commercial property than for railroad property so that railroad property would be taxed at a higher rate of market value than commercial property — again, the exact result prohibited by the 4-R Act.

From the aforementioned discussion, it is clear that, with reference to your second question, railroad transportation property may be assessed at the same or lower level of assessment than commercial (and industrial) property, but not at a higher level. Thus, to minimally satisfy the 4-R Act requirements, if commercial property is subject to a rollback in market value, railroad transportation property must be rolled back in taxable value at least to the level of assessment established for commercial property.

By your third question, you inquire whether a legislative establishment of a level of assessment below the full market value standard for commercial property and a corresponding establishment of a similar level of assessment for railroad property in compliance with the 4-R Act would necessitate a like level of assessment standard for all properties assessed by the Director of Revenue and for industrial property which is locally assessed. More particularly, in discussions with your staff and you, concern was expressed whether all property assessed by the Director had to be taxed at a uniform level of assessment to satisfy equal protection and uniformity requirements of the federal and Iowa Constitutions.

Property assessed by the Director can be described as "public utility" property. Such property is described in section 428.24, The Code 1979, Chapter 433, The Code 1979 (Telegraph and Telephone Companies), Chapter 434, The Code 1979 (Railway Companies), Chapter 436, The

Code 1979 (Express Companies), Chapter 437, The Code 1979 (Electric Transmission Lines), and Chapter 438, The Code 1979 (Pipeline Companies). *See also* rules 730 I.A.C. §71.6 and §71.7, pertaining to industrial property locally assessed.

Our research did not disclose any federal statutes like the 4-R Act which would require the above mentioned public utility property (other than railroad property) and industrial property to be assessed at least at no higher level of assessment than commercial property. Therefore, the essence of your question is whether a legislative scheme whereby commercial property and railroad property would be valued, for property tax purposes, at a lower level of assessment than other public utility property and industrial property would be consistent with the equal protection clause of the fourteenth amendment to the United States Constitution and the uniformity provisions of the Iowa Constitution. *See* Iowa Const. art. I, §6 and art. III, §30. In this regard, the federal equal protection clause and the uniformity provisions of the Iowa Constitution are generally deemed to be of similar import so that a legislative classification not in violation of federal equal protection is, likewise, not in violation of the Iowa Constitution's uniformity provisions. *Dickinson v. Porter*, 240 Iowa 393, 35 N.W.2d 66 (1949), app.dis., 338 U.S. 843, 70 S.Ct. 88, 94 L.Ed. 515 (1949); *City of Waterloo v. Selden*, 251 N.W.2d 506 (Iowa 1977).

Commercial property is obviously different than public utility property and industrial property. Legislative tax classifications based upon the use of property and which apply a different rate of valuation to such classes are constitutionally permissible. *Dickinson v. Porter*, supra; 1 Cooley, *Taxation* (4th Ed. 1924) at p. 717. Therefore, the Iowa legislature has the constitutional authority to subject commercial property to taxation at a level of assessment below full market value without decreasing the level of assessment of public utility property and industrial property. Of course, if the legislature does follow that course of action, it will have to lower the level of assessment of railroad property to comply with the 4-R Act.

The United States Supreme Court has firmly established the principle that a state may single out and subject railroads and their property to assessment and taxation in a mode and at a rate different from other businesses and property without violating the equal protection clause of the fourteenth amendment. *Kentucky Railroad Tax Cases*, 115 U.S. 321, 6 S.Ct. 57, 29 L.Ed. 414 (1885); *Michigan C.R. Co. v. Powers*, 201 U.S. 245, 26 S.Ct. 459, 50 L.Ed. 744 (1906); *Southern R. Co. v. Watts*, 260 U.S. 519 43 S.Ct. 192, 67 L.Ed. 375 (1923); *Ohio River & W.R. Co. v. Dittey* 232 U.S. 576, 34 S.Ct. 372, 58 L.Ed. 737 (1914). Because railroads are inherently different than other types of businesses, including public utilities, these cases allow railroad property to be taxed at rates which differ from others or to be taxed like some classes and differently than other classes. Therefore, as long as all railroads similarly situated are assessed at the same level of assessment by a tax scheme, there is no violation of the equal protection clause. The legislature may tax railroad property like other classes of property, if it chooses to do so, but it is not constitutionally required to do so and it, therefore, may provide for the assessment of such railroad property at a lower level of assessment than other property. Thus, the requirement of the 4-R Act that railroad

property be subject to taxation at a level of assessment not higher than commercial and industrial property merely creates a classification which, consistent with the federal and Iowa Constitutions, the Iowa legislature could have made in the first instance.

Therefore, it is the opinion of this office that the legislature could provide for a property tax scheme whereby commercial property and railroad property would be valued at a lower level of assessment than public utility property and industrial property.

November 14, 1979

STATE OFFICERS AND DEPARTMENTS: Notice requirements for transfer of appropriations. Art. III, §1, Iowa Const. §§8.38, 8.39, 8.40 and 721.2, The Code 1979. Section 8.39 requires the comptroller to notify the chairpersons of the appropriations committees of both houses and the chairpersons of the relevant subcommittees of the appropriations committees at least two weeks prior to affecting a transfer of appropriated funds. A transfer made without the required notice is void. Sections 8.38 and 8.40 provide potential civil remedies for violation of the notice requirement and 721.2 could provide criminal penalties for knowing violations of Chapter 8. (Schantz to Rush and Schwengels, State Senators, 11-14-79) #79-11-11

The Honorable Bob Rush and The Honorable Forrest Schwengels, State Senators: We have received your request for an opinion of the Attorney General in which you pose five questions concerning the notice requirements imposed by §8.39, The Code 1979, in connection with the transfer of appropriated funds. You asked.

1. Is the Governor (through the comptroller) required to provide any notice to the Legislature regarding transfer and use of appropriations pursuant to §8.39?

2. If so, to whom is notice required to be given?

3. When is notice required to be given?

4. What is the effect of a transfer which has been made which does not conform with the notice requirements or other provisions of §8.39?

5. Are there any criminal or civil sanctions available under Chapter 8 for misuse of appropriations including noncompliance with §8.39?

Section 8.39 generally authorizes the Governor and comptroller to transfer funds appropriated for one purpose to another purpose within an agency or to another agency if certain conditions are satisfied. These substantive criteria were discussed in Op. Att'y Gen. #79-4-40. Transfers made pursuant to §8.39 are to be reported *subsequently*, on a monthly basis, to the Legislative Fiscal Committee.

By amendment adopted in 1978, ch. 1027, Acts of the 67th G.A., the Legislature has imposed an additional requirement of *prior* notice to committee chairs. The pertinent portion of §8.39, The Code 1979, now provides:

Prior to any transfer of funds pursuant to this section, the state comptroller shall notify the chairpersons of the standing committees on budget of the senate and the house of representatives and the chairpersons of subcommittees of such committees of the proposed transfer. The notice from the state comptroller shall include information concerning the

amount of the proposed transfer, the departments, institutions or agencies affected by the proposed transfer and the reasons for the proposed transfer. Chairpersons notified shall be given at least two weeks to review and comment on the proposed transfer before the transfer of funds is made.

The statute itself rather clearly answers your first three questions. First, the comptroller (not the governor) is required to give notice prior to making a transfer of appropriations. The use of the verb "shall" in this context indicates that notice is a statutory duty rather than a discretionary act. Section 4.1(36), The Code 1979. Second, the statute provides that the chairpersons of the standing committees on budget of both the Senate and House of Representatives and the chairpersons of the budget subcommittees of such committees. As the committees which currently prepare the budget, the appropriations committees and subcommittees should be the recipients of the required notice. Notice need be given only the chairpersons of subcommittees involved with the agency affecting the transfer and, in the case of an interagency transfer, the agency receiving the transferred funds. Third, the notice must be given at least two weeks prior to affecting the transfer. The expression "two weeks" here connotes calendar rather than business days.

Your fourth and fifth questions concern the sanctions or remedies for failure to provide the required notice in a timely manner and, inasmuch as §8.39 itself is silent on the matter, are rather more difficult. Your fourth question is essentially whether a transfer made without the required notice is void.

We conclude that transfers without proper notice are void. As previously noted, the amendment adding the notice requirement used the mandatory verb "shall." Moreover, the first clause of §8.39 provides that "no appropriation shall be used for any other purpose than that for which it was made except as otherwise provided by law." The authority granted the executive to transfer funds is thus an exception to this general prohibition. An exception to a general prohibition is to strictly construed. *Wood Bros. Thresher Co. v. Eicher*, 231 Iowa 550, 526, 1 N.W.2d 655, 661 (1942); 2A Sutherland, *Statutory Construction*, §47.11 (4th ed. 1974). That rule of construction is complemented here by the rule that statutes should be construed to avoid constitutional difficulties. *Iowa Nat. Indus. Loan Co. v. Iowa State Dept. of Revenue*, 224 N.W.2d 436, 442 (Iowa 1974); *State v. Ramos*, 260 Iowa 590, 148 N.W.2d 862 (1967). The legislative branch of government has primary responsibility for the appropriation of state funds. *Welden v. Ray*, 229 N.W.2d 706, 709-10 (Iowa 1975). Section 8.39 constitutes a partial delegation of that authority to the executive branch in order to achieve needed fiscal flexibility. Such a delegation is potentially challengeable as a violation of the separation of powers principle of Art. III, §1, Iowa Const. If the notice provisions of §8.39 are construed as mandatory conditions precedent to a valid transfer, they become a meaningful procedural safeguard and a court would be significantly less likely to accept an impermissible delegation of legislative power challenge to §8.39. *See Warren County v. Judges of Fifth Jud. Dist.*, 243 N.W.2d 894 (1976); Note, *Safeguards, Standards and Necessity: Permissible Parameters for Legislative Delegation in Iowa*, 58 Iowa L.Rev. 974 (1973).

Your fifth question concerns potential civil and criminal sanctions for failure to provide the required notice. Sections 8.38 and 8.40 plainly have potential application here. Section 8.38 provides:

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.

Because the language of this section so closely parallels §8.39, we believe this remedy would be available for at least some violations of the notice requirements.

Section 8.40 provides for a penalty of two hundred fifty dollars for violations of Chapter 8 and specifies that violations are grounds for termination of employment. Section 8.40 provides:

A refusal to perform any of the requirements of this chapter, and the refusal to perform any rule or requirement or request of the governor or the state comptroller made pursuant to or under authority of this chapter, by any board member, commissioner, director, manager, building committee, or other officer or person connected with any institution, or other state department or establishment as herein defined, shall subject the offender to a penalty of two hundred fifty dollars, to be recovered in an action instituted in the district court of Polk county by the attorney general for the use of the state. If such offender be not an officer elected by vote of the people, such offense shall be sufficient cause for removal from office or dismissal from employment by the governor upon thirty days' notice in writing to such offender; and, if such offender be an officer elected by vote of the people, such offense shall be sufficient cause to subject the offender to impeachment.

This office has the statutory responsibility for bringing actions pursuant to §§8.38 and 8.40. We note first that the courts have not had occasion to construe these sections. If an alleged violation of §8.39 were to occur, it would be necessary for us to address such questions as whether §8.38 imposes strict liability and what constitutes "a refusal to perform any of the requirements of this chapter" within the meaning of §8.40. In any event, in the normal process of determining an appropriate remedy to seek, this office would consider such familiar criteria as whether the alleged violation was flagrant or technical and whether it was deliberate or inadvertent.

Finally, we would note that §721.2, nonfelonious misconduct in office, could create criminal liability for certain violations of Chapter 8. That section 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:

1. Makes any contract which contemplates an expenditure known by him or her to be in excess of that authorized by law.

4. By color of his or her office and in excess of the authority conferred on him or her by that office, requires any person to do anything or to refrain from doing any lawful thing.

6. Fails to perform any duty required of him or her by law.

As we have previously opined, this section requires proof of a "knowing" violation. *See* Op. Att'y Gen. #79-9-15.

In summary, the 1978 amendment to §8.39 requires the comptroller to notify the chairpersons of the appropriations committees of both houses and the chairpersons of the relevant subcommittees of the appropriations committees at least two weeks prior to affecting a transfer of appropriated funds. A transfer made without the required notice is void. Sections 8.38 and 8.40 provide potential civil remedies for violation of the notice requirement and §721.2 could provide criminal penalties for knowing violations of Chapter 8.

November 14, 1979

CONSTITUTIONAL LAW: GOVERNOR: Acceptance of Federal Funds and Transfers of State Funds. Iowa Const. Art. III, §§1, 24; §§7.9, 8.39, The Code 1979. The Governor may not constitutionally accept federal funds if the acceptance commits state funds subject to appropriation which have not been appropriated. However, it will not invariably be necessary for the executive to point to an appropriation specifically "earmarked" as matching funds. Funds may constitutionally be transferred pursuant to §8.39 in connection with the acceptance of federal funds if the statutory requirements for a proper transfer are satisfied. (Schantz to Rush, State Senator, 11-14-79) #79-11-12

The Honorable Bob Rush, State Senator: You have requested our opinion concerning the constitutionality of §§7.9 and 8.39, The Code 1979. This request is apparently related to an opinion issued by this office earlier this year involving the construction of the Vocational Rehabilitation Center. In Op. Att'y Gen. #79-4-40, although stressing the question was not free from doubt, we concluded that the Director of General Services has implied authority, delegated from the Governor and derived from §§7.9 and 8.39, to contract for the construction of the new center, without a specific appropriation for that purpose. We noted but did not resolve certain constitutional questions raised by resort to §7.9 in those circumstances.

Now, noting that Art. III, §§1 and 24, Iowa Const., place the responsibility for control of the purse strings in the Legislature, you ask the following questions:

1. Is Sec. 7.9 of the Code constitutional if acceptance of federal funds obligates state funds which have not been appropriated by the legislature?

2. If Sec. 7.9 of the Code is constitutional in the above instance, what limitation, if any, is there on the governor's authority to commit state funds without a legislative authorization?

3. Is the transfer of state funds under Section 8.39 of the Code constitutional if the transfer is required, or otherwise the result of acceptance of federal funds under Sec. 7.9?

I

Section 7.9, The Code 1979, provides:

The governor is authorized to accept for the state, the funds provided by any Act of Congress for the benefit of the state of Iowa, or its political subdivisions, provided there is no agency to accept and administer such funds, and he is authorized to administer or designate an agency

to administer the funds until such time as an agency of the state is established for that purpose.

Your first question is whether the executive branch may accept federal funds pursuant to §7.9 if such acceptance obligates state funds which have not been appropriated by the Legislature. Presumably, you have in mind federal programs which require a state "match" and situations such as that involved in our previous opinion where, although no state "match" was required, the executive undertook a project whose cost exceeded the available federal funds.

Section 7.9 does not purport to authorize the executive to obligate state funds in the absence of a legislative appropriation. Thus, the statute does not violate Art. III, §24 on its face and the real question is whether the Governor could exercise the authority to "accept and administer" federal funds consistently with the constitution if, in so doing, he were to obligate state funds which have not been appropriated by the Legislature. The short answer is no. Article III, §24 would be violated if the governor, in accepting federal funds, were to commit state funds subject to appropriation[1] without legislative authorization.

Lest the short answer be misleading, however, some elaboration is appropriate. Although in accepting federal funds the executive can commit only those funds subject to appropriation which have in fact been appropriated, this does not mean that the executive can commit only funds which have been specifically earmarked as "matching funds" or otherwise specifically designated for a project such as the Vocational Rehabilitation Center. It has long been held that the word "appropriation" in Art. III, §24 does not refer only to the specific appropriations of the General Assembly which are grouped together and designated as the "appropriation acts;" the concept of a "standing" appropriation long has been recognized in Iowa. *See Prime v. McCarthy*, 92 Iowa 569, 576-79 (1894); *Frost v. State*, 172 N.W.2d 575, 579 (Iowa 1969); *Graham v. Worthington*, 259 Iowa 845, 862, 146 N.W.2d 623, 637-38 (1966). *See also* 1936 Op. Att'y Gen. 682, 685. It should be noted in this regard that §8.6 (10), The Code 1979, recognizes the concept of standing appropriations and requires the comptroller to prepare a biennial report containing a complete list of all such appropriations for the General Assembly. We also note that the comptroller has not regarded and we do not regard §7.9 as creating a standing appropriation of state "matching funds" for the purpose of obtaining federal funds.

To summarize, the executive, in seeking or accepting federal funds pursuant to §7.9 can commit only those funds subject to appropriation which have in fact been appropriated. Although appropriated funds may only be spent for the purposes authorized by the legislature, it will not invariably be necessary for the executive to point to an appropriation specifically "earmarked" as matching funds.[2]

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[1] As we noted in our prior opinion, the requirement for an appropriation is generally limited to the so-called "general fund" of the treasury and not to certain "special funds," even though the state treasurer may act as custodian of the funds. *See generally Farrell v. State Board of Regents*, 179 N.W.2d 533, 546 (Iowa 1970).

[2] Our answer to your first question makes it unnecessary to address the second.

II

You also inquire whether a transfer of funds under §8.39 is constitutionally permissible if the transfer is required by the acceptance of federal funds pursuant to §7.9.

Section 8.39, The Code 1979, provides:

No appropriation nor any part thereof shall be used for any other purpose than that for which it was made except as otherwise provided by law; provided that the governing board or head of any state department, institution, or agency may, with the written consent and approval of the governor and state comptroller first obtained, at any time during the biennial fiscal term, partially or wholly use its unexpended appropriations for purposes within the scope of such department, institution, or agency.

Provided, further, when the appropriation of any department, institution or agency is insufficient to properly meet the legitimate expenses of such department, institution, or agency of the state, the state comptroller, with the approval of the governor, is authorized to transfer from any other department, institution, or agency of the state having an appropriation in excess of its necessity, sufficient funds to meet that deficiency.

Prior to any transfer of funds pursuant to this section, the state comptroller shall notify the chairpersons of the standing committees on budget of the senate and the house of representatives and the chairpersons of subcommittees of such committees of the proposed transfer. The notice from the state comptroller shall include information concerning the amount of the proposed transfer, the departments, institutions or agencies affected by the proposed transfer and the reasons for the proposed transfer. Chairpersons notified shall be given at least two weeks to review and comment on the proposed transfer before the transfer of funds is made.

Any transfer made under the provisions of this section shall be reported to the legislative fiscal committee on a monthly basis. The report shall cover each calendar month and shall be due the tenth day of the following month. The report shall contain the following: The amount of each transfer; the date of each transfer; the department to which the transfer was made; the department and fund from which the transfer was made; a brief explanation of the reason for the transfer; and such other information as may be required by the committee. A summary of all transfers made under the provisions of this section shall be included in the annual report of the legislative fiscal committee.

In our earlier opinion, Op. Att'y Gen. #79-4-40, we summarized the authority provided by §8.39 as follows:

This section actually provides for two types of transfers. First, the governor and comptroller may authorize a transfer of a department's own *unexpended appropriation for purposes within the scope of such department*. Second, the comptroller may transfer funds from another department having an appropriation in excess of its necessity to a department *whose appropriation is insufficient to meet its legitimate expenses*. With respect to *intra-departmental* transfers, the only limitation is that the transferred funds be used "for purposes within the scope of the department." In this particular situation that limitation is satisfied. As previously noted, the Governor designated the director as the proper person to administer the federal grant. Moreover, there can be little question about the propriety of designating the director for such a project because it has been the recent custom for the director to superintend construction of new state buildings.

With respect to *inter-departmental* transfers, however, we note two limitations. The transferred funds must be used to meet "legitimate expenses" of a department "whose appropriation is insufficient." We in-

terpret this to mean that inter-departmental transfers may be made only to supplement an existing appropriation. *See* 1968 OAG 132, 150.

As we previously noted in passing, a prior Attorney General's Opinion had held that §8.39 is not an unconstitutional delegation of the appropriation power from the legislative branch to the executive branch, 1974 Op. Att'y Gen. 82. We find no reason to modify that view.

Turning to your specific question, we believe that a transfer of funds pursuant to §8.39 may be employed constitutionally in connection with the acceptance of federal funds pursuant to §7.9 to the extent, but only to the extent, that the requirements for a valid transfer are satisfied. In the case of intra-departmental transfers, the funds accepted pursuant to §7.9 and the funds transferred pursuant to §8.39 must be used "for purposes within the scope of the department." In the case of inter-departmental transfers, the funds transferred may be used only to meet "legitimate expenses" of a department "whose appropriation is insufficient." In other words, before an interdepartmental transfer can be employed in connection with §7.9, it must be shown that the Legislature made an appropriation to the receiving department for at least the general purpose for which the transferred funds will be expended. It will be noted that the funds subject to appropriation which may be transferred pursuant to §8.39 have been formally appropriated and will be expended for a purpose generally approved by the Legislature. This would appear to satisfy Art. III, §§1 and 24.

November 14, 1979

AGRICULTURE: Grain Moisture Testing. Sections 159.5 and Chapter 215A, The Code 1979; H.F. 734, Section 3, 1979 Session 68th G.A. The use of a sample of grain for moisture testing obtained by a method of probing for foreign material not approved pursuant to §159.5(10) is not prohibited pursuant to H.F. 734 and §159.5(10). (Willits to Lounsberry, Secretary of Agriculture, 11-14-79) #79-11-13(L)

November 19, 1979

MUNICIPALITIES: Police Radio Broadcasting System—IOWA CONST. art. 3, §40; §§28E, 364.1, 364.3(4), 384.1, 384.24(3)(j), 693.4, 693.5, 693.6, The Code, 1979. A city may not levy a separate tax to defray the maintenance expenses of a Chapter 693 Police Radio Broadcasting System. So long as a city operates only a receiver set, it may not be required, to contribute to the expenses of operating a Chapter 693 system. Member cities and a county operating a Chapter 693 system may reach a Chapter 28E agreement covering the respective contributions to the maintenance expenses of the system and a city may provide funds to cover its contribution as a part of its general tax levy under Section 384.1. (Swanson to Heintz, Chickasaw County Attorney, 11-19-79) #79-11-14 (L)

November 19, 1979

ELECTIONS: Campaign Finance; Chapter 56, The Code 1979, Public officeholders may expend campaign funds held by a candidate's committee for any lawful purpose provided that full disclosure of contributions and expenditures is made in compliance with the Campaign Finance Disclosure Act. (Hagen to Holden, State Senator, 11-19-79) #79-11-15 (L)

November 20, 1979

COUNTIES AND COUNTY OFFICERS: County employees' reimbursement for personal automobile use. §§79.9, 79.10, 79.13, The Code 1979. Reimbursement made to a local public employee for use of a personal

automobile in performance of public duties must be made pursuant to §79.9, The Code 1979, mileage reimbursement limitation in effect. (Hyde to Gustafson, Crawford County Attorney, 11-20-79) #79-11-16

Thomas E. Gustafson, Crawford County Attorney: You have requested an opinion of this office concerning the method of reimbursement for county employee automobile expenses. Specifically, your question dealt with employees in the office of the county assessor:

Can employees submit actual expenses incurred in the use of their own automobiles in the performance of a public duty in lieu of the mileage allotment of fifteen cents[1] per mile as set forth in §79.9, The Code 1979?

Section 79.9, The Code 1979, provides:

When a public officer or employee other than a state officer or employee, is entitled to be paid for expenses in performing a public duty, a charge shall be made, allowed and paid for the use of an automobile of eighteen cents per mile for actual and necessary travel effective July 1, 1979, and twenty cents per mile effective July 1, 1980. *A statutory provision stipulating necessary mileage, travel, or actual reimbursement to a local public officer or employee shall be construed to fall within the mileage reimbursement limitation specified in this section unless specifically provided otherwise.* [Emphasis added].

Section 79.9 was a blanket provision enacted in 1974, 65th G.A., ch. 1091, §6, subjecting certain reimbursement provisions elsewhere in the Code to the rate imposed by the section. The legislature simplified the constant updating procedure that had been necessary in that only one section of the Code would need revising in order to bring the reimbursement in line with the effects of inflation.

Section 79.9 by its own language applies to local public officers and employees automobile expenses, whether they are described as "necessary", "mileage", "travel" or "actual". Prior opinions of this office have interpreted the word "necessary" to mean "actual", and such "actual" expenses were subject to the monetary per-mile limitation. 1934 Op. Atty. Gen. 53, 1934 Op. Atty. Gen. 305. In view of the express nature of the Code's provision for public employee automobile expenses, the county's ability pursuant to its extensive home rule powers to provide alternative methods has been preempted. *See* Op. Atty. Gen. #79-4-7.

Your request noted that the language in §79.10, The Code 1979, which provides: "No law shall be construed to give to a public officer or employee both mileage and expenses for the same transaction," appears to indicate a choice of reimbursement to an employee by either "mileage" or "expenses". However, this office has interpreted the word "expense" to mean other than personal automobile allowance. That opinion referred specifically to other modes of travel, such as travel by railroad, as properly defining expense. 1932 Op. Atty. Gen. 55. Further, §79.13, The Code 1979, uses the words "mileage *or* other traveling expenses . . . railroad, hotel and other traveling expenses . . .", which implies that the legislature's use of the word "expense" refers to costs other than those incurred

[1] Since your letter, the legislature has amended the rate to eighteen cents effective July 1, 1979 and twenty cents effective July 1, 1980, 1979 Session, 68th G.A., ch. 2, §41.

by a public employee's use of a personal automobile. Thus, no choice of method of reimbursement is apparent in the statutes.

In conclusion, it is our opinion that reimbursement made to a local public employee for use of a personal automobile in performance of public duties must be made pursuant to the §79.9 mileage reimbursement limitation in effect. The reimbursement rate for personal automobile use may be inadequate by today's standards, but it is within the legislature's province to make any revisions.

November 20, 1979

SCHOOLHOUSE FUND: Ch. 24, §§257.25, 275.32, 291.13, 297.5, 198.18. A school district board of directors may use excess schoolhouse bond funds for constructing and equipping an athletic field on land owned by the district without a new vote by the electors. (Hagen to Fisher, Webster County Attorney, 11-20-79) #79-11-17

Monty L. Fisher, Webster County Attorney: You have asked for an opinion of the Attorney General concerning the use of schoolhouse funds. The voters of the Northwest Webster Community School District approved issuance of school bonds for the purpose of constructing and furnishing a new Junior-Senior High School. You report that construction of the building will be completed at a smaller cost than expected. The questions you propound are as follows:

1) May the school district use the excess funds for the purpose of constructing and equipping an athletic field on land adjacent to school buildings that is owned by the district?

2) May it do so without another vote by the electors?

We believe the answer to both questions is yes.

The statutory system for financing the acquisition of school sites and of constructing and equipping school buildings by Iowa public school districts is contained in Title XII of the Iowa Code. Sections 275.32, 278.1, 298.18, 297.5 and 291.13, The Code 1979, are particularly relevant as is Chapter 24, the local budget law.

The Code requires that the schoolhouse funds be kept separate. There is no authority vested in a district board of directors to transfer funds from one of the funds to the other. Your questions are limited strictly to the use of funds in the schoolhouse fund.

There is no doubt that the construction and equipping of an athletic field is a schoolhouse expenditure, and thus, to be financed from the schoolhouse fund of the district. Physical education is required to be taught in grades one through twelve. Sections 257.25(3)(4) and (6), The Code 1979. Furthermore, the academic physical education requirement in high school may be satisfied by participation in interscholastic programs. *See* §257.25(6)(g), The Code 1979. Thus, an athletic field is no less a classroom than a science laboratory or an English or history classroom in the high school building. We believe authority to build and equip a new Junior-Senior High School building encompasses construction and equipping of an athletic field on land owned by the school district. While the word used in the public measure submitted to the Northwest Webster Community School District electors was "building" rather than "schoolhouse", we do not think the difference is of significance within the meaning of the statute.

The people of the district approved a bond issue pursuant to §278.1(7), The Code 1979. We see no reason for resubmission of the question to the voters if the funds are to be used for schoolhouse purposes and not for purposes which must be financed by the general fund of the school district.

The questions you raise with respect to the proposed use of the schoolhouse fund are slightly different from others raised with this office on previous occasions but our response here is consistent with the earlier opinions. *See* 1976 Op. Atty. Gen. 198 and 723; 1972 Op. Atty. Gen. 130.

November 21, 1979

SCHOOLS: Offsetting tax against non-resident tuition payments; §282.2, The Code 1979. A non-resident of a school district who pays tuition in that district should deduct school taxes from tuition in the year both are paid, rather than deducting taxes from tuition paid in the year the taxes were assessed. (Norby to Anderson, Dickinson County Attorney, 11-21-79) #79-11-18 (L)

November 26, 1979

STATE OFFICERS AND DEPARTMENTS: Department of Substance Abuse—Contracts for Substance Abuse Treatment. Sections 125.44, 124.45, The Code 1979. If the contract between the department and a facility is "open-ended," the department is responsible for 75 per cent of the total unpaid expenses submitted to the department by the facility on a cost-reimbursement basis. If the contract is in the form of a "maximum grant" agreement, the department's maximum liability is that total figure on the face of the contract, again on a cost-reimbursement basis. If the supplemental or additional costs result from "care, maintenance, and treatment," then the department would be responsible for their payment, and these costs would be included in any computation to determine the point at which the department's total liability had been exhausted under a "maximum grant" contract. (Dallyn to Carr, State Senator, 11-26-79) #79-11-19 (L)

November 26, 1979

SCHOOLS: Transfer to Schoolhouse Fund: A school district board of directors may not transfer funds from the general fund to the schoolhouse fund for the purpose of constructing a hot lunch facility without approval of the electors even though there is a sufficient surplus in the general fund to defray the cost of such construction. Iowa Const., Art. IX, § 2nd(1); ch. 24, 296, 2978; §§24.14, 275.32, 278.1(5)(7); 279.33, 279.34, 283A.9, 291.12-15, 297.5, The Code 1979. (Hagen to Brown, State Senator, 11-26-79) #79-11-20 (L)

November 26, 1979

ELECTIONS: Campaign Finance Disclosure Commission. Ch. 56, §56.11, The Code 1979. The Campaign Finance Disclosure Commission may participate in and agree to informal settlement or disposition any time before a complaint is filed with it, and once a complaint has been filed, when such informal settlement results in the dismissal of the complaint by the parties. (Hyde to Eisenhauer, Executive Director, Campaign Finance Disclosure Commission, 11-26-79) #79-11-21 (L)

November 27, 1979

The Iowa Natural Resources Council, in considering floodway and flood plain construction applications pursuant to Section 455A.33, The Code, 1979, may not consider or rely upon effects caused by activities occurring outside a floodway or flood plain. The Iowa Geological Survey may take this into consideration when requested to provide geological information to the Natural Resources Council. 455A.14. 455A.18,

455A.33, 305.1, 305.8, The Code, 1979. (Valde to Grant, Director and State Geologist, Iowa Geological Survey, 11-27-79) #79-11-22

Dr. Stanley C. Grant, Director and State Geologist, Iowa Geological Survey: You have requested the opinion of the Attorney General concerning the jurisdiction of the Iowa Natural Resources Council to inquire into the need for an Environmental Impact Statement and the advantages and disadvantages of alternative pipeline routes when the Council is considering an application for a permit to construct a pipeline channel crossing. Your question arises because the Council has requested information on alternative pipeline routes from your agency pursuant to Section 455A.14(1), The Code, 1979. That section authorizes the Council to "request and receive from (various agencies including the Iowa Geological Survey), such assistance and data as will enable the council *to properly carry out its activities and effectuate its purposes . . .*" (emphasis added).

We assume your concern over this issue arises from Section 305.8, The Code, 1979, which directs the state geologist to "cooperate with (various agencies including the Natural Resources Council) in the making of topographic maps and the study of geologic problems of the state when, *in the opinion of the geological board, such cooperation will result in profit to the state.*" (emphasis added). Since the issues of popeline routing through certain geological formations and the related geological hazards constitute "geological problems of the state", presumably you have requested this opinion to assist in the determination of whether you will provide the requested assistance to the Council on the basis that "such cooperation will result in profit to the state."

This opinion is provided to your agency to assist in making that determination, although we cannot make the decision for you. Section 305.8 provides that the geological board created by Section 305.1 has the authority to determine whether such cooperation will result in profit to the state. Therefore, your concern over "whether the Iowa Geological Survey can legitimately respond to a request from the Iowa Natural Resources Council to conduct a geological analysis of routes for a crude oil pipeline alternative to the route approved by the Iowa State Commerce Commission" cannot be directly decided by this office. However, the geological board in making that decision may be assisted by this opinion.

We understand from your request and from our discussions with the Iowa Natural Resources Council staff that the Council has received applications for permits to construct pipeline crossings across the channels of four rivers and streams within the state. However, in its consideration of these applications the Council has asked your agency for the geological information referred to previously.

The Council generally has jurisdiction under Section 455A.33, The Code, 1979, over any construction or other similar activities on floodways and flood plains. Section 455A.33(3) requires that before a "structure, dam, obstruction, deposit or excavation" may be "erected, made, used or maintained in or on any floodway or flood plain" the persons desiring to do so must apply to the Council and receive a permit allowing them to proceed. The Council has promulgated rules dealing with various types of floodway and flood plain activities. Rules 580-5.8 and 5.59 are con-

cerned with pipeline crossings of river channels such as are involved in the present case. We believe these rules properly come within the scope of activities regulated by the Council pursuant to Section 455A.33. It is our opinion that the terms quoted from Section 455A.33 indicate an intent on the part of the Legislature to include all construction or other similar or related activities in or on floodways or flood plains within the Natural Resources Council's jurisdiction and thus the terms should be broadly construed to effectuate the Council's purposes.

However, it appears from your request and from the attached letter from the Council, indicating its action on the pipeline channel crossing applications, that the Council may be concerned with more than simply the floodway and flood plain activities. Apparently the Council is concerned about possible effects upon surface or ground water in the event of pipeline rupture or failure along its route through various geological formations. The Council has indicated it is concerned with pipeline failures which may occur at any location along the pipeline route, even at locations which may be remote from one of the four crossings being considered.

Section 455A.33(1) provides that it is "unlawful to suffer or permit any structure, dam, obstruction, deposit or excavation to be erected, used or maintained *in or on any floodway or flood plains*," which will cause or allow certain prohibited conditions. (emphasis added). Pursuant to Section 455A.18 the Council is directed "upon application by any person for approval of the construction or maintenance of any structure, dam, obstruction, deposit or excavation to be erected, used or maintained *in or on the flood plains of any river or stream*," to investigate the effect of any such activity (*in or on the flood plains*) on the efficiency and capacity of the floodway and on certain other designated criteria. Thus both Section 455A.33, which proscribes certain floodway and flood plain activities and provides for application to conduct any construction-type activities in or on floodways and flood plains, and Section 455A.18, which designates certain criteria to be considered by the Council upon the receipt of such a floodway or flood plain construction application, are concerned only with those activities *in or on floodways or flood plains* and the effects arising from those activities conducted *in or on floodways or flood plains*.

We have searched Chapter 455A and have found no authority for the Natural Resources Council to consider effects flowing from structures or activities *not* on a floodway or flood plain when considering an application for a permit to construct in or on a floodway or flood plain pursuant to Section 455A.33. We, therefore, are of the opinion that the Natural Resources Council is limited in its consideration of floodway or flood plain construction applications to those effects flowing or arising from or attributable to the structure, dam, obstruction, deposit or excavation *in or on a floodway or flood plain*.

"Administrative bodies have only such power as is specifically conferred, or is to be necessarily implied, from the statute creating them," *Quaker Oats Co. v. Cedar Rapids Human Rights Commission*, 268 N.W.2d 862, 868 (Iowa 1978). It is our opinion that the Natural Resources Council has no jurisdiction over those pipeline construction activities occurring outside a floodway or flood plain and that it would be improper for the Council to consider any effects other than those arising from

activities occurring *in or on a floodway or flood plain* when making its decision on applications to construct on a floodway or flood plain. It seems clear that the Legislature limited the Council to a consideration of the effects arising from activities it is considering permitting *in or on a floodway or flood plain*, and the Council may not extend its jurisdiction by taking into consideration the effects of activities occurring wholly outside of a floodway or flood plain.

We do not mean to say that the Council may not consider the effects arising from or caused by floodway or flood plain activities if the effects are felt or occur at locations not on a floodway or flood plain. The Council in our opinion may consider any effects caused by or arising from a floodway or flood plain project, wherever those effects arise or are felt. But the Council may not consider effects which may be caused by or result from activities outside a floodway or flood plain when deciding whether to approve an application received pursuant to Section 455A.33.

December 4, 1979

JUVENILE JUSTICE: COURT EXPENSES: §§232.141 and 232.142. An attorney who is employed in a county-funded adult or juvenile defender advocate program and who is appointed by the court as counsel or guardian ad litem for a juvenile cannot be awarded "reasonable compensation" by the court for such services. Only the actual costs incurred by the county qualify for inclusion in the computation under §232.141. (Fortney to Williams, Deputy Commissioner, Dept. of Social Services, 12-4-79) #79-12-1

Mrs. Catherine Williams, Deputy Commissioner, Iowa Department of Social Services: You have requested an opinion of the Attorney General regarding the assessment of juvenile court expenses pursuant to §232.141, The Code 1979. More particularly, you have inquired whether or not an attorney who is employed in a county-funded adult or juvenile defender advocate program and who is appointed by the court as counsel or guardian ad litem for a juvenile can be awarded "reasonable compensation" by the court for such services, and does such compensation, if allowed, qualify for inclusion in the computation under §232.141. It is our opinion that only the actual costs incurred by the county for the attorney are includable in the computation.

A thoroughly revised juvenile justice code became operative in this state July 1, 1979. Consequently, the sections to which your questions are addressed have yet to be analyzed by a court. It is therefore necessary to approach your problem by looking at the fiscal aspects of the new law as a whole in order to gather the apparent intent of the legislature.

Division VIII of Chapter 232 relates to expenses and costs of the juvenile justice system. At present, Division VIII consists of only two sections, to wit: §§232.141 and 232.142. Section 232.142 relates solely to the maintenance and cost of juvenile homes operated by counties. As such, it is inapplicable to your question. Section 232.141 sets out a procedure by which expenses are allocated between the counties and the state. This section establishes a rather basic framework for financial responsibility for juvenile justice. Essentially, this framework consists of a mechanism by which each county determines what is referred to as its "base cost". [*See* §232.141(4)(a)] This is arrived at by adding the *actual* expenditures for certain juvenile services in three designated fiscal years.

Once this base cost is established, it serves as the benchmark by which a county's future liability is measured. With the exception of an inflationary escalator clause contained in §232.141(4)(b), each county is expected to expend an amount equal to its base cost in each fiscal year. Once a county has reached its base cost, as adjusted for inflation, the balance of the year's expenditures are assumed by the state.

When viewed as a whole, §232.141 can be seen as an attempt to apportion the actual costs of operating the juvenile justice system between the counties and the state. It is clear from the section that the state's liability begins only at the point at which a county meets its base cost by actual expenditures. Your reference to the concepts asserted by some local officials would indicate a belief that an attorney can be hired by the county at a set salary and yet his work can be billed against the base cost as if he were private counsel charging on an hourly basis. Such a belief is ill founded. When §232.141(1)(d) speaks of "reasonable compensation", it refers to expenses which are a charge upon the county and are in turn met by the county. Section 232.141 does not contemplate **a situation in which a county is permitted to credit its base cost with hypothetical expenses, thereby resulting in a shift of financial responsibility to the state prior to the point at which the county has in fact expended an amount equal to its base cost, adjusted for inflation.**

In summary, it is our opinion that should a county elect to hire an attorney as a county employee to provide the services mandated by the juvenile justice bill, that county is credited against its base cost only the amount of expenses actually incurred for the attorney and his support costs, not the amount which those same services would cost if obtained from private counsel.

December 4, 1979

TAXATION: Horizontal Property Regime (Condominiums). Sections 425.11, The Code 1979, as amended by 68th G.A., Chapter 102, §§1, 427.3, 428.4, 441.23, 499B.3, 499B.10, 499B.11. The declaration to submit an existing parcel to the horizontal property regime, once properly acknowledged and recorded, creates new individual units or properties which should be assessed separately as of January first of the year following the division of the existing parcel and the owners of said individual units who otherwise qualify are entitled to claim the military service tax exemption for 1979 and the whole structure should be allowed one homestead tax credit for 1979 to be divided among the qualified unit owners, although in 1980 and thereafter each such owner could apply for and receive a homestead tax credit for his or her individual unit. (Price to Kopecky, Linn County Attorney, 12-4-79) #79-12-2

Mr. Eugene J. Kopecky, Linn County Attorney: You have requested an opinion of the Attorney General regarding the assessment and taxation of premises formerly assessed and taxed as one high rise luxury apartment building which was subsequently converted to condominiums under Chapter 499B, The Code 1979, and whether the individual owner of each condominium qualifies for a separate homestead tax credit and/or the military service tax exemption. Specifically you state:

1. "The initial question presented to your office is whether the declaration to submit a premise to the horizontal property regime recorded on June 12, 1979, creates individual units or properties, thereby creating separate individual assessments for the 1979 calendar year."

2. "Whether the owners of the individual properties contained within the building who recorded their deeds of ownership after declaration and prior to July 1, 1979, would be entitled to the homestead tax credit and/or military service exemption for 1979, said taxes payable in 1980-81. This question assumes that said individuals claiming the credit or exemption lived in their respective units prior to July 1, 1979."

In order for a specific type of property to qualify as condominiums the specific requirements provided for in Chapter 499B must be complied with.

Section 499B.3, The Code 1979, provides in relevant part:

Recording of declaration to submit property to regime. When the sole owner or all of the owners . . . desire to submit a parcel or real property upon which a building is located or to be constructed to the horizontal property regime established by this chapter, a declaration to that effect shall be executed and acknowledged by the sole owner . . . or all of such owners . . . and shall be recorded in the office of the county recorder of the county in which such property lies.

According to the facts supplied by you, the property in question had been assessed in the past as a luxury-type high rise apartment building existing under one legal description. On June 12, 1979, a deed was recorded whereby ownership of the premises was transferred under one legal description to Company A. Concurrnt with the recording of this deed, a declaration to submit the premises to the horizontal property regime under Chapter 499B was recorded.

According to section 499B.3, the declaration, once acknowledged by the owners and duly recorded in the county where the property lies, is the operative document creating a horizontal property regime. Once real property containing a building is committed to a horizontal property regime, each individual apartment located therein is as completely and freely alienable as any separate parcel of real property is under Iowa law, except as expressly limited by Chapter 499B. *See* section 499B.10. Consequently, it is obvious that when the declaration to submit the premises in question to the horizontal property regime was duly acknowledged and recorded on June 12, 1979, individual units were thereby created.

Once property has been submitted to the horizontal property regime, real proprety taxes and special assessments are levied on each individual unit.

Section 499B.11(1), The Code 1979, provides:

Real property tax and special assessments — levy on each apartment.

1. All real property taxes and special assessments shall be levied on each apartment and its respective appurtenant fractional share or percentage of the land, general common elements and limited common elements where applicable as such apartments and appurtenances are separately owned, and not on the entire horizontal property regime.

Sections 499B.10 and 499B.11(1) when read in conjunction with each other provide that once property has been submitted to the horizontal property regime, each individual unit is "completely and freely" alienable as any separate parcel of real property and all real property taxes and special assessments must be levied on each individual unit since such units are separately owned.

Section 428.4, The Code 1979, provides in relevant part:

Property shall be assessed for taxation each year . . . . Real estate shall be listed and assessed in 1978 and every two years thereafter. The assessment of real estate shall be the value of the real estate as of January 1 of the year of the assessment . . . . 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 changd in value subsequent to January 2 of the preceding real estate assessment 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 assessment shall be completed as specified in section 441.28, but no reduction or increase in actual value shall be made for prior years. If an assessor makes a change in the valuation of the real estate as provided for herein, the provisions of sections 441.23, 441.37, 441.38 and 442.39 shall apply.

Section 441.23, The Code 1979, provides in relevant part:

Notice of valuation. 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 the taxpayer's property, and notify the person, if he or she feels aggrieved, to appear before the board of review and show why the assessment should be changed . . . . .

Department of Revenue Rule 730-71.2(1) IAC provides:

Responsibility of assessor. The valuation of real estate as established by city and county assessors shall be the actual value of said real estate as of January first of the year in which the assessment is made. New parcels of real estate created by the division of existing parcels of real estate shall be assessed separately as of January first of the year following the division of the existing parcel of real estate.

Sections 328.4 and 441.23 of the Code and rule 730-71.2(1) of the IAC set forth the responsibilities and procedures to be followed by city and county assessors in the valuation of real estate. It is the position of the Department of Revenue that when property previously listed under one legal description has subsequently been submitted to the horizontal property regime, new parcels of real estate are being created by said division of an existing parcel. As such, the newly created parcels of real estate should be assessed separately as of January first of the year following the division of the existing parcel of real estate. Such procedure is in conformity with 730-71.2(1) IAC. Since the property in question was submitted to the horizontal property regime on June 13, 1979, the newly created parcels should be assessed separately as of January 1, 1980. Rule 730-71.2(1) is, in our opinion, consistent with the provisions of section 428.4.

Your second question deals with whether the owners of the individual properties contained within the building who recorded their deeds of ownership after the declaration to submit the property to the horizontal property regime and prior to July 1, 1979, are entitled to the homestead tax credit and/or the military service tax exemption for 1979.

Section 449.11(2) provides that "*any exemption from taxes that may exist on real property or the ownership thereof shall not be denied by virtue of the registration of the property under the provisions of this chapter.*" (emphasis added)

In order to qualify for the military service tax exemption for 1979, the claimant thereof must conform with the eligibility and filing requirements of sections 427.3 thru 427.6, The Code 1979, inclusive.

In 1946 Op. Att'y. Gen. 155, the Attorney General opined that the claimant for the military service tax exemption must be the beneficial owner thereof. Construing section 499B.11(2) in connection with sections 427.3 thru 427.6, the military service tax exemption would be available to each owner who properly claimed the exemption in 1979, since they would in fact have an ownership interest in each individual unit. *See* 1976 Op. Att'y. Gen. 125.

In order to qualify for the homestead tax credit in 1979, the claimant thereof must conform with the eligibility and filing requirements of chapter 425, The Code 1979.

Section 425.11(1)(a), The Code 1979, defines homestead to include "the *dwelling house* which the owner is living at the time of filing the application." (emphasis added)

Section 425.11(1)(c), The Code 1979, states that the homestead "must not embrace more than one dwelling house."

Section 425.11(1)(d), The Code 1979, defines "dwelling house" to include "any building occupied wholly or in part by the claimant as a home." The dwelling house as defined in section 425.11(1)(d) would consist of the entire building occupied by the individual owners of each condominium. In *Overstreet v. Tubin*, 53 So.2d 913, (Fla. 1951) and *Gautier v. State*, 127 So.2d 683 (3rd D.C.A. 1961), *appeal dismissed*, 135 So.2d 740 (Fla. 1961) the Florida Courts interpreted dwelling house to mean the whole structure of a multiple dwelling house, rather than each separate unit thereof, and as such the courts held that the whole structure should be allowed but one homestead tax credit to be divided among the qualified unit owners. To modify this tax treatment of the condominium, the Florida legislature amended its statute to allow the individual condominium owners to claim the homestead tax exemption separately.

The Iowa legislature has provided the same modification by amending section 425.11. In 1979 Session, 68th G.A., chapter 102 §1, the Iowa legislature amended section 425.11(2) to allow a homestead tax credit to individuals who hold an interest in a horizontal property regime provided the holder of the interest in the horizontal property regime is liable for and pays the property tax on the homestead. However, this amendment does not become effective until January 1, 1980. Therefore, in future years, i.e. 1980 and thereafter, each conversion from apartment building to condominiums would allow each individual owner of a unit to each claim a separate homestead tax credit provided they meet all of the eligibility and filing requirements of chapter 425, The Coed 1979, as amended.

However, since 1979 Session, 68th G.A., chapter 102, §1, is not effective until January 1, 1980, it is the opinion of this office that in construing section 499B.11(2) in connection with section 425.11, the whole structure should be allowed but one homestead tax credit *for 1979* to be divided among the qualified unit owners.

Therefore, it is the opinion of this office that the declaration to submit an existing parcel to the horizontal property regime, once properly acknowledged and recorded, creates new individual units or properties which should be assessed separately as of January first of the year following the division of the existing parcel and the owners of said individual units who otherwise qualify are entitled to claim the military service tax exemption for 1979 and the whole structure should be allowed one homestead tax credit for 1979 which should be divided among the eligible unit owners.

December 4, 1979

COUNTIES AND COUNTY OFFICERS: County Attorney; County Public Hospital Board of Trustees. §336.2(2), (6), and (7), 347.13, 347.14 (10), The Code 1979. Chapter 336, The Code 1979, which enumerates the duties the county attorney must render to county officers, covers services to be performed for the county public hospital board of trustees. The board of trustees may employ independent legal counsel in the exercise of their general grant of power to administer and manage the hospital. (Bennett to Glaser, Delaware County Attorney, 12-4-79) #79-12-3 (L)

December 5, 1979

COUNTIES AND COUNTY OFFICERS: Appointment of Deputy Sheriffs — §§4.7, 341.1, 341A.7, 341A.8 and 341A.13, The Code 1979. Appointment of deputy sheriffs, excluding the top deputies listed in §341A.7, does not require the approval of the board of supervisors. (Blumberg to Davis, Scott County Attorney, 12-5-79) #79-12-4 (L)

December 5, 1979

FINANCIAL INSTITUTIONS: Title insurance purchases by lending institution. Sections 515.48(10), 524.905(5)(f), 534.2(1), The Code 1979. It is not unlawful for lending institutions to purchase title insurance out of the state of Iowa on property located within the state. This title insurance does not satisfy Iowa law requirements for proof of first or prior lien status of mortgages held by Iowa lending institutions. (Hyde to Pringle, Supervisor, Savings and Loan Associations, State Auditor's Office, 12-5-79) #79-12-5 (L)

December 5, 1979

STATE OFFICERS AND DEPARTMENTS: Regular Registration Plates for Board of Medical Examiner's Investigators — §§4.1(36), 147.55, 148.6, 258A.3, 258A.4 and 321.19, The Code 1979. Investigators for the Board of Medical Examiners are eligible for regular license plates on state vehicles. The issuance of such plates is discretionary. (Blumberg to Saf, Executive Director, Iowa Board of Medical Examiners, 12-5-79) #79-12-6 (L)

December 6, 1979

STATE OFFICERS AND DEPARTMENTS: RULES AND REGULATIONS: §17A.4(4)(a), 17A.5(2), The Code, 1979. Objections made pursuant to Chapter 17A must be made before a rule becomes effective. A rule generally becomes effective *on* the thirty-fifth day after proper filing, indexing and publication. A rule properly filed, indexed and published on August 8 becomes effective on September 12 and may not be objected to on September 12. (Appel to Lounsberry, Secretary of Agriculture, 12-6-79) #78-12-7

The Honorable Robert H. Lounsberry, Secretary of Agriculture: We are in receipt of your opinion request concerning the proper interpretation of §§17A.4(4)(a) and 17A.5(2), The Code 1979.

You ask whether a rule concerning pesticides filed by your Department with the Administrative Rules Coordinator, and published and indexed on August 8, 1979, may be validly objected to by the Administrative Rules Committee on September 12. *See* Iowa Ad. Bulletin, Vol. 2, No. 3, p. 152.

Section 17A.4(4) provides that the Administrative Rules Committee, the Governor, or the Attorney General may file objections to any rules promulgated by an administrative agency prior to its effective date. Such an objection shifts the burden of proof from the challenger to the agency in any resulting litigation over the rule's validity, §17A.4(4)(a).

Any objection, of course, must be timely filed. Section 17A.4(4) states that objections may be made "prior to the effective date" of the proposed rule. Section 17A.5(2) states that rules generally become effective "thirty-five days after the date of filing" of the rules with the Administrative Rules Coordinator.

Guidance on the proper calculation of calendar days is provided by §4.22, The Code, which states:

In computing time, the first day shall be excluded and the last day included, unless the last day falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday . . .

The administrative rule in question became effective thirty-five days after the required filing, publication and indexing which were completed on August 8, 1979. Excluding the first day and including the last day, the thirty-fifth day after the filing of the rules is September 12, 1979. The question becomes whether the rule becomes effective *on* the thirty-fifth day after filing, publication and indexing or whether thirty-five full days must expire before the rule takes effect, i.e., *on* the thirty-sixth day after filing.

About the only thing that can be definitely stated is that the statute is clearly ambiguous. Reasonable persons may come to different conclusions on the proper interpretation. We have, after exhaustive search, been able to discover no authority which assists us in resolving the issue.

In our view, however, the interpretation most likely to be accepted by Iowa courts is that rules become effective *on* the thirty-fifth day after proper filing, publishing and indexing. We think it significant that the legislature did not say that rules become effective *after* thirty-five days, which would more likely mean after the expiration of thirty-five full days. And, we note that §17A.5(2)(b) states that rules, under certain conditions, may become effective "*at a stated date less than thirty-five days after filing, indexing and publication.*" This provision subtly suggests that rules become effective *on* a specified date rather than after expiration of the specified number of days.

We also think an analogy can be drawn with respect to the effective date of statutes. Section 3.7 of the Code, *inter alia*, provides that acts or resolutions of the General Assembly generally take effect *on* the first day of July following their passage unless otherwise stated. The legislature, thus, is comfortable with the notion that policy prescriptions take effect on a calculated day rather than after its expiration.

We wish to stress that the rule promulgated is not necessarily free from legal challenge. Under the Iowa Administrative Procedure Act, rules may be challenged in district court by an aggrieved party as "arbitrary, capricious, or a clearly unwarranted exercise of discretion" or otherwise beyond agency authority, §17A.19(8). Without a valid outstanding objection from the Administrative Rules Committee or the Attorney General, however, the burden of proof rests with the party seeking invalidation of the agency's rule.

December 6, 1979

SCHOOLS: Administrative rules. Sections 17A.2(7), 17A.4, 257.10(4), 257.10(6), 257.10(7), 257.18(8), 257.18(9), 257.18(10), The Code 1979. The State Department of Public Instruction's *Policy and Guidelines on Non-Discrimination in Iowa Schools*, which are "rules" as defined by §17A.2(7), The Code 1979, but were not adopted according to rule-making procedures as required in §17A.4, The Code 1979, are not valid and have no binding force and effect. (Norby to Comito, State Senator, and Rapp, State Representative, 12-6-79) #79-12-8

The Honorable Richard Comito, State Senator; The Honorable Stephen J. Rapp, State Representative: We have received your request for an Attorney General's opinion as to whether the guidelines for minority enrollment set out in the Iowa Department of Public Instruction's *Policy and Guidelines on Non-Discrimination in Iowa Schools* (hereinafter the "Policy and Guidelines") constitute "rules" within the meaning of Section 17A.2(7), The Code 1979, (Iowa Administrative Procedure Act (IAPA)).

A rule is defined in §17A.2(7) as follows:

'Rule' means any agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure or practice requirements of any agency.

The Policy and Guidelines were promulgated by the State Superintendent of Public Instruction and approved by the State Board of Public Instruction in 1972. The Policy and Guidelines contain two sections, a policy statement on nondiscrimination in Iowa schools and guidelines for implementation of this policy statement. The policy statement declares that all Iowa school districts should "move toward the goal of providing equal educational opportunities for all children," and further declares that the State Board will foster measures to guarantee that every pupil will be given "education and treatment that is in no way biased on a basis of race, creed, economic status, or national origin." Policy and Guidelines, p. 2. The guidelines for implementation of the policy statement provide for a system to ascertain the presence of discrimination in Iowa schools and for action to remedy such discrimination. A procedure is specified for local school boards to submit data on racial composition of its schools, and for the State Board to review this data. Policy and Guidelines, pp. 3-4. Additionally, the State Board may request a local Board to formulate a "plan of action" to correct conditions of segregation, Policy and Guidelines, pp.5-6. If the State Superintendent is not satisfied that the plan of action complies with the Policy and Guidelines, the State Superintendent shall notify the local board and the State Board. Policy and Guidelines, p. 6. After a review of the findings of the State Superintendent, the State Board may forward these findings to the Iowa Civil Rights Commission. Policy and Guidelines, p. 6.

The Policy and Guidelines appear to fall within the scope of the general definition of a rule. The Policy and Guidelines prescribe the policy of the State Board to be the furtherance of nondiscriminatory provision of education in Iowa. Additionally, procedures are established for the collection of data, the formation and evaluation of plans of action to eliminate segregation in schools, and for reaching "findings" regarding complinace by local schools with the Guidelines. An agency statement detailing a procedure as involved as this certainly falls within the definition of a rule. Additionally, labeling an agency statement as "policy" does not remove it from the scope of the definition of a rule. "Use of the term 'policy' as well as the term 'law' in the definition [of a rule] is calculated to ensure that agencies cannot evade rulemaking requirements by merely hiding behind the fiction that when they establish a certain principle it is only 'policy' and not 'law'." *See* Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 Iowa L.R. 731, 830 (1975).

The Guidelines do not appear to fall into any of the exceptions to the definition of a rule contained in Section 17A.2(7). Section 17A.2(7)(k), which addresses educational institutions, provides that the definition of a rule does not include "A statement concerning only inmates of a penal institution, students enrolled in an educational institution, or patients admitted to a hospital, when issued by such an agency." This exception, however, is limited to internal regulations of these institutions, such as academic standards, and should not be applied to broad questions of policy such as those involved in the Guidelines. *See* 1976 Op. Atty. Gen. 471. *See also* Bonfield, *supra*, 843-44. *See also* 1970 Op. Atty. Gen. 356, 358.

Having determined that the Policy and Guidelines are rules within the meaning of ch. 17A, the authority to promulgate them and their enforceability must be considered. At the time the Policy and Guidelines were issued, the Superintendent and the Board were necessarily concerned about compliance by local school districts with federal law concerning segregation in public schools. This concern would include compliance with the Civil Rights Act and numerous court decisions applying this Act. 42 U.S.C. §2000c. Additionally, the Department of Public Instruction was involved in numerous federal grants which require as a condition of continued funding that local school districts not discriminate in providing educational opportunities. 42 U.S.C. §2000d. The Board and the Superintendent are both entrusted by statute with various duties which require them to foster compliance by local school districts with the federal requirements noted above.

Among the specific powers and duties of the State Board is the duty to advise and counsel school officials concerning school laws, §257.10(4), to approve plans submitted by the State Superintendent for cooperation with the federal government and administration of federal funds, §257.10(6), and to approve plans submitted by the State Superintendent for enforcement of laws for which the State Board and other agencies are jointly responsible, §257.10(7). Similarly, the State Superintendent must advise and counsel school officials regarding the interpretation of school laws, §257.18(10), and recommend policies to the Board concerning cooperation with the federal government and administration of federal funds, §257.18(8)(a).

As indicated above, the compliance with federal laws was an important concern at the time the Policy and Guidelines were promulgated. In light of the statutory duties enumerated above, it appears that it was a proper exercise of these duties for the Superintendent to formulate and the State Board to approve the Policy and Guidelines as a means of offering assistance to local boards which were subject to federal laws regarding equal opportunities in education. However, in regard to enforcement of the Policy and Guidelines by the State Board, which might consist of enforcement of a request for data or implementation of a plan of action, additional considerations are involved. As indicated above, the Policy and Guidelines fall within the definition of a "rule" for purposes of ch. 17A. The Policy and Guidelines admittedly were not promulgated through the notice and hearing procedure provided for in §17A.4(1), "Procedure for Adoption of Rules." This section requires that prior to the adoption of a rule, the agency seeking to adopt the rule must give notice of its intended action by publication in the "Iowa Administrative Bulletin," afford all interested persons not less than twenty days to submit written data, views or arguments, and, in some instances, afford interested parties the opportunity to present oral presentations. *See* 1970 Op. Atty. Gen. 356, 358. Section 17A.4(2) provides that the notice and hearing provision of §17A.4(1) shall be inapplicable if for "good cause" the agency finds that notice and public participation would be "unnecessary, impracticable, or contrary to the public interest." It is difficult to conceive that the promulgation of the Policy and Guidelines would fall within this exception, considering the importance of the subject matter and the extent of public interest in that subject matter.

In conclusion, the Department of Public Instruction's "Policy and Guidelines on Non-Discrimination in Iowa Schools" are "rules" for purposes of ch. 17A. They were appropriately promulgated by the State Superintendent and the State Board under their authority to advise and counsel school officials regarding school laws. However, as they were not promulgated pursuant to the public notice and hearing procedures provided for in §17A.4, they cannot be enforced by the Department of Public Instruction. Although a state agency is certainly free to issue purely hortatory statements, a policy statement intended in any manner as a basis for overt or covert decisionmaking by an agency must be adopted pursuant to proper rulemaking procedures to be enforceable against the public or other governmental bodies.

December 7, 1979

BEER AND LIQUOR CONTROL DEPARTMENT: §§123.49(2)(c), 537.1301(16), 537.1301(7), The Code 1979. A liquor control license or retail beer permit holder may establish a bona fide credit card system and sell liquor or beer on credit pursuant to this system. (Norby to Gallagher, Iowa Beer and Liquor Control Department, 12-7-79) #79-12-9(L)

December 7, 1979

CONSTITUTIONAL LAW: GOVERNOR: ITEM VETO. Art. III, §16, Constitution of Iowa. Senate Files 471, 497 and House File 764, 68th G.A., 1st Session. The Governor's attempted item veto of conditions and restrictions to appropriations in S.F. 471, S.F. 497 and H.F. 764 are invalid. If the Governor desires to veto a legislatively imposed qualification upon an appropriation, he must veto the accompanying

appropriation as well. (Miller to Rush and Junkins, State Senators, 12-7-79) #79-12-10

The Honorable Bob Rush and Lowell L. Junkins, State Senators: We are in receipt of your opinion request asking whether Governor Ray properly exercised his authority under Article III, section 16, of the Constitution of the State of Iowa in disapproving certain provisions of Senate File 471, Senate File 497 and House File 764 enacted by the last session of the General Assembly.

In Senate File 471, the legislature appropriated funds to a miscellaneous group of state regulatory and finance departments, boards and commissions. The Governor item-vetoed section 8 of that Act which provides:

Notwithstanding the provisions of section eight point thirty-nine (8.39) of the Code, funds appropriated under this Act shall not be subject to transfer to any other department, institution or agency. Any unencumbered or unobligated balances of any appropriation made under this Act which exists (six) on June thirtieth of a fiscal year shall revert to the fund from which it was appropriated.

In Senate File 497, the legislature appropriated supplemental funds to the Department of Social Services for medical assistance, foster care and homemaker services. The Governor item-vetoed section 2 of that Act which states:

Any unencumbered or unexpended funds not used for the purposes specified in section one (1) of this Act and remaining on June 30, 1979, shall revert to the general fund of the state. Notwithstanding section eight point thirty-nine (8.39) of the Code, funds appropriated by this Act shall not be subject to transfer or expenditure for any purpose other than the purposes specified in section one (1) of this Act.

This limitation on the transfer of funds applied only to $50,000 appropriated for making improvements for fire protection purposes.

The Governor's authority to exercise an item veto in appropriation bills is contained in section 16, Article III of the Constitution of the State of Iowa which provides, in relevant part:

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 key Iowa Supreme Court case interpreting Article III, section 16, of the Iowa Constitution is *Welden v. Ray*, 229 N.W.2d 706 (1976). In that case, the Court *inter alia*, considered the validity of an item veto of a sentence in a bill which limited the use of a general services appropriation. The Governor attempted to veto a provision which declared that "Funds appropriated by this section shall not be used to supplement the construction of new buildings." *See* 229 N.W.2d at 708.

The Supreme Court held that the item veto was invalid. The Court noted that the provision "was a condition or restriction, . . . upon the

purpose or use of the money appropriated. In imposing the conditions or restrictions, the legislature exercised the authority which is inherent in its power to appropriate." 229 N.W.2d at 710. The Court cited a law review article, which stated:

It is obvious that the item veto power does not contemplate striking out conditions and restrictions alone as items for that would be affirmative legislation, whereas the governor's veto power is a strictly negative power, not a creative power, 229 N.W.2d at 713, citing Note, 18 *Drake L.Rev.* at 250.

In *Welden*, the Supreme Court emphasized that qualifications on appropriations may be negative as well as affirmative. According to the Court, "No difference in substance exists between affirmative and negative qualifications; both are restrictions upon the appropriations." 229 N.W.2d at 710.

While the Supreme Court has not directly considered attempted item vetoes of restrictions which prohibit transfers of funds otherwise authorized by §8.39, The Code 1979, the Court in *Welden* held invalid the attempted veto of a provision which stated:

The budget of total expenditures for each institution under the department of social services during the biennium shall not exceed the state appropriation for each institution set forth in this Act except that the maintenance recovery shall be available to the institutions.

The purpose of this provision was to insure that monies expended by various social service institutions could not be increased by §8.39 transfers.

In our view, this decision is relevant to the present contest. If the Governor may not item-veto a provision which purports to prevent augmentation of appropriations pursuant to the mechanism established in §8.39, it logically follows that an attempt to veto a provision limiting transfer of appropriated funds for other purposes pursuant to §8.39 is also invalid.

The previous Attorney General took the same position. In 1975 Op. Atty. Gen. 138, Attorney General Turner held that the Governor could not item-veto a provision in an appropriations bill which staed:

Notwithstanding the provision of section eight point thirty-nine (8.39) of the Code, there shall be no transfer of funds appropriated by this Act between categories or line items provided by this Act.

In his opinion, Attorney General Turner noted the logical and precedential force of *Welden* in determining the question, 1975 Op. Atty. Gen. 141.

It could be argued that since the provisions the Governor item-vetoed in the present case do not condition how the main appropriations are to be spent, but only purport to limit proper disposition of any unexpended monies, the provisions are in fact separate items subject to gubernatorial veto. So construed, the bills in question would contain two items, main appropriations, subject to various limitations and conditions which may not be item-vetoed, and a residual appropriation, independent of the main appropriation, that may be "blue-pencilled" by the Governor.

This approach, however, appears to have been rejected by the Iowa excise the entire item and not simply the limiting conditions. We are not

Supreme Court. In *Welden*, one of the item vetoes invalidated was a residual provision which stated that "Any remaining state matching funds for such (cancelled federal) programs shall revert to the fund from which it was appropriated." Thus, it would appear that the Iowa Supreme Court has held that limitations on the disposition of residual funds not expended pursuant to a direct appropriation may not be item-vetoed by the Governor. While a policy argument could be made to the contrary, the Supreme Court in *Welden* has decided the issue.

It also could be maintained that the effect of this opinion is to allow the legislature to repeal §8.39 by simply tacking limiting language such as that used in the Acts considered here on every appropriations measure without allowing the Governor an opportunity to veto the measure. There are, however, at least two flaws in this argument.

First, the limiting language in the Acts before us is not inconsistent with §8.39. Section 8.39 allows "unexpended appropriations" to be transferred for intra and interdepartment uses if certain procedures are followed. But where the legislature directs that funds be expended *only* for certain purposes and has expressly directed that residual funds be placed in a specific account, i.e., the general fund, we do not believe "unexpended appropriations" exist within the spirit of the statute. Instead, the legislature has created express priorities in its appropriations Act, which it has reinforced by refusing to authorize §8.39 transfers, which might otherwise distort the legislative allocations.[1]
veto the provisions. Rather, the Governor can veto the Acts, but he must

Second, it would not be accurate to state that the Governor cannot unmindful of the practical difficulties that could result from veto of appropriations bills, particularly when passed in the closing days of the session. However, we note that the Governor may, in his discretion, exercise considerable influence on the legislature by announcing his intent to veto unacceptable conditions on legislation in advance. Any legislation action would therefore be subject to the restraint of the open political process.

We are not unmindful of the potential difficulties for the Executive that can result from unduly restrictive legislative appropriations. Budget projections are necessarily hazardous, and the need for managerial flexibility is obvious when the legislature meets only a few months in the year. We trust that the legislature will not interpret this opinion as implicit support for impractical legislative restriction on public expenditures.

Indeed, we urge the legislature to use its power to condition appropriations in a politically responsible manner with due regard for administrative flexibility.

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[1] We also note that the legislature has not attempted to defeat generally the purposes of §8.39, but has only attached the questioned riders to a few appropriations measures. It thus cannot be said that this limited action amounts to a repeal of §8.39. A different question would be presented if the legislature routinely attached this rider to appropriations measures.

Our task, however, is to interpret the law. It is clear from *Welden* that the Iowa Supreme Court has held that restrictions on how appropriations may be spent may not be item-vetoed by the Governor. Because of the principle of *stare decisis*, we believe that the Iowa Supreme Court and lower courts would follow the established case law and hold the attempted vetoes of S.F. 471, 497, and H.F. 764 invalid.

December 12, 1979

COURTS: Probate fees for testamentary trusts. Sections 633.10, 633.28, 633.31, 633.70, The Code 1979; rule 372, Iowa R.C.P. Docketing of a trust created by a will is subject to a clerk's fee. The amount of fee for such docketing and filing of annual reports should be determined by local court rules. (Hyde to Johnson, State Auditor, 12-12-79) #79-12-11(L)

December 12, 1979

COUNTIES AND COUNTY OFFICERS: Clerk of Court, duties re issuance of marriage license. DOMESTIC RELATIONS: Marriage. License. Sections 595.4, 596.1, 596.2, 596.7, The Code 1979. If a marriage license is issued but becomes void due to a failure to solemnize within twenty days, a second license may be issued pursuant to the first application for a license, which is valid for one year after it is filed. However, the clerk must be satisfied of the competency of the parties to marry at the time the second license is actually issued. A health certificate (blood test) obtained within twenty days prior to the date of application is valid for the one-year period the application is valid. The clerk may charge the same fee for the second license as for the first. (Norby to Pawlewski, Commissioner of Public Health, 12-12-79) #79-12-12 (L)

December 13, 1979

BEVERAGE CONTAINER DEPOSIT LAW: §§455C.1, 455C.2, 455C.3, 455C.4, The Code 1979. Beverage distributors may not refuse to accept and pick up from retail dealers the kind, size and brand of empty containers they sell to dealers because they are not in plastic bags purchased from the distributor. Requiring the dealer to purchase bags from the distributor could in some cases violate the law's requirement that distributors pay dealers one cent per container for handling. (Ovrom to Mullins, State Representative, 12-13-79) #79-12-13(L)

December 13, 1979

CRIMINAL LAW, PROBATION, RESTITUTION ORDERS: Sections 907.12 and 606.7, The Code 1979. Restitution plan entered into pursuant to Code §907.12 does not constitute a lien and the Clerk of Court does not have authority to issue execution as in civil cases. The Clerk of Court is not required to maintain a separate index for restitution orders. (Cleland to Bordwell, Washington County Attorney, 12-13-79) #79-12-14(L)

December 14, 1979

CRIMINAL LAW: Accommodation Offense. Sections 204.401(1), 204.401 (3), 204.410, 902.8, The Code 1979. The accommodation offense defined in §204.410 is a separate and distinct criminal offense. It is classified as a serious misdemeanor by reference to §204.401(3). Since it is a serious misdemeanor, it may not be used as the basis for an habitual offender allegation under §902.8. (Staskal to Thoman, Assistant Woodbury County Attorney, 12-14-79) #79-12-15(L)

December 14, 1979

MUNICIPALITIES: Revenue Bonds — §§384.82 and 384.87, The Code, 1979. A city that issues revenue bonds to purchase property may use the proceeds of the sale of that property to pay off the bonds. (Blumberg to Bruner, State Representative, 12-14-79) #79-12-16(L)

December 18, 1979

PUBLIC RECORDS: Confidentiality: Chapter 68A, Code of Iowa 1979; §§455B.16, 455B.52; 400 I.A.C. §§51, 52, 53 (455B). Written records of complaints received by the Department of Environmental Quality, including names of complainants, are public records subject to public examination and copying. However, if examination of a particular record would not be in the public interest and would cause substantial and irreparable injury to a person or persons, the Department could seek to prevent its disclosure. (Ovrom to Crane, Executive Director, Iowa Department of Environmental Quality, 12-18-79) #79-12-17(L)

December 27, 1979

STATE OFFICERS AND DEPARTMENTS: Department of Public Safety — criminal history data and intelligence data. Chapter 692, The Code 1979. Section 692.8, The Code 1979, creates a blanket proscription against placing "intelligence data" in any kind of computer data storage system. The section in its present form is violated if "intelligence data" is placed into a computer even though its main use and purpose is file automation. (Richards and Young to Holetz, Acting Commissioner, Department of Public Safety, 12-27-79) #79-12-18(L)

December 27, 1979

STATE OFFICERS AND DEPARTMENTS: Reversion of Funds—§8.33, The Code 1979. Grants made by the Commission on Aging, from appropriations by the Legislature, to area agencies are not subject to reversion at the end of the fiscal year pursuant to §8.33. (Blumberg to Bowles, Executive Director, Commission on the Aging, 12-27-79) #79-12-19(L)

December 27, 1979

STATE OFFICERS AND DEPARTMENTS: Board of Nursing; Licensed Practical Nurses — 42 U.S.C. §1395 et seq.; 42 CFR 405.1024(e); §152.1 (3), The Code 1979. Licensed practical nurses are not prohibited from taking telephone or other verbal orders from a physician unless a statute or regulation so provides. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 12-27-79) #79-12-20(L)

December 28, 1979

ADOPTIONS: Independent Placements. §§238.1, 238.2, 238.5, 600.2(2), 600.8, 600A.2(17), 600A.4(2)(a), 600A.4(3), The Code 1979. A person may make an independent placement for an adoption without being licensed as a child-placing agency. The legislature intended that both "child-placing agencies" and "independent placements" could be used in the adoption process. (Robinson to Reagen, Commissioner, Department of Social Services, 12-28-79) #79-12-21(L)

December 28, 1979

SCHOOLS: Tuition, school supplies. Sections 282.6, 301.1, The Code 1979. Iowa public schools must be provided free of tuition to all actual residents between the ages of five and twenty-five. All facilities, supplies, and other items which are necessary or essential to instruction must be provided free of charge in a tuition-free school. A school district may purchase other supplies and distribute them to students, but they must be provided for free, rented for a reasonable fee, or sold at cost. (Norby to Murray, State Senator, 12-28-79) #79-12-22(L)

December 31, 1979

ENVIRONMENTAL PROTECTION; CONSTITUTIONAL LAW. Liability for Hazardous Waste Removal. 1979 Session, 68th G.A., ch. 111, §9.4 (H.F. 719, §9.4); §§455B.48, .49(4), .110, .120; Chapters 25 and 25A, The Code; Iowa Const., art. I, §§6, 9, 18; art. III, §§24, 31; U.S. Const., Am. XIV. Section 9.4 of H.F. 719, which provides cost allocation among those deemed responsible and those who benefit from removal of hazardous waste which was lawfully placed in a disposal site, may apply to suits to recover cost of removal of hazardous conditions under §§455B.116 and 455B.120, The Code, but does not affect other D.E.Q. statutory authority. Section 9.4 is applicable only to disposals made pursuant to a permit. Section 9.4 does not authorize a binding judgment against the State absent an appropriation. Section 9.4 would likely be found to violate equal protection to the extent it imposes liability solely on the basis of benefit from removal. Section 9.4 is not unconstitutionally vague. (Osenbaugh to Crane, Executive Director, Department of Environmental Quality, 12-31-79) #79-12-23

Mr. Larry Crane, Executive Director, Department of Environmental Quality: You have requested our advice concerning the construction and validity of section 9.4 of H.F. 719.[1] That bill regulates hazardous waste by imposing notification and permit requirements. Section 9.1 authorizes suits to recover penalties as well as injunctive relief and administrative action to remove hazardous waste causing an imminent threat to human health. However, these enforcement provisions are inapplicable if section 9.4 applies. That section provides a method to allocate costs among persons in addition to the owner or operator of a hazardous waste disposal site under certain conditions:

4. Notwithstanding any other provision of this Act, when hazardous waste was placed in a disposal site in whole or in large measure in accordance with the law existing at the time of placement, and the presence of such waste in the site is subsequently found to be in conflict with laws or rules adopted at a later date and to constitute a serious and imminent threat to human health which must be reduced or eliminated, the executive director shall request the attorney general to institute legal proceedings to determine how the threat may best be reduced or eliminated and how the cost of reducing or eliminating the threat shall be allocated to or among the past and present owners and operators of the site, and other parties including the state and its political subdivisions deemed by the court to bear some responsibility for the threat or to benefit from the removal or elimination of the threat. Upon a finding by a court that a serious and imminent threat to human health exists, the court may act and may stay that part of the reduction or elimination of the threat allocated to the state or governmental subdivision until such time as public funds have been appropriated to cover those allocated costs.

The court shall base an allocation of costs upon the following criteria:

a. The extent to which parties complied with the law and attempted to comply with the law.

b. The extent to which parties profited by acting contrary to the law.

c. The extent to which parties exercised good judgment and discharged their responsibilities to society in accordance with the perceptions of the time.

d. The ability of parties to pay for corrective measures.

e. The extent to which parties would benefit from the elimination of the threat to human health.

f. The broad implications for society of an allocation of costs.

[1] Enacted as Chapter III, 1979 Session, 68th G.A.

g. The damages to other persons associated with the hazard created by the disposal site.

h. Other criteria as the court deems pertinent.

"Hazardous waste" is defined in section 2.3(a) as follows:

'Hazardous waste' means a waste or combination of wastes that, because of its quantity, concentration, biological degradation, leaching from precipitation, or physical, chemical, or infectious characteristics, has either of the following effects:

(1) Causes, or significantly contributes to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

(2) Poses a substantial danger to human health or the environment. 'Hazardous waste' may include but is not limited to wastes that are toxic, corrosive or flammable or irritants, strong sensitizers or explosives.

Section 9.4 applies to "disposal sites"; "disposal" is defined in section 2.2 as follows:

'Disposal' means the discharge, deposit, injection, dumping, spilling, leaking or placing of a hazardous waste into or on land or water so that the hazardous waste or a constituent of the hazardous waste may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

Thus section 9.4 applies only where dangerous wastes have been placed in a site where they may be released into the environment.

You hav asked a number of questions concerning this statute. Because we have serious questions as to the constitutionality of the statute, we have determined to respond formally to only the following major issues:

I. Applicability of section 9.4.

A. Does section 9.4 affect DEQ authority under other provisions of chapter 455B?

B. Must waste have been originally placed in compliance with common law as well as with any statutes or rules in order for section 9.4 to apply?

C. Is section 9.4 a waiver of sovereign immunity, taking precedence over the State Tort Claims Act, chapter 25A, The Code?

II. Constitutionality of section 9.4.

A. Is it constitutional to require "persons deemed by the court to benefit from removal or elimination of the threat" caused by others to pay for part of the costs of cleanup?

B. Is section 9.4 unconstitutionally vague?

I. Applicability of section 9.4.

A. Impact on other DEQ authority.

You ask whether section 9.4 of H.F. 719 limits the authority of your Department to bring enforcement actions under other applicable authority. You note for example that section 455B.116, The Code, authorizes the Executive Director to remove a "hazardous condition," which is the actual or imminent spill of a "hazardous substance." The quoted terms are defined in section 455B.110(1) and (2), The Code, in such a way that frequent overlap with "hazardous waste" under H.F. 719 will occur.

Additionally, leakage of hazardous waste into water would violate section 455B.48 so as to authorize injunctive relief to prevent continuing discharge under section 455B.49(4).

Subsection 9.4 does not expressly limit the Director's authority to seek penalties or injunctive relief under other provisions of chapter 455B. While subsection 9.4 is to be applied to sites within its coverage "[n]otwithstanding any other provisions of this Act," we construe this to refer only to H.F. 719.

H.F. 719 consistently uses the term "this Act" in a manner which indicates reference only to H.F. 719 and not to all of chapter 455B. Many references appear to numbered sections "of this Act" (e.g., sec. 4(1), (2), (3); sec. 5(1)); other references refer to "the effective date of this Act" (e.g., sec. 3(1), sec. 5(3)). The phrase in these contexts clearly refers only to H.F. 719. That the legislature intended "this Act" to refer only to the new part created by H.F. 719 and not to all of chapter 455B is perhaps most apparent in section 11, "Rules," which states in part:

Rules adopted by the commission under this Act shall be consistent with and shall not exceed the requirements of 42 U.S.C. 6921-6931 (1979) . . .

That federal statute regulates only hazardous waste management, the subject covered by H.F. 719. The legislature could not have intended to so limit all rule making authority of the Department. The structure of chapter 455B further supports this construction. That chapter has a number of separate and distinct parts each of which contain differing provisions for rule making, enforcement, etc. H.F. 719 creates a new part of division IV of chapter 455B, with its own definitions (sec. 2 of H.F. 719), rule making authority (sec. 11), judicial review procedures (sec. 12) and enforcement authority (sec. 9).

Since H.F. 719 creates a separate statutory part complete within itself and other references to "this Act" clearly refer only to the amending bill, we believe the legislature intended the term "this Act" in section 9.4 to refer only to H.F. 719. This evidence overcomes the usual presumption that these words refer to the entire statute and not merely to the amending act. *See, State ex rel. Board of Pharmacy Examiners v. McEwen*, 250 Iowa 721, 725-26, 96 N.W.2d 189, 192 (1959).

However, in some situations, there may be direct and irreconcilable conflict between section 9.4 and sections 455B.116 and 455B.120, which authorize the Director to remove a "hazardous condition" and to recover the costs of removal from the owner or operator of a site. Since these statutes both relate to hazardous waste and would apparently apply to the same sites, they are *in pari materia* and will be construed to be consistent if at all possible. *Wonder Life Company v. Liddy*, 207 N.W.2d 27, 3223 (Iowa 1973); *Iowa Water Pollution Control Commission v. Town of Paton*, 207 N.W.2d 755, 763 (Iowa 1973). Courts will also "seek to give effect to all provisions of the Act, and do not presume statutes are repetitious or superfluous." *Berger v. General United Group, Inc.*, 268 N.W.2d 630, 638 (Iowa 1978). When a particular site fits within both section 9.4 and sections 455B.116 and 455B.120, section 9.4 is the more specific statute concerning allocation of costs and would control over the more general provisions. *Doe v. Ray*, 251 N.W.2d 496, 501 (Iowa 1977). Section 9.4 would govern in case of conflict also because it is the

later enactment. *Doe v. Ray, supra*, 251 N.W.2d at 503. Harmonizing the statutes so as to give practical effect to all provisions, we believe the Director may exercise emergency removal powers under section 455B.116 to prevent the threat of a spill, but the owner or operator of the site could take advantage of the cost allocation provided by section 9.4, if applicable, in defending a suit to recover the costs of removal.

We do not think that section 9.4 affects authority granted DEQ under other parts of chapter 455B. There is nothing in section 9.4 or the title of the bill to indicate any intent to legislate on any subject but hazardous waste.

B. Applicability to existing discharges.

However, there may be few situations in which section 9.4 will apply. The cost allocation procedure established by that section comes into play only upon proof of three conditions. The operator would be required first to establish that "hazardous waste was placed in a disposal site in whole or in large measure in accordance with the law existing at time of placement . . ."

In our opinion, section 9.4 is operative only when the discharger has substantially complied with a permit to dispose of hazardous waste. *See*, sec. 2; sec. 6.1. This construction appears consistent with the requirement in section 9.4 that the waste has been placed "in whole *or in large measure* in accordance with the law existing at the time of placement . . ." (Emphasis added.) A substantial compliance test implies that specific regulatory requirements exist. Additionally it is only where a permit has been granted for waste which subsequently violates later rules or laws that a court would be likely to find that the state bore some responsibility for the threat.

It is also highly unlikely that hazardous waste disposal could be conducted in accordance with law prior to the passage of H.F. 719. The placing of toxic waste in a site where it may enter the environment and cause harm would constitute a nuisance under Iowa law. Section 657.1, The Code, defines a nuisance as follows:

Nuisance—what constitutes—action to abate. Whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof.

Chemical pollution may also constitute a common law nuisance. *Bates v. Quality Ready-Mix Co.*, 261 Iowa 696, 703, 154 N.W.2d 852, 857 (1968) (injunction which would close cement plant upheld; one factor establishing nuisance was emission of cement dust which killed vegetation). Proof of negligence is not a prerequisite to a nuisance action; nuisance is instead a wrongful condition for which the person responsible therefor is liable. *Claude v. Weaver Const. Co.*, 261 Iowa 1225, 1229, 158 N.W.2d 139, 31 A.L.R.3d 1336 (1968).

Under existing Iowa law, compliance with Department regulations does not preclude abatement of pollution as a nuisance. *Kremier v. Turkey Valley Community School District*, 212 N.W.2d 526, 535 (Iowa 1973). Nor is there presently authority to charge abatement costs to those benefited. In an Arizona case a developer was required to pay damages

to an enjoined feedlot because the developer had built a large housing development near an existing feedlot. *Spur Industries, Inc. v. Del E. Webb Development Co.*, 108 Ariz. 178, 494 P.2d 700 (1972). Thus the only known case in which the cost of nuisance abatement was charged to the plaintiff was based on fault.

To construe the statute to provide cost allocation for removal of existing hazardous waste disposal sites would retroactively shift part of the responsibility for abatement to persons who could under present law seek abatement of the nuisance. Such construction would also immunize existing disposal sites from penalty actions under section 9.1 (which does not apply to sites within section 9.4) although existing sites are expressly made subject to the Act's permit requirements. Sec. 6.2.

We construe the statute to authorize cost allocation and to preclude other enforcement actions only where the discharger has substantially complied with a permit issued pursuant to H.F. 719. So construed, the statute is nonetheless a radical departure from existing law in that it imposes abatement costs on persons who benefit and creates a significant exception to the Act's enforcement provisions.

C. Waiver of sovereign immunity.

You ask whether section 9.4 is an effective waiver of sovereign immunity. The statute grants authority to a court to allocate costs of hazardous waste abatement among parties including the state and its governmental subdivisions but provides no appropriations for such judgments. The only reference to appropriations implies that future appropriations would be necessary:

> . . . the court may act and may stay that part of the reduction or elimination of the threat allocated to the state or governmental subdivision until such time as public funds have been appropriated to cover those allocated costs.

If a portion of the cost of abatement is allocated to the state because the negligent or wrongful act of its employees makes it partly responsible for the damage, the State Tort Claims Act would provide the basis for a binding judgment against the state. Section 25A.2(5).[2] Chapter 613A would provide a similar mechanism for torts by local governments or their employees. (Both statutes exempt, however, acts by employees exercising due care in the execution of regulations. Sections 25A.14(1), 613A.4(3), Iowa Code, 1979.) Any other judgment against the state could be paid pursuant to chapter 25, The Code, which requires submittal to the state Appeal Board and then the General Assembly of any claim "which has no appropriation available for its payment." Section 25.1, The Code.

We do not construe section 9.4 as authority for a court to compel the state to pay a portion of abatement costs in the absence of an appropriation therefor. The Iowa Constitution, art. III, §24, states, "No money shall be drawn from the treasury but in consequence of appropriations

[2] Whether, in the event of allocation of costs to the state by reason of negligent or wrongful acts of its employees, Chapter 25A would be the exclusive remedy—specifically whether prior resort to the state appeal board is required—is a question we do not address.

made by law." *See also*, Iowa Const., art. III, §31, which provides, ". . . nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws . . ." There have been instances in which the Iowa court has abrogated sovereign immunity although the legislature had not provided appropriations for such judgments. In each, however, a state agency had "laid aside the attributes of its sovereignty" by entering into contracts, *Kersten Co., Inc. v. Department of Social Services*, 207 N.W.2d 117, 120 (Iowa 1973), quoting *Carr v. State*, 127 Ind. 204, 26 N.E. 778, 779 (1891), or by acquiring land, *State v. Dvorak*, 261 N.W.2d 486, 489 (Iowa 1978). Section 9.4 allocates costs upon the state and its subdivisions as such. Additionally, none of these cases squarely confronts the issue of payment without appropriation. *Kersten* notes, in another context, that the state department in question had a large appropriation "for all purposes," including the contracts it allegedly breached. The dissent in *Kersten* stated that any judgment would be "an illusory and empty victory" without legislative appropriation. As Justice Rawlings stated in that dissent:

Finally, in this regard, it is for the General Assembly alone to enact laws governing the expenditure of state funds including appropriations for payment of money. See Iowa Const., art. VII, §§2, 5; *Graham v. Worthington*, 259 Iowa at 857-861, 146 N.W.2d at 634-637.

Here, however, there has been no appropriation for payment of contract breach damages, and neither the attorney general nor courts can bind the state to pay same either by agreement, judicial fiat or judgment, in the absence of specific valid statutory authority. See 49 Am.Jur., States, Territories, and Dependencies, §104; 81 C.J.S. States §§231-232. See also Code §25A.11.

207 N.W.2d 117, 122, 124-25. In *Dvorak*, the state had assumed the duties of a landowner and had presumably appropriated money to the Conservation Commission to maintain the lands acquired. Absent some authorization for payment from the legislature as in the Tort Claims Act, chapter 25A, *see, Graham v. Worthington*, 259 Iowa 845, 857, 146 N.W.2d 626, 637-38 (1966), a court has no power to appropriate and tax except to preserve its own inherent functions. *See, Webster County Bd. of Supervisors v. Flattery*, 268 N.W.2d 869, 878, 879 (Iowa 1978) (special concurrence Uhlenhopp, J.).

The grant of authority to a court to require the state to accept part of the financial responsibility of a discharger based upon factors other than its own contribution to the threat could arguably violate Article VII, §1, of the Iowa Constitution, which states:

. . . 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.

To the extent section 9.4 merely waives sovereign immunity for claims for which the state might otherwise be liable, it does not violate the state constitution. *Graham v. Worthington, supra*, 259 Iowa at 865-870, 146 N.W.2d at 639-642 (holding Chapter 25A, State Tort Claims Act, constitutional). But allowing a court to require the state to bear a portion of costs based upon such factors as the ability of parties to pay, sec. 9.4(d), or "the broad implications for society of an allocation of costs," sec. 9.4(e), might well cause the state to assume the liabilities of another.

We therefore construe section 9.4 as requiring further legislative appropriation in order to impose such costs on the state.[3]

II. Constitutionality.

A. Allocation of costs to those who benefit.

You ask whether section 9.4 constitutionally imposes costs on those who benefit from removal. Given the absence of any cases involving similar statutes, we are forced to reason by analogy and from basic constitutional principles. Based on this reasoning, we conclude that section 9.4 denies equal protection of the laws to those persons charged with abatement costs solely because they will benefit from removal. The Act imposes liability for the acts of another without any requirement of relationship, control, or liability. It makes third persons the involuntary debtors of others in an action brought by the state to remove a threat created by another. The remedy in this state enforcement action would be inconsistent with the remedy available to these third parties to have the threat removed in a nuisance action. Furthermore, the statute provides no guidelines to determine which of those benefited shall be brought in as parties and subjected to allocation of costs. The assessment of costs for special benefits from improvements is a legislative function; the statute provides vague guidelines in delegating this function to a court.

Section 9.4 must be justified as an exercise of the police power of the state:

> . . . but, to justify a state in exercising [the police power], it must appear that the interest of the public requires such interposition, and that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive to individuals.

Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17, 27 (Iowa 1977), quoting *State v. Thompson's School*, 226 Iowa 556, 561, 285 N.W. 133, 135 (1939). Prevention of the threat of hazardous waste is clearly within the ambit of the police power. The difficult issue is whether the means used are rationally related to the ends sought. *Iowa Natural Resources Council v. Van Zee*, 158 N.W.2d 111, 116 (Iowa 1968).

Apart from the authority to levy a uniform tax or provide special assessments for public improvements, or the law of unjust enrichment, there is little authority to involuntarily compel a person to pay for benefits. *See, Childs v. Shower*, 18 Iowa 261, 269-271 (1865) (a statute making the true owner of land personally liable for costs of improvements made by a bona fide occupying claimant an unconstitutional invasion of the constitutional rights of property); *Swift v. Calnan*, 102 Iowa 206, 213-14, 71 N.W. 233, 234 (1897) (sustaining a statute allowing persons to build a wall one-half on the land of the neighbor which the neighbor could use as a party wall by paying one-half the cost). These cases indicate that the Iowa Constitution, Article I, §§9, 18, imposes limitations on the use of the police power to involuntarily compel one person to pay

[3] We would also note that the statute does not create a standard of liability but instead leaves it to the court to allocate costs to those "deemed to bear some responsibility." It is unclear whether the legislature intended the state to be strictly liable if it issued the permit or whether liability would depend on existing theories of liability such as negligence.

another for benefits to property. A judgment against those benefited cannot be authorized as the subjection of that person's property or acts to reasonable regulation since the costs do not result from their acts or use of property. This contrasts sharply with cases such as *Woodbury County Soil Cons. Dist. v. Ortner*, 279 N.W.2d 276, 279 (Iowa 1979), in which the Iowa court found no violation of due process although substantial sums would be expended by the defendants in bringing their property into compliance with soil erosion limitations.

The imposition of liability without fault generally is imposed where the person held liable pursues an activity of unusual risk and is more able to distribute the risks of loss. *Bridgeford v. U-Haul Company*, 238 N.W.2d 443, 448 (Neb. 1976) (upholding statute imposing liability on lessors of trucks for accidents of lessees). Liability for the acts of another has traditionally required some relationship or control. In *Selcine v. Wisner*, 200 Iowa 1389, 1393, 206 N.W. 130, 131 (1925), the court construed a statute making car owners liable for the negligence of the driver as requiring the owner's consent to use of the car. The court said:

It is obvious, if damages result from the use of an automobile driven by a person without the owner's consent, that the owner would not be liable, and a statute which attempts to fix liability on such owner without reference to his consent in the operation of the car would result in taking his property without due process of law.

The Act attempts to limit the liability of dischargers for removal of waste which was placed in reliance on existing law. It does so by authorizing sharing of such costs by other persons deemed responsible or others who would benefit thereby. Since the latter would often be able to seek abatement of such a nuisance at common law, see pp.7-8, *supra*, the Act authorizes the Attorney General to bring a proceeding which could result in an inconsistent remedy.

Limitations on nuisance actions may unconstitutionally infringe one's right to possession and enjoyment of property. Iowa Const., Art. I, §9; 76 Op. Att'y Gen. 451. While changes in common law remedies are not per se unconstitutional, the change may not result in arbitrary treatment. In *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 57 L.Ed. 2d 595, 98 S.Ct. 2620 (1978), the United States Supreme Court upheld the congressionally imposed $560 million ceiling on nuclear accident liability. The court did not reach the question whether due process requires a reasonable substitute remedy where a common law remedy is limited or abrogated since it found Congress had provided a reasonable substitute. The substitute remedies and guarantees provided by Congress, the mandatory waiver of defenses provided, and the purpose of encouraging private development of nuclear power provided a rational basis for the liability limitation. While change in a common law remedy may not be forbidden, limitations on pre-existing remedies may not be arbitrarily imposed. *Arneson v. Olson*, 270 N.W.2d 125, 135 (N.D. 1978) (holding $300,000 limit on medical malpractice claims violative of equal protection). Unlike the statute in *Duke Power*, section 9.4 requires the victims of hazardous waste nuisances to pay part of the abatement costs for hazardous waste threats if a permit were granted for such waste. The statute does not substitute new remedies; it imposes financial burdens.

In our opinion, the classifications established in section 9.4 do not meet the requirements of the equal protection clause of the United States

Constitution, Amendment XIV, or the Iowa Constitution, Art. I, §6, as defined in *Redmond v. Carter*, 247 N.W.2d 268, 271 (Iowa 1977) (holding construction of Iowa Constitution to prohibit district judges from appointment to Court of Appeals would violate federal equal protection requirements) :[1]

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. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172, 92 S.Ct. 1400, 1405, 31 L.Ed.2d 768, 777 (1972).

Is there a ratonal basis for authorizing courts to impose costs of hazardous waste abatement on non-responsible persons although similar costs cannot be so imposed in other nuisance abatement actions? We think not. The limitation on remedies for nuclear power accidents was justified by the Congressional desire to encourage the development of nuclear power. No similar legislative purpose is evident here. If the purpose is to transfer some responsibility to those who have permitted the activity, only the state assumes such function and not local governments or others who may be found liable. If the purpose is to provide funds for abatement of threats for which the disposer cannot pay, the statute is both over-inclusive and under-inclusive. Other parties can be charged even if the discharger has adequate financial capacity. Conversely, the statute provides cost-sharing only if the discharged complied with a permit issued under the Act.

As to third parties, the statute fails to treat those similarly situated alike in that the burden falls only on those who are joined as parties and only in cases brought by the state while private nuisance actions are unaffected. There is also no rational basis for charging local governments and other third parties part of the cost in cases where the discharger had a state permit and not in other cases. The statute provides no means by which such parties are given notice or an opportunity to contest the granting of such a permit. It is an event over which they have no control; as such, it provides no basis for liability. Nor can it be seen why those who benefit from the threat of hazardous waste should bear part of the cost of abatement while such is not required of those benefited by abatement of other nuisances.

If it is unconstitutional to impose judicial liability on those who benefit from removal, does this render all of section 9.4 or all of H.F. 719 unconstitutional? The test of separability is legislative intent.

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[1] Iowa Const., Art. I, §6, providing, "All laws of a general nature shall have a uniform operation . . ." is comparable to the federal equal protection clause but may be more stringent in some circumstances. *See, Beitz v. Horak*, 271 N.W.2d 755, 759 (Iowa 1978).

It is a recognized principle that the objectionable part of a statute may alone be voided when the remaining portion is complete and enforceable by itself and when it appears the legislature intended the remainder to stand even if a part was invalid.

State v. Books, 225 N.W.2d 322, 325 (Iowa 1975). As stated in *State v. Monroe*, 236 N.W.2d 24, 35 (Iowa 1975), quoting approvingly from 82 C.J.S. Statutes §93, pages 154-155:

A statute may be unconstitutional in part and yet be sustained with the offending part omitted, if the paramount intent or chief purpose will not be destroyed thereby, or the legislative purpose not substantially affected or impaired, if the statute is still capable of fulfilling the apparent legislative intent, or if the remaining portions are sufficient to accomplish the legislative purpose deducible from the entire act, construed in the light of contemporary events.

Since H.F. 719 contains no separability clause, the presumption is that it stands or falls in its entirety. *Motor Club of Iowa v. Department of Transportation*, 251 N.W.2d 510, 519 (Iowa 1977). However, the Iowa Supreme Court has stated, "the cardinal principle of statutory construction is to save and not to destroy." *State v. Monroe, supra*, 236 N.W.2d at 35.

We think the provisions imposing liability on those who benefit can be stricken from section 9.4 without destroying the chief purpose of H.F. 719. Section 9.4 will nonetheless provide a basis for allocating costs to others deemed responsible and will provide a defense to penalty actions for dischargers fitting within its provisions. In our opinion then the offending provisions are separable from the rest of the statute.

Even if the statute were held constitutional, there are many obstacles to practical application of the statute. As noted, there are no criteria or procedures for joining governmental subdivisions and others as parties. Inconsistent results will occur depending on whether suit is brought by the procedure established here or by a nuisance action. There are no appropriations to apply if the state is found liable nor is there any provision authorizing municipalities or counties to raise taxes for this purpose. The court is authorized to stay that part of the threat allocated to government until the money is appropriated. Thus hazardous waste creating a serious threat to human health may remain unprotected until or unless the legislature subsequently appropriates the necessary funds. If the court does not stay the government's portion and no funds are appropriated, the discharger may be unable to recover the government's share.

The statute may also be inconsistent with remedies available under federal law. For example, section 311(f)(2) of the Clean Water Act, 33 U.S.C. §1321(f)(2), makes owners or operators of onshore facilities liable for up to $50,000,000 for the cost of removal of hazardous waste discharges into navigable waters in certain circumstances.

The statute also raises potential conflict of interest problems for this office. The legal proceedings authorized by section 9.4 are to be brought by this office upon your request. The result of such a suit is likely to be a judgment against the state, which of course this office represents. Additionally, given our belief that it would be unconstitutional and unfair, absent a uniform tax or assessment, to charge such costs to

persons solely because they would benefit from removal, it will be difficult for this office to join such persons as parties even though such joinder may reduce the judgment entered against the state.

B. Vagueness.

You ask whether section 9.4 is unconstitutionally vague. The criteria for allocation of costs are very vague. For example, the court may consider "the broad implications for society of allocation of costs" and such other factors as deemed appropriate. This leaves vast discretion in the trial court to determine who is benefited and the amount to allocate to each.

We think it unlikely that the statute would be found unconstitutionally vague. In *Beitz v. Horak*, 271 N.W.2d 755, 759-60 (Iowa 1978), a vagueness challenge to the Iowa quest statute was rejected because it was not a statute regulating conduct so that the need for notice is not apparent. Since parties charged allocation costs for benefit are unlikely to have notice of the facts giving rise to liability and have no means of preventing such liability, a precisely drawn statute would not likely affect their conduct.

The vagueness of the criteria may increase the likelihood that the statute will be found to violate the equal protection clause on its face or as applied.

We would recommend that the General Assembly reconsider section 9.4. If the purpose is to impose partial financial responsibility on the regulatory agency on whose permits the discharger relies, it is only the state and not local governments which issue hazardous waste permits. A special or standing appropriation must be made to allow binding judgments against the state. Additionally, the statute leaves it to the court to determine whether the state does bear some responsibility for the threat. There is no pre-established standard of liability for the regulatory agency.

In light of the constitutional objections to charging those benefited by removal of the threat, we would advise the legislature to delete this authority. We would note, however, that consideration might be given to authorizing counties and cities to raise taxes for the purpose of removing hazardous waste threats. The grant of this taxing authority would allow local governments to voluntarily bear the cost of removal of sites where private action would not be feasible. Taxation or assessment provides a procedure for imposing costs fairly on persons benefited.

The optimum solution might be the creation of a fund to remove hazardous waste threats where private resources are inadequate as, for example, when the discharger is now bankrupt or has ceased to exist.

You have asked a number of questions concerning the operation of the statute. Given the constitutional difficulties of the statute and the number of issues raised, we defer consideration of these questions at this time. We will, of course, be happy to provide advice informally as questions arise.

December 31, 1979

BEER AND LIQUOR; GAMBLING: Licensing qualifications — §123.3 (11)(b), §§99B.1(2), 99B.3, 99B.7, 99B.12, 725.9, 725.15. Payment of the federal gambling tax on coin operated gambling devices by the operator of an establishment licensed as a organization qualified to conduct gambling activities is not, standing alone, sufficient to prevent that operator from qualifying as a person of good moral character so as to obtain a liquor control license. (McGrane to Gallagher, Director, Iowa Beer and Liquor Control Department, 12-31-79) #79-12-24 (L)

December 31, 1979

ELECTIONS: Absentee voters; Preservation of Election Materials. Chapter 53; Sections 49.77, 49.77-.81, 50.19, 50.20-.22, 53.13, 53.15, 53.16, 53.30, 53.31, The Code 1979; Sections 53.28, 53.30, The Code 1971. Sections 53.30 and 50.19, The Code 1979, can be read together to permit destruction of absentee voter envelopes, bearing a qualified elector's affidavit, six months after the election of no contest is pending. If an election contest is pending, the absentee voter envelopes must be preserved until final determination of the contest. (Hyde to Richards, Story County Attorney, 12-31-79) #79-12-25

Ms. Mary E. Richards, Story County Attorney: You have requested an opinion from this office concerning the preservation of election materials, in particular, absentee ballot envelopes. Specifically, you have inquired:

Is it possible to read these two sections [§§50.19 and 53.30, The Code 1979] together to permit destruction of the absentee voter envelopes six months after the election if no contest is pending?

Chapter 53 of the Iowa Code, "Absent Voters Law", was amended by the 1973 Session, 65th G.A., ch. 136, when the General Assembly extensively revised the state election laws, enacting permanent registration of all voters in the state, and revising and clarifying laws prescribing procedures for elections. Under prior law, the unsealed absentee ballot envelope bore a printed affidavit to be notarized at the time the absentee voter "cast" his or her ballot. Sections 53.13, 53.15, 53.16, The Code 1971. These requirements remain basically unchanged. *See* §§53.13, 53.15, 53.16, The Code 1979. The affidavit in the form set out in the 1971 Code, however, provided information relative to voter registration and eligibility to vote, and pursuant to §53.28, The Code 1979, (repealed by the 1973 Session, 65th G.A., ch. 136, §401): ". . . constitute[d] a sufficient registration of the voter except in precincts where permanent registration is required." Because the affidavit was used for registration purposes, §53.30, The Code 1971, provided for its preservation:

The ballot enevelope having the voter's affidavit thereon shall, in case the ballot is deposited in the box, be preserved and returned with the certificates of registration, pollbook, and alphabetical lists to the city clerk, who shall preserve the same, and it shall be used by the registers of election, in precincts where registration is required, in making up the new registry lists from the pollbooks, and such affidavits shall serve as the registration record of the voter for the new registry books and lists.

Despite the enactment of permanent voter registration, the 1973 revisions of ch. 53 retained this preservation requirement. "The ballot envelope having the qualified elector's affidavit thereon shall be preserved." Section 53.30, The Code 1979. The direction in §53.30 is couched in mandatory terms, *i.e.*, "shall", and implies a mandatory obligation, excluding any notion of discretion. *See* §4.36(a), The Code 1979; *Schmidt v. Abbott*, 261 Iowa 886, 890, 156 N.W.2d 649, 651 (1968). No time

limitations are provided; at first glance, it appears that the absentee ballot envelopes must be preserved indefinitely.

A careful reading of ch. 53 to discern the legislative intent behind the preservation requirement, however, leads to a different conclusion. As shown on the sample affidavit you forwarded with your request, the qualified elector's affidavit printed on the absentee ballot envelope is identical to and serves the same purpose as the "Voter's Declaration of Eligibility" which, pursuant to §49.77, The Code 1979, is required to be executed by a voter at the time he or she votes. Section 53.31, The Code 1979, provides: "The vote of any absent voter may be challenged for cause and the precinct election officials of election shall determine the legality of such ballot *as in other cases.*" [Emphasis added]. The language emphasized refers to §§49.79-59.81, The Code 1979, which provides a method for challenging voter eligibility. *See also* §50.20-.22, The Code 1979.

The ballot envelope bearing the voter's affidavit is apparently to be preserved so that, in the event a vote is challenged for cause, a determination of the legality of such vote can be made. It must be preserved beyond the time the ballot it contains has been removed and tallied. It need not be preserved indefinitely. Once a challenge to a voter's eligibility has been resolved, or no challenge has been issued, there would no longer be any purpose in preserving the envelope bearing the affidavit.

The ballot cast is destroyed after six months, providing there is no election contest. *See* §50.13, The Code 1979. Similarly, §50.19, The Code 1979, provides:

The commissioner may destroy precinct election registers, *the declarations of eligibility signed by voters*, and other material pertaining to an election, except the tally lists, *six months after the election if no contest is pending. If a contest is pending all election materials shall be preserved until final determination of the contest.* Before destroying the election registers and declarations of eligibility, the commissioner shall prepare records as necessary to permit compliance with section 48.31, subsection 1. [Emphasis added].

In our opinion, these time limits apply to absentee voter's ballots and affidavits declaring voter eligibility as well. It is unlikely the legislature intended that certain election materials such as absentee ballot envelopes be preserved beyond the time when they could provide a basis for an election challenge or contest, and even beyond the time other similar election materials may be destroyed.

In conclusion, it is our opinion that §53.30, The Code 1979, and §50.19, The Code 1979, can be read together to permit destruction of absentee voter envelopes, bearing a qualified elector's affidavit, six months after the election if no contest is pending. If a contest is pending, the absentee voter envelopes must be preserved until final determination of the contest.

December 31, 1979

STATE OFFICERS AND DEPARTMENTS: Expenditure of funds by State Conservation Commission to acquire land to expand state park at Lake McBride—1979 Session, 68th G.A., Ch. 14, §7. Plain meaning of language used in capital projects appropriation bill enacted by 68th G.A. is to prohibit the expenditure of funds by the State Conservation Commission to acquire land to increase the extent or size of the state park at Lake McBride, whether the land to be acquired lies within or

without the outer limits of the park. (Peterson to Brabham, Director, State Conservation Commission, 12-31-79) #79-12-26(L)

December 31, 1979

CONSTITUTIONAL LAW: Witness Fees — §622.71, The Code 1979. Section 622.71, which does not allow witness fees for peace officers and public officials testifying in court in the county of their residence, but does allow witness fees for those same officers who testify in court in a county not of their residence is constitutional and does not violate equal protection. (Blumberg to Richards, Story County Attorney, 12-31-79) #79-12-27(L)

December 31, 1979

CONSUMER CREDIT CODE: CONSUMER LOANS: Chapter 537, The Code. Separate loans extended by a financial institution to an individual will not automatically be aggregated for the purpose of determining whether the $35,000 limitation of §537.1301(15)(a)(5) is exceeded. §537.3304 requires that the intent of the lender in using multiple agreements must be considered. The $35,000 limitation may not be avoided by having more than one bank provide funds pursuant to a "participation agreement," even if each bank supplies less than $35,000. The upper limit of credit specified in an open-end account agreement determines whether the transaction is a consumer credit transaction. The $35,000 limitation may be avoided if an entire line of credit is secured by an interest in land, if the credit is not primarily for an agricultural purpose. (McFarland to Huston, Superintendent of Banking, 12-31-79) #79-12-28

Mr. Thomas H. Huston, Superintendent of Banking: This office has received your letter of October 16, 1979, requesting an opinion of the Attorney General on a series of questions relating to the *Iowa Consumer Credit Code*, Chapter 537, The Code. Specifically, you asked the following:

1. Whether all loans by a particular financial institution to an individual must be aggregated for the purpose of applying the $35,000 ceiling set out in §537.1301(15)'(a)(5)?

2. If the answer to question number one is "yes", does a total which exceeds the $35,000 ceiling prevent all component loans from being consumer loans or only that portion of the aggregate which exceeds $35,000?

3. If the answer to question number one is "yes", may the $35,000 limitation be avoided if the consumer agrees with the bank that all nonagricultural loans which would cause the ceiling to be exceeded shall be secured by an interest in land?

4. May the $35,000 limitation be avoided if the loan is made by more than one bank pursuant to a participation agreement, each bank applying a separate $35,000 ceiling, even though the consumer deals directly only with the lead bank?

5. How would each of the above questions be answered if each referred to a separate debit of less than $35,000 pursuant to a single line of credit in excess of $35,000?

You will recall that this office addressed your first question in an informal opinion issued to you in a letter on October 25, 1979. After additional consideration, this office has decided to adopt the analysis and conclusions stated in that letter as a final opinion. The October 25 letter stated, in part:

The position of this office is that each loan should be considered separately for the purpose of determining whether the $35,000 limitation of

section 537.1301(15)(a)(5) is exceeded. This assumes, of course, that each loan is, in substance, a single transaction.

Section 537.3304(2) prohibits a lending institution from using multiple agreements in situations that, in substance, are single transactions, for the purpose of obtaining a higher finance charge than would otherwise be permitted:

With respect to a supervised loan, a lender may not use multiple agreements with intent to obtain a higher finance charge than would otherwise be permitted . . . .

The first sentence of §537.3304(2) posits two tests to be applied in determining whether the prohibitions of that section have been violated. First; is the lender using multiple agreements? Second; does the lender have the intent to obtain a higher finance charge than would otherwise be permitted? Guidelines for applying the first test are set out in the second sentence of §537.3304(2):

. . . . For the purposes of this subsection, multiple agreements are used if a lender allows any person, or husband and wife to become obligated in any way under more than one loan agreement with the lender or with a person related to the lender.

Considered by itself, the fact that multiple agreements are used by the lender does not mean that the agreements must be aggregated for the purpose of determining whether the $35,000 limitation has been exceeded. The intent factor must still be considered. Only if the multiple agreements were executed with the intent of obtaining a higher interest rate than would have been allowed on a single larger loan, will the agreements be aggregated for the purpose of determining whether the $35,000 limitation has been exceeded.

On its face, §537.3304(2) provides no guidelines for determining whether a lender will be deemed to have used multiple agreements with the intent of obtaining higher interest rates. Clearly, it prohibits a lender from using multiple consumer loan agreements in what is, in substance, a single transaction, e.g.: executing two $30,000 notes for the purchase of a single $60,000 piece of farm equipment.

Because of our conclusion that each loan should be considered separately for the purpose of determining whether the $35,000 limitation of §537.1301(15)(a)(5) is exceeded, questions two and three need not be addressed at this time.

The answer to question number four is that the $35,000 limitation may not be avoided when funds for a single-purpose loan are made available by more than one bank through a "participation agreement" and a consumer deals directly with only the lead bank. In designating the dollar limitation in §537.1301(15)(a)(5) which defines consumer credit loans, the legislature assumed that transactions exceeding a certain dollar amount are generally of a nature that do not require the protections provided through and interest rates authorized by the ICCC. Therefore, when the substance of a transaction is a single-purpose loan in an amount over $35,000, the transaction is excluded from the ICCC because of the dollar amount involved, regardless of the fact that each bank involved in the "participation agreement" may contribute less than $35,000.

Finally, you inquired whether questions one through four would be answered differently with respect to separate debits pursuant to a single line of open-end credit in excess of $35,000. As explained above, for certain policy reasons, the line distinguishing consumer credit transactions from transactions that would be subject to Chapter 535 usury rates was drawn at $35,000. Section 537.1301(15)(a) provides as follows:

. . . a consumer loan is a loan in which all of the following are applicable:

* * *

(5) . . ., the amount financed does not exceed thirty-five thousand dollars . . . .

Section 537.1301(5)(b) defines the "amount financed" as "In the case of a loan, the net amount paid to, *receivable by*, or paid or payable for the account of the debtor, ..." (Emphasis added)

When a lender expressly commits itself pursuant to a loan agreement to provide funds in an amount exceeding $35,000, it has manifested an intent that, at some point, the "amount financed" would exceed $35,000. The fact that the amount "receivable by" the debtor may not be advanced in one lump sum is irrelevant. At the point that the lender agrees to advance an amount in excess of $35,000, the transaction involves an amount exceeding the dollar amount that was determined, for policy reasons, to divide consumer credit transactions from nonconsumer credit transactions and is removed from the operation of the ICCC.

The result is that the factor determining whether a particular open-end credit transaction is a consumer credit transaction, is the amount stated in the loan agreement creating the open-end account; not the total amount of advances or charges that have been made on the account at any particular point in time.

The conclusion reached through the preceding textual analysis would also be reached by applying provisions of the ICCC requiring the administrator to keep its rules in conformity with the rules of other UCCC jurisdictions. Subsection 3 of §537.6104 provides as follows:

To keep the administrator's rules in harmony with the rules of administrators in other jurisdictions which enact the uniform consumer credit code, the administrator, so far as is consistent with the purposes, policies and provisions of this chapter, shall do both of the following:

* * *

b. In adopting, amending, and repealing rules, take into consideration the rules of administrators in other jurisdictions which enact the uniform consumer credit code.

Four of the ten other states which have adopted the UCCC have handled the present issue by promulgating rules which specifically exclude from the UCCC, credit transactions pursuant to express written agreements by creditors to extend credit in excess of the amount which has been designated in each jurisdiction as the ceiling for consumer credit transactions. *See, e.g.* section 2.3(f), Rules of Wyoming's Uniform Consumer Credit Code Administrator.

Since the Iowa Attorney General, as administrator of the ICCC, performs a quasi rule-making function in issuing opinions under the ICCC, it is obligated to make a reasonable effort to issue an opinion that is in conformity with rules adopted by other UCCC states, thereby promoting the underlying purposes and policies of the UCCC to "make the law, including administrative rules, more uniform among the various jurisdictions." Section 537.1102(2)(g), The Code.

The answer to question number two with regard to open-end credit agreements was implied in the preceding answer. Since the upper dollar

limit specified in the agreement creating the open-end credit transaction is the factor that determines whether the transaction is a consumer credit transaction, it necessarily follows that all advances pursuant to a line of credit in excess of $35,000, regardless of the amount of these advances, are excluded from the provisions of the ICCC.

In answer to question number three wtih regard to open-end credit, since the amount specified in the initial agreement for open-end credit determines whether the *entire* line of credit is within the ICCC, the $35,000 limitation may not be avoided through an agreement whereby amounts *in excess* of $35,000 would be secured by an interest in land. However, the $35,000 limitation would be avoided through an agreement that the entire line of credit be secured by an interest in land, if the line of credit is not primarily for agricultural purposes:

. . ., a "consumer loan" is a loan in which all of the following are applicable:

(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.* (Emphasis added)

§537.1301(15)(a), The Code.

The answer to question number four with regard to open-end credit is the same as it was with regard to individual loans; the $35,000 limitation may not be avoided simply by having more than one lender provide loans pursuant to one loan participation agreement. A point to be made in response to all of the questions posed in your request is that allowing a lender to disguise the substance of any transaction through the form of the transaction would violate the intent of the drafters of the ICCC to exclude certain transactions from its provisions.

The following points will be restated to summarize the major issues addressed through this opinion.

1. Separate loans extended by a financial institution to an individual will not automatically be aggregated for the purpose of determining whether the $35,000 limitation of §537.1301(15)(a)(5) is exceeded. Instead, the intent of the lender in using multiple agreements controls.

2. The $35,000 limitation may not be avoided by having more than one bank provide funds pursuant to a "participation agreement," even if each bank supplies less than $35,000.

3. The upper limit of credit specified in an open-end account agreement determines whether the transaction is a consumer credit transaction.

4. The $35,000 limitation may be avoided if an entire line of credit is secured by an interest in land, if the credit is not primarily for an agricultural purpose.

December 31, 1979

MINORS: Uniform Gifts to Minors Act; ch. 565A, §§565A.1(11), 565A.9(2), 565A.11, ch. 599, §599.1. The provisions concerning minority age contained in §599.1 do not affect the provisions concerning minority age contained in §565A.1(11). (Hoyt to Sherzan, State Representative, 12-31-79) #79-12-29(L)

January 2, 1980

STATE OFFICERS AND DEPARTMENTS: Governor, Lieutenant Governor, Emergency Proclamation. Iowa Const. art. III, §9, art. IV, §§7, 17 (1857); Iowa Const. art. 4, §18 (1846); §§7.14, 29A.7, 29C.2, 29C.3 (1), 29C.6(1), The Code 1979. Mere physical absence of the governor from the state unaccompanied by any health-related disability on his part does not authorize the lieutenant governor to assume the powers of the governor. However, in an emergency where reasonable efforts to contact the governor are unsuccessful, the authority to take emergency action would devolve upon the lieutenant governor. The governor may not delegate to the lieutenant governor or to members of his staff the power to issue an emergency proclamation under Ch. 29 or to order the national guard into service under §29A.7. But once the decision to issue a proclamation or to order the national guard into service is made by the governor, the lieutenant governor or members of the personal staff may act in an administrative capacity to execute or carry out that decision. (Miller and Haskins to Rush, State Senator, 1-2-80) #80-1-1

The Honorable Bob Rush, State Senator: You have asked our office about who may exercise the powers of the governor when the governor is absent from the State.

I

The first question is when the lieutenant governor may exercise the powers of the governor's office. The instances in which he or she may do so are set forth in Iowa Const. art. IV, §17 (1857) as follows:

In case of the death, impeachment, resignation, removal from office, or other disability of the Governor, the powers and duties of the office for the residue of the term, or until he shall be acquitted, or the disability removed, shall devolve upon the Lieutenant Governor.

You ask whether absence of the governor from the state would fall under the category of "removal from office". "Removal from office" contemplates statutory removal. *See Haymaker v. State*, 163 P. 248, 251 (N.M. 1917). The procedure for removal of the governor from office is set out in Ch. 68, The Code 1979, and is by impeachment. Obviously, the phrase "removal from office" is limited to instances where the governor is removed after impeachment.

II

You next ask whether the phrase "other disability" in art. IV, §17, above, can go beyond disability of a health-related nature and encompass a *de facto* inability of the governor to perform the duties of his office by reason of physical absence from the state. It is clear that when the governor is physically incapacitated the lieutenant governor may exercise the powers of the governor under art. IV, §17. *See* 1923-1924 Op. Att'y Gen. 263. Section 7.14, The Code 1979, sets forth the procedure for determining when the governor faces an "other disability" under the constitution. That section states:

1. Whenever it appears that the governor is unable to discharge the duties of his office for reason of disability pursuant to Article IV, section 17, Constitution of Iowa, the person next in line of succession to the office of the governor, or the chief justice, may call a conference consisting of the person who is chief justice, the person who is director of mental health, and the person who is the dean of medicine at the state University of Iowa. Provided, if either the director of dean is not a physician duly licensed to practice medicine by this state he may assign a member of his staff so licensed to assist and advise on the conference. The three members of the conference shall within ten days after the con-

ference is called examine the governor. Within seven days after the examination, or if upon attempting to examine the governor the members of the conference are unable to examine him because of circumstances beyond their control, they shall conduct a secret ballot and by unanimous vote may find that the governor is temporarily unable to discharge the duties of the office.

2. The finding of or failure to find a disability shall be immediately made public, and in case the governor is found to be unable to discharge the duties of the office, the person next in line of succession to the office of governor shall be immediately notified. After receiving the notification such person may, under Article IV, section 17, and amendment 2 of 1952, Constitution of Iowa, become governor until the disability be removed.

3. Whenever a governor who is unable to discharge the duties of the office believes his disability to be removed, he may call a conference consisting of the three persons referred to as members of such a conference in subsection 1. The three members of the conference shall within ten days examine the disabled governor. Within seven days after the examination they shall conduct a secret ballot and by unanimous vote may find the disability removed.

4. The finding of or failure to find the disability removed shall be immediately made public.

Inclusion of the director of mental health and the dean of medicine at the state University of Iowa is evidence that the legislature believed that the term "other disability" in art. IV, §17, primarily concerns health-related disabilities.

Also of significance is the predecessor provision to art. IV, §17 of the 1846 Iowa Constitution. Iowa Const. art. 4, §18 (1846) provided:

In case of the impeachment of the governor, his removal from office, death, resignation, or *absence from the state, the* powers and duties of the office shall devolve upon the secretary of state, until such disability shall cease, or the vacancy be filed (sic). (emphasis added.)

Use of the words "other disability" in the 1857 Constitution in lieu of the words "absence from the state" is consistent with either an intent that the concept of disability is broader than absence from the state but nonetheless includes it or an intent that mere absence from the state is not to be a ground for exercise of the governor's powers by the lieutenant governor.[1] Leading decisions from other jurisdictions indicate that the latter conclusion is correct.

In *Markham v. Cornell*, 18 P.2d 158 (Kan. 1933), the court was faced with interpreting the words "other disability" in a provision of the Kansas constitution allowing the lieutenant governor to act in the place of the governor. Temporary absence from the state was held not to constitute an "other disability". As in Iowa, an earlier constitution had authorized the lieutenant governor to act in the "absence of the governor from the state". The Kansas court felt that the failure of the framers

[1] The constitutions of many other states, like the 1846 Iowa Constitution, utilize the words "absence from the state". *See generally State v. Garvey*, 195 P.2d 153 (Ariz. 1948). Whether effective absence of the governor is required or whether mere temporary absence is sufficient is the issue under these constitutions. *Compare Sawyer v. First Judicial District Court*, 410 P.2d 748, 750 (Nev. 1966); *In Re An Act Concerning Alcoholic Beverages*, 31 A.2d 837, 841 (N.J. 1943); *with Walls v. Hall*, 154 S.W.2d 573, 577 (Ark. 1941); *Mongomery v. Cleveland*, 98 So. 111, 114 (Miss. 1923).

of a later constitution to use the explicit words "absence from the state" indicated that the words "other disability" did not cover it. The Kansas court implied, however, that in the event of a "public emergency" which threatened the existence of "orderly government", the lieutenant governor might be authorized to assume the governor's powers. The facts of the case also suggested that the lieutenant governor had acted without approval of the governor when the governor was absent from the state.

Another apposite case is *In Re Advisory Opinion to the Governor*, 112 So. 2d 843 (Fla. 1959). There, the court opined that the governor's proposed absence for approximately thirty days for the purpose of making an inspection trip to Russia would not constitute an "inability" of the governor to discharge his official duties. Absence from the state, the court felt, was not an "inability" under the constitution. The court noted that the governor would be in frequent direct contact with his administrative staff, who would presumably continue to act at his direction.

The conclusion we derive from the cases is that the mere physical absence of the governor from the state unaccompanied by any health-related disability on his or her part does not constitute an "other disability" under art. IV, §17, so as to authorize the lieutenant governor to act for the governor.

It is evident, however, that the purpose of art. IV, §17, is to ensure that the citizens of Iowa are not without a person capable of performing the constitutional and statutory duties imposed upon a governor. The term "governor" refers to an *office* and not merely to a particular person. Upon the office of governor falls the duty to "take care that the laws are faithfully executed," art. III, §9, Iowa Const. With modern facilities of communication and transportation, the person elected to the office of governor will ordinarily not be disabled from fulfilling this duty by mere physical absence from the state. However, in every government worthy of the name, some adequate method of meeting emergencies is provided. *Cf.* Hart, *The Emergency Ordinance: A Note on Executive Power*, 23 Colum.L.Rev. 528, 529 (1923). Highly unusual circumstances of an emergency nature could occur in which absence from the state would constitute an "other disability" within the meaning of art. IV, §17. *See In Re Advisory Opinion to the Governor*, 112 So.2d at 847-48. In an emergency situation in which reasonable efforts to contact the governor have been unsuccessful and the lieutenant governor reasonably concludes that the emergency is such that action must be taken before the governor may be contacted, we believe the Iowa courts would conclude that the powers and duties of the governor would devolve upon the lieutenant governor for that purpose. In such an emergency situation, where the disability is not health-related, the procedures set forth in §7.4 would be inapplicable. Moreover, the powers and duties of the office of governor would revert back to the person of the governor when communications were reestablished.

III

You next ask whether the govenor may delegate to a member of his personal staff or to the lieutenant governor the power to issue an emergency proclamation under Ch. 29C, The Code 1979, in the event of

an emergency arising in his absence from the state. The relevant terms in Ch. 29C are set forth in §29C.2, The Code 1979, as follows:

"*Disaster*" means man-made catastrophes and nature 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 terms includes insurrection, rioting, looting, and persistent violent civil disobedience.

Section 29C.3(1), The Code 1979, provides:

1. The governor may, after finding a state of public disorder exists, proclaim a state of 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.* (emphasis added.)

Section 29C.6(1), The Code 1979, states:

In exercising the governor's powers and duties under this chapter and to effect the policy and purpose, 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 effcetive 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. (emphasis added.)

As can be seen, the above sections require that a public disorder emergency proclamation or a disaster emergency proclamation 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. *See generally*, Op. Att'y Gen. #79-8-11.

Although the governor must frequently delegate important responsibilities to staff or to other officers in the executive branch, where the legislature confers extraordinary power upon the office of governor itself, that power may not ordinarily be further delegated. Generally, powers conferred upon public officers involving the exercise of judgment or discretion cannot be delegated to subordinates in the absence of statutory authorization. *See Cal. School Employees Ass'n v. Personnel Commission*, 474 P.2d 436, 439 (Cal. 1970); *Burkholder v. Lauber*, 216 N.E.2d 909, 911 (Ohio C.P. 1965). We think it clear that the *decision* to declare an emergency under Chapter 29C is for the governor personally and may not be delegated to staff. However, the details of complying with the requirements of Chapter 29C, e.g. fact-finding or drafting the procla-

mation, may be delegated to staff with appropriate gubernatorial direction.

Nor is the lieutenant governor in any different position than the members of the governor's personal staff in this respect. Unlike the members of the governor's personal staff, the lieutenant governor is an elected official. But Ch. 29C does not refer to the lieutenant governor and, as seen, mere absence from the state of the governor does not constitutionally authorize the lieutenant governor to assume and exercise the powers of the governor. Hence, unless the governor is under an "other disability" in art. IV, §17, the lieutenant governor cannot issue an emergency proclamation under Ch. 29C.

Section 29C requires that emergency proclamations be "signed by the governor". The question that arises is whether this language means the governor must personally sign the proclamation after having determined that an emergency exists. Obviously, if that is the meaning of the language, a governor who is absent from the state could not always take effective emergency action. Indeed, that interpretation of 29C would result, in certain circumstances, in the office of governor devolving upon the lieutenant governor under the analysis set forth above. However, we believe an Iowa court would take a more flexible view of the requirement that the proclamation be "signed by the governor". In *Ferguson v. Stilwill*, 224 N.W.2d 11 (Iowa 1974), the Supreme Court of Iowa considered a challenge to the validity of an Illinois certificate of conviction which required attestation by the Illinois Secretary of State. It appeared that the signature of "Michael J. Howlett" had been pasted over another signature and was thus rendered illegible. The court upheld the validity of the certificate in the absence of any showing that the act of pasting was unauthorized and quoted the following with approval from 80 C.J.S. *Signatures*, §7:

> In the absence of a statute prescribing the method of affixing a signature, it may be affixed in many different ways. It may be written by hand, and, generally, in the absence of statute otherwise providing, it may be printed, *stamped*, typewritten, engraved, photographed, or cut from one instrument and attached to another. (emphasis added.)

Thus, we think it would be permissible for the governor, when absent from the state, to direct a staff member to place his signature on an emergency proclamation by means of a stamp. The function of the signature is simply to verify that the governor has personally decided to issue the proclamation. This procedure therefore satisfies both the letter and spirit of the statutory requirement. From an abundance of caution, we might also recommend that, in the event the governor is absent from the state and must direct that his signature be stamped upon an emergency proclamation, the governor also contact the Secretary of State, with whom the proclamation must be filed, and verify that he has authorized his staff to stamp the proclamation.

IV

You ask whether, if the reuirements of §29C.3(1) or §29C.6(1) are not complied with, the national guard may nonetheless be called into service. The pertinent provision here is §29A.7, The Code 1979. It states:

> 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.* (emphasis added.)

The governor is commander in chief of the militia, the army, and the navy of the State by virtue of art. IV, §7, Iowa Const. Although the national guard may not actually be employed solely for purposes specified by chapter 29C prior to the execution of the formal requirements of that chapter, the governor possesses adequate authority to cope with emergencies by the following means. First, as commander in chief, the governor may direct that necessary preparations for deployment of the national guard be taken while the procedural requirements for the disaster proclamation are being completed. Second, the governor possesses authority independent of that grounded in a chapter 29C emergency proclamation to employ the national guard for the enforcement of state laws and the protection of life and property. Thus, if the governor determines that a public disorder or disaster presents a significant problem of law enforcement or threats to life and property, the national guard may be employed immediately without waiting for completion of the procedural requirements of chapter 29C.

You inquire whether the governor may delegate to his personal staff the decision to order the national guard into service under §29A.7. We do not believe that the staff may actually make this important decision. They can execute the decision once it is made by the authorized person but cannot themselves make it. The same is true of the lieutenant governor. Section 29A.7 does not speak of the lieutenant governor ordering the national guard into service; it refers only to the governor doing that. And unless the lieutenant governor is authorized to act for the governor by virtue of art. IV, §17, he cannot act on his own to order the national guard into service.

In sum, mere physical absence of the governor from the state unaccompanied by any health-related disability on his or her part does not authorize the lieutenant governor to assume the powers of the governor. However, in an emergency where reasonable efforts to contact the governor are unsuccessful, the authority to take emergency action would devolve upon the lieutenant governor. The governor may not delegate to the lieutenant governor or to members of his personal staff the power to issue an emergency proclamation under Ch. 29C or to order the national guard into service under §29A.7. But once the decision to issue a proclamation or to order the national guard into service is made, the lieutenant governor or members of the personal staff may act in an administrative capacity to execute or carry out that decision.

January 3, 1980

CONSTITUTIONAL LAW; STATE OFFICERS AND DEPARTMENTS; U.S. CONST. amend. I, IOWA CONST. art. I, §3, §29A.14, Code of Iowa (1979), 1978 Session, 67th G.A., ch. 1039, §5, 1969 Session, 63rd G.A., ch. 37, §1, 1967 Session, 62d G.A., ch. 74, §1. The chapel located at Camp Dodge can be leased to members of the public for denominational weddings and funerals and for religious services only on a temporary or irregular basis and at a fair rental value provided that the chapel is also available for use by nonsectarian or non-religious organizations. The decision to lease the chapel to a religious organization may not be made on the basis of doctrinal belief. (McNulty to Gilbert, Adjutant General, 1-3-80) #80-1-2

Adjutant General Roger W. Gilbert, Iowa National Guard: You have requested the opinion of this office regarding the permissible uses of the chapel located on the grounds of Camp Dodge by members of the public. The chapel in question comprises the upper level of the two-story Iowa National Guard Memorial Building, a state-owned facility.[1] Maintenance costs of the building are the financial responsibility of the state. You specifically ask whether members of the public can use the chapel at Camp Dodge for weddings, funerals or denominational worship services, and if so, whether a fee can be charged for such use. You also inquire whether a religious denomination can be excluded from using the chapel because of doctrinal beliefs opposed to military service.

As a threshold matter, it should be noted that the Adjutant General has statutory power to lease any of the facilities at Camp Dodge. §29A.14, The Code 1979.[2] Thus, there is no question that the chapel may be leased to members of the public. Resolution of your questions, therefore, involves consideration of the state and federal constitutional provisions prohibiting the establishment of religion by the state. We have concluded that the chapel at Camp Dodge can be leased to members of the public for denominational weddings and funerals and for religious worship services onily on a temporary or irregular basis and at a fair rental value provided that the chapel is also available for use by nonsectarian or nonreligious orgnizations. The decision to lease the chapel to a religious organization may not be made on the basis of doctrinal belief. It should be emphasized, however, that you are not obligated to lease the chapel to members of the public for religious or any use. But if you do lease the chapel, it must be done under the aforementioned guidelines.[3] A discussion of the federal and state constitutional principles follows.

The first amendment to the United States Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." The establishment clause is applicable to the states through the fourteenth amendment. *Everson v. Board of Education*, 330 U.S. 1, 8, 67 S.Ct. 504, 508, 91 L.Ed. 711, 719 (1947). For state activity to pass muster under the establishment clause, it must first, reflect a clearly secular legislative purpose,

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[1] The Iowa legislature appropriated funds for the construction of the memorial building in 1967. *See* 1967 Session, 62d G.A., ch. 74, §1, *as amended*, 1969 Session, 63rd G.A., ch. 37, §1.

[2] *29A.14 Leasing facilities.* The adjutant general with the approval of the director of general services shall have authority to operate or lease any of the facilities at Camp Dodge. Any income or revenue derived from such operation or leasing shall be deposited with the state treasurer and credited to the general fund of the state.
Although in the 1979 Code, this section does not take effect until January 1, 1980. *See* 1978 Session, 67th G.A., ch. 1039, §5.

[3] This opinion does not discuss the constitutionality of the use of the chapel by National Guard members while on duty at Camp Dodge. It seems apparent, however, that such use is constitutionally permissible. *See School District of Abington Township v. Schempp*, 374 U.S. 203, 296-99, 83 S.Ct. 1560, 1610-12, 10 L.Ed.2d 844, 900-02 (1963) (Brennan, J., concurring). *Cf. Rudd v. Ray*, 248 N.W.2d 125 (Iowa 1976) (state legislation providing for salaried chaplains and religious facilities for those incarcerated at the state pentitentiary did not contravene the state or federal constitutions).

second, must have a primary effect that neither advances nor inhibits religion, and third, must avoid excessive governmental entanglement with religion. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 773, 93 S.Ct. 2955, 2965, 37 L.Ed.2d 948, 963 (1973).

Before analyzing the applicability of these tests to your questions, it should be noted that you are under no constitutional compulsion to rent the chapel to any member of the public. *See Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (officers of federal military reservation may constitutionally ban all partisan political activity); *Hunt v. Board of Education of Kanawha*, 321 F.Supp. 1263 (S.D. W.Va. 1971) (school authorities' prohibition of use of schoolhouse for religious worship did not violate plaintiff's freedom of speech or free exercise of religion).

However, if you do decide to lease the chapel to religious organizations, the chapel must also be made available to nonsectarian organizations. It has been recognized that the use of public property for religious use does not offend the establishment clause where the property is equally available to all members of the public and the government avoids sponsorship of the religious activity. *See O'Hair and Murray v. Andrus*, No. 79-2462 (D.D.C., Oct. 3, 1979). *See also Allen v. Morton*, 495 F. 2d 65, 67 (D.C. Cir. 1973). In *O'Hair* the court upheld the right of Pope John Paul II to celebrate Mass on governmental land. The court reasoned that since the archdiocese of Washington, the sponsoring organization, received no greater privileges, benefits or access to the park than nonsectarian organizations, the establishment clause would not be violated. Although we have found no cases involving the leasing of a chapel under governmental auspices, the same principle would appear to apply.

If, however, you are prepared to lease the chapel only to religious organizations, or if nonsectarian organizations are effectively precluded from the use of the chapel by the application of your leasing requirements, an establishment violation seems likely. Exclusive or near-exclusive use of the chapel by sectarian organizations would not serve a secular legislative purpose in that religion would be benefited to the exclusion of secular expression. Such arrangements should be avoided.

Generally speaking, the decision to lease the chapel cannot be made on the basis of the content of expression that a particular organization, religious or secular, espouses.[1] *See e.g., Hudgens v. NLRB*, 424 U.S. 507, 520, 96 S.Ct. 1029, 1036, 47 L.Ed.2d 196, 207 (1976); *Police Department of the City of Chicago v. Mosely*, 408 U.S. 92, S.Ct. 2286, 2290, 33 L.Ed. 2d 212, 216 (1972). Traditional constitutional principles dictate that only neutral principles relating to time, place and manner can be constitutionally imposed. *See Cox v. New Hampshire*, 312 U.S. 569, 576, 61 S.Ct. 762, 766, 85 L.Ed. 1049, 1054 (1941). These general principles are applicable if you decide to rent to religious organizations. Thus, the answer to your question whether you can exclude a religious denomination from using

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[1] *But see* note 5, *infra*.

the chapel because of doctrinal beliefs antithetical to military service, while renting to other religious organizations, is no.[5]

Religious use of the chapel at Camp Dodge may, however, be only temporary since the permanent employment of publicly maintained property for denominational services creates state sponsorship or endorsement of that religious activity. *See Southside Estates Baptist Church v. Board of Trustees, School Tax District No. 1, in and for Duvall County*, 115 So. 2d 697, 700 (Fla. 1958). Weddings and funerals would surely constitute such temporary or irregular use and would be permissible. Indeed, weekly denominational services could be held at the chapel if the sponsoring religious groups are diligently striving toward the procurement of their own houses of worship and instruction. *Resnick v. East Brunswick Township Board of Education*, 77 N.J. 88, 389 A.2d 944, 958 (1978). However, use of the chapel by a congregation without evidence of immediate intent to construct or purchase its own building would be impermissible. *See id.; Southside Estates Baptist Church v. Board of Trustees, School Tax District No. 1, in and for Duvall County*, 115 So. 2d 697, 700 (Fla. 1059). The Court in *Resnick* refused to put a time limit on religious use of public school facilities but indicated that five years of such continued use, although permissible, was approaching the outer limits of a reasonable time. 389 A.2d at 959. We, too, decline to put a time limit on permissible temporary religious use of the chapel. It seems apparent, however, that other courts would hold that five years of continued religious use would be impermissible. In any event, absent objective evidence that a religious organization intends to construct its own building, we are of the opinion that leasing to such groups would be constitutionally impermissible.

In summary, the establishment clause of the first amendment allows religious use of the Camp Dodge chapel by members of the public only on a temporary or irregular basis and provided that the chapel is also made available to nonsectarian groups. The state must be reimbursed for all expenses.

The conclusion is the same under the Iowa Constitution. Article I, §3 of the Iowa Constitution provides:

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[5] This is not to say, however, that certain types of speech may not be banned at Camp Dodge. In *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976), the United States Supreme Court upheld the constitutionality of military regulations which prohibited partisan political activities on a federal miiltary reservation as well as the distribution of conventional political campaign literature which presented a clear danger to military loyalty. *See id.*, at 838, 96 S.Ct. at 1217, 47 L.Ed.2d at 514. Assuming that Camp Dodge is much like a federal military reservation, it seems possible that you may prohibit all partisan political activity and still allow other nonpolitical secular organizations to use the chapel which, as mentioned previously, justifies the use of the chapel for denominational services. Carefully drawn regulations, limiting the use of the chapel to religious groups and groups of the same class, i.e., non-profit organizations, would appear to pass constitutional muster. *See Resnick v. East Brunswick Township Board of Education*, 77 N.J. 88, 389 A.2d 944, 957 (1978). It is emphasized, however, that such regulations must be concrete and specific to avoid unconstitutional application.

The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry."

This constitutional prohibition has been interpreted by the Supreme Court of Iowa not to prevent the temporary or occasional use of a schoolhouse for religious worship. *Davis v. Boget*, 50 Iowa 11, 15 (1878). Other courts have identically interpreted similar constitutional provisions. *See Resnick v. East Brunswick Township Board of Education*, 77 N.J. 88, 389 A.2d 944 (1978); *Pratt v. Arizona Board of Regents*, 110 Ariz. 466, 520 P.2d 514, 517 (1974). The New Jersey and Arizona Courts have required that the state not incur any costs for such rental. 389 A.2d at 951, 520 P.2d at 517. Thus, the Iowa Constitution allows you to rent the chapel at Camp Dodge to religious organizations for temporary use at a fair rental value. Consistent with the federal constitutional guarantees outlined above, nonsectarian organizations must be able to rent the chapel as well.

January 4, 1980

COUNTIES: Selection of official county newspapers. Chapter 349, Sections 349.3, 349.5, 349.6, 349.7, The Code 1979. A county board of supervisors has no authority to restrict or extend the definition of "bona fide yearly subscribers" beyond the plain language set forth in §349.7, The Code 1979. (Hyde to Holt, State Representative, 1-4-80) #80-1-3 (L)

January 4, 1980

FINANCIAL INSTITUTIONS: Legal Relationship of "Due-on-Sale Clause" Provisions in Home Mortgage Instruments. United States Constitution art. VI, cl. 2; 12 U.S.C. §1464(a), 12 C.F.R. §545.6-.11(f) and (g); 1978 Session, 67th G.A., ch. 1190, §12(2)(c), as amended by S. F. 158, 1979 Session, 68th G.A., §22, and further amended by H. F. 658, 1979 Session, 68th G.A., §16. Ch. 1190, as amended, and 12 U.S.C. §1464(a), are in conflict in that both seek to regulate the employment of "due-on-sale clauses" by federal savings and loan associations in home mortgage instruments. The federal regulations allow employment of said "due-on-sale" provisions while the Iowa Code voids such provisions except in certain circumstances. The federal statute preempts the state statute to the extent that it conflicts with the federal statute, and, consequently, "due-on-sale clauses" may be utilized by federal savings and loan associations. Ch. 1190, as amended, is constitutional except insofar as it voids "due-on-sale clauses" in the context of home loan mortgage instruments issued by federal savings and loan associations. (Hagen to Pope, State Representative, 1-4-80) #80-1-4

The Honorable Lawrence E. Pope, State Representative: You have requested an opinion of the Attorney General regarding ch. 1190, §12(2)(c), as amended effective July 1, 1979, by Senate File 158, 1979 Session, §22 and further amended by House File 658, 1979 Session, §16. Specifically, you asked the following:

The question arises whether ch. 1190's regulation of due-on-sale clauses is preempted by federal law [12 U.S.C. §1464(a)] and regulation [12 C.F.R. §545.6-11(f)(g)] in this area insofar as federal savings and loan associations are concerned. Stated more directly, my question is: Can the above referenced portion of ch. 1190 be applied to loan or mortgage instruments of federal savings and loan associations in Iowa?

Chapter 1190, §12 was passed by the 67th G.A., 1978 Session and was effective from July 1, 1978 until July 1, 1979. It temporarily amended Chapter 535 by adding the following section:

1. As used in this section, the term "loan" means any money loaned to a borrower who furnishes, as security for all or part of the loan, a mortgage on real property which is a single-family or a two-family dwelling occupied or to be occupied by the borrower.

2. The assessment and collection in connection with a loan of a loan origination fee, closing fee, commitment fee or similar charge is prohibited. If any lender receives any amount as a loan origination fee, closing fee, commitment fee or similar charge, or any combination thereof, which exceeds the amount permitted by this section, the borrower shall have the right to recover that charge, plus attorney fees and court costs incurred in any action necessary to effect such recovery.

Any costs charged to a borrower, associated with a loan, shall not exceed actual costs which shall be disclosed to the borrower. Such costs may only include one or more of the following:

a. Credit reports.
b. Appraisal fees.
c. Attorney's opinions.
d. Abstracting.
e. County recorder's fees.
f. Inspection fees.
g. Mortgage guarantee insurance charge.
h. Surveying of property.
i. Termite inspection.

The lender shall not charge the borrower for the cost of revenue stamps or real estate commissions which are paid by the seller.

3. A lender shall not, as a condition of making a loan as defined in this section, require the borrower to place money, or to place property other than that which is given as security for the loan, on deposit with or in the possession or control of the lender or some other person if the effect is to increase the yield to the lender with respect to that loan; provided that this subsection shall not prohibit a lender from requiring the borrower to deposit money without interest with the lender in an escrow account for the payment of insurance premiums, property taxes and special assessments payable by the borrower to third persons. Any lender who requires an escrow account shall not violate the provisions of paragraph a of subsection one (1) of section five hundred seven B point five (507B.5) of the Code.

4. If any lender receives interest either in a manner or in an amount which is prohibited by subsection three (3) of this section, the borrower shall have the right to recover all amounts collected or earned by the lender, whether or not from the borrower, in violation of this section, plus attorney fees, plus court costs incurred in any action necessary to effect such recovery.

5. The provisions of this section shall not apply to any loan which is subject to the provisions of section six hundred eighty-two point forty-six (682.46) of the Code, nor shall it apply to origination fees, administrative fees, commitment fees or similar charges paid by one lender to another lender if these fees are not ultimately paid either directly or indirectly by the borrower who occupies or will occupy the dwelling.

Senate File 158, §22, 68th G.A., 1979 Session, approved March 27, 1979 amended ch. 1190, §12 effective July 1, 1979 to read in relevant part as follows:

1. As used in this section, the term "loan" means . . . a loan of money which is wholly or in part to be used for the purpose of purchasing real

property which is a single-family or a two-family dwelling occupied or to be occupied by the borrower. "Loan" includes the refinancing of a contract of sale, and the refinancing of a prior loan, whether or not the borrower also was the borrower under the prior loan, and the assumption of a prior loan.

. . .

c. If the purpose of the loan is to enable the borrower to purchase a single-family or two-family dwelling, for his or her residence, the loan agreement shall not contain any provision which prohibits the borrower from transferring his or her interest in the property to a third party for use by the third party as his or her residence, and shall not contain any provision which requires or permits the lender to make a change in the interest rate, the repayment schedule or the term of the loan as a result of a transfer by the borrower of his or her interest in the property to a third party for use by the third party as his or her residence. A provision of a loan agreement which violates this paragraph is void.

d. If a lender collects a fee or charge which is prohibited by paragraph a or b of this subsection or which exceeds the amount permitted by paragraph a or b of this subsection, the borrower has the right to recover the unlawful fee or charge or the unlawful portion of the fee or charge, plus attorney fees and costs incurred in any action necessary to effect recovery.

. . .

House File 658, §16, 68th G.A., 1979 Session, approved June 10, 1979, further amended §12, ch. 1190 as follows:

If the purpose of the loan is to enable the borrower to purchase a single-family or two-family dwelling, for his or her residence, any provision of a loan agreement which prohibits the borrower from transferring his or her interest in the property to a third party for use by the third party as his or her residence, or any provision which requires or permits the lender to make a change in the interest rate, the repayment schedule or the term of the loan as a result of a transfer by the borrower of his or her interest in the property to a third party for use by the third party as his or her residence shall not be enforceable except as provided in the following sentence. If the lender on reasonable grounds believes that its security interest or the likelihood of repayment is impaired, based solely on criteria which is not more restrictive than that used to evaluate a new mortgage loan application, the lender may accelerate the loan, or to offset any such impairment, may adjust the interest rate, the repayment schedule or the term of the loan. A provision of a loan agreement which violates this paragraph is void.

An analysis of the specific questions you have propounded concerning the application of the 1978 Acts, ch. 1190, §12(2)(c) as amended effective July 1, 1979 by Senate File 158, 1979 Session, §22, and further amended by House File 658, 1979 Session, §16, must resolve these basic questions: (1) Does ch. 1190, as amended, differ from the Home Owners Loan Act of 1933, as amended, 12 U.S.C. §1461, *et seq.*, and the Federal Home Loan Bank Board regulations, 12 C.F.R. §545.6-11(f)(g)? (2) Is ch. 1190, as amended, preempted by the Home Owners Loan Act, 12 U.S.C. §1464 (a) and 12 C.F.R. §545.6-11(f)(g) insofar as it relates to due-on-sale provisions of federal savings and loan instruments, and, consequently, unconstitutional in part? (3) If ch. 1190, as amended, is unconstitutional in part, can the statute be severed so as to preserve the remaining provision of ch. 1190?

I.

DOES CH. 1190, AS AMENDED, DIFFER FROM THE HOME OWNERS LOAN ACT OF 1933, AS AMENDED, 12 U.S.C. §1461, *ET SEQ.*,

AND THE FEDERAL HOME LOAN BANK BOARD REGULATIONS, 12 C.F.R. §545.6-11(f)(g)?

Both the federal and Iowa Acts and regulations in part purport to regulate mortgage loan instruments utilized by federal savings and loan associations. In effect, as you note, the Iowa statute declares "void" the clauses, commonly referred to as due-on-sale clauses, in loans for the purpose of single or two-family dwellings except to the extent a lender's security is impaired. An extensive analysis of the entire due-on-sale concept and its enforcement is contained in "Enforcement of Due-on-Transfer Clauses," 13 Real Prop., Prob. and Tr. J. 891 (1978) and in Annot., 69 A.L.R. 3d 713 (1976), and we direct your attention to the detailed discussions contained therein.

The Iowa Act, ch. 1190, as amended by House File 658, 1979 Session, §16, states in pertinent part that:

any provision of loan made after July 1, 1979 which prohibits the borrower from transferring his or her interest in the property to a third party for use by the third party as his or her residence, or any provisions which requires or permits the lender to make a change in the interest rate, the repayment schedule or the term of the loan as a result of a transfer by the borrower of his or her interest in the property to a third party for use by the third party as his or her residence shall not be enforceable except as provided in the following sentence.

If the lender on reasonable grounds believes that its security interest or the likelihood of repayment is impaired, based solely on criteria which is not more restrictive than that used to evaluate a new mortgage loan application, the lender may accelerate the loan, or to offset any such impairment, may adjust the interest rate, the repayment schedule or the term of the loan.

The relevant federal statute, 12 U.S.C. §1464 establishes on its face a federal savings and loan system providing in §1464(a):

In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized *under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulations of associations to be* known as 'Federal Savings and Loan Associations', and to issue charters therefor, *giving primary consideration to the best practices of local manual thrift and home-financing institutions in the United States.*

The Federal Home Owners Loan Act of 1933 (H.O.L.A.), as amended, is found at 12 U.S.C. §1461 *et seq.* The Act was originally the Federal Home Loan Bank Act, passed in 1932 in an attempt to alleviate the exigent economic conditions in home financing. The apparent intent of the Act was to provide federal controls in the area of home purchases. President Franklin Roosevelt set out the intent of this legislation in a letter dated April 13, 1933:

Implicit in the legislation . . . is a declaration of *national policy.* This policy is that the broad interests of the Nation require that special safeguards should be thrown around home ownership as a guaranty of social and economic stability. [Emphasis added].

H.R. Doc. No. 19, 73rd Cong., 1st Sess. 1681, 1702 (1933).

Although the Act established a new federal regulatory agency, the Federal Home Loan Bank Board, and established 12 Federal Home Loan Banks to provide wholesale banking services to member banks and

mortgage loan companies to the public, the situation did not improve. It was estimated that approximately 40% of all single-family home loans were delinquent and in default in the United States. *See* 77 Cong. Rec. 2480, April 27, 1933 (remarks by Rep. Luce) *id.* at 2486 (remarks of Rep. Goldsbrough) and remarks of President Roosevelt, H.R. Doc., 73rd Cong., 1st Session 1618, 1702 (1933).

A revised H.O.L.A. was the Congressional response [12 U.S.C. §1464 (a)]. A new corporation, the Home Owners Loan Corporation, was established to stabilize and underwrite home loans. Simultaneously, all loans between the Federal Home Loan Banks were discontinued. Most importantly to this discussion, Congress established a federal savings and loan system (§5(a) of the H.O.L.A.) by granting plenary authority to the Bank Board over the establishment and operation of federal associations.

In creating this federal system, Congress recognized that in certain matters federal savings and loan associations were to follow or comply with state law. *See* 12 U.S.C. §1464(h)(i). But for the most part, Congress relied on the Federal Home Loan Bank Board to establish rules and create substance out of its basic outline for the new federally-chartered institutions. *See Central Savings and Loan Assn. of Chariton v. Iowa Federal Home Loan Bank Board*, 422 F.2d 504, 506 (8th Cir. 1970). As stated in *North Arlington National Bank v. Kearny Federal Savings and Loan Association*, 187 F.2d 564, 565 (3rd Cir. 1951), *cert. denied*, 342 U.S. 816 (1952), "The H.O.L.A. lays down general rules and prohibitions, but leaves details to the [Bank] Board."

The regulations of the Board derived pursuant to 12 U.S.C. §1464(a) and in particular 12 C.F.R. §545.6-11(f) and (g) produce the inexorable conflict of the federal and state law. 12 C.F.R. §545.6-11(f) and (g) state as follows:

(f) Due-on-sale clauses. *A federal association continues to have the power to include, as a matter of contract between it and the borrower*, a provision in its loan instruments whereby the association may, at its option, declare *immediately due and payable all of the sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent.* Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by an association of such an acceleration option (hereafter called a due-on-sale clause) shall be governed exclusively by the terms of the contract between the association and the borrower, and all rights and remedies of the association and borrower thereto shall be fixed and governed by said contract.

(g) Limitations on the exercise of due-on-sale clauses. (1) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association may not exercise **a due-on-sale clause based on any of the following:**

(i) Creation of a lien or other encumbrance subordinate to the association's security instrument;

(ii) Creation of a purchase money security interest for household appliances;

(iii) Transfer by devise, descent, or by operation of law upon the death of a joint tenant; or

(iv) Grant of any leasehold interest of three years or less not containing an option to purchase.

(2) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, no Federal association shall impose a prepayment charge or equivalent fee in connection with the acceleration of the loan pursuant to the exercise of a due-on-sale clause.

(3) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association shall have waived its option to exercise a due-on-sale clause as to a specific transfer if, prior to that transfer, the association and the person to whom the property is to be sold or transferred (the existing borrower's successor in interest) reach written agreement that the credit of such person is satisfactory to the association and that the interest payable to the association on sums secured by its security instrument shall be at such rate as the association shall request. Upon such written agreement and resultant waiver, the association shall release such existing borrower from all obligations under the loan instruments, and for purposes of §541.14(a) the association shall be deemed to have made a new loan to such existing borrower's successor in interest. [Emphasis supplied].

Consequently, Chapter 1190, §12(2)(c), as amended, effective July 1, 1979, by Senate File 158, 1979 Session, §22 and further amended by House File 658, 1979 Session, §16, differs from and conflicts with 12 U.S.C. §1464(a) and 12 C.F.R. §545.6-11(f) and (g). This conflict cannot be reconciled; the state provisions prohibit enforcement except as provided in due-on-sale clauses contained in home mortgages (single-family or two-family dwellings) and the federal provisions expressly authorize federal savings and loan associations to include and exercise due-on-sale clauses.

II.

IS CH. 1190, AS AMENDED, PREEMPTED BY THE HOME OWNERS LOAN ACT, 12 U.S.C. §1464(a) AND 12 C.F.R. §545.6-11(f)(g) INSOFAR AS IT RELATES TO DUE-ON-SALE PROVISIONS OF FEDERAL SAVINGS AND LOAN INSTRUMENTS, AND, CONSEQUENTLY, UNCONSTITUTIONAL IN PART?

Preemption of state legislation by federal acts arises from the Supremacy Clause, U.S. Const. art. VI, cl. 2. Initially, there must be an "assumption that the historic police powers of the states [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Preemption can also be found where federal regulation is so pervasive as to make reasonable the conclusion that there is no arena for state action. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978).

The H.O.L.A. and the detailed regulations propounded thereunder do not in and of themselves necessarily compel an immediate conclusion of preemption. Such intervention creating an entire federal system of institutions, however, is a significant consideration. *See De Canas v. Bisa*, 424 U.S. 351, 362 (1976). *Cosmetic, Toiletry and Fragrance Assn. v. Minnesota*, 440 F.Supp. 1216, 1223 (D. Minn. 1977) *affd.*, 575 F.2d 1256 (8th Cir. 1978). The powers granted in 12 U.S.C. §1464(a)(b)(c) and (d) are broad and general in scope. It has long been held that federal savings and loan associations are instrumentalities of the United States.

See United States v. State Tax Commission, 481 F.2d 936, 969 (1st Cir. 1975); *Federal Savings and Loan Insurance Corp. v. Kearny Trust Co.*, 151 F.2d 720, 725 (8th Cir. 1945); *First Federal Savings and Loan Assn. v. Loomis*, 97 F.2d 831, 837 (7th Cir. 1938).

The preemption doctrine has been defined in the context of an analysis of the H.O.L.A. "due-on-sale" regulations in *Glendale Fed. Sav. & Loan Assn. v. Fox*, 459 F.Supp. 903 (C.D. Cal. 1978). Its insightful analysis is set out below:

The doctrine of federal preemption stems from the Supremacy Clause of the Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . ." U.S. Const. art. VI, cl. 2. Under that clause, "[o]ccupation of a legislative 'field' by Congress in the exercise of a granted power is a familiar example of its constitution power to suspend state laws." *Parker v. Brown*, 317 U.S. 341, 350, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1942). When such preemption occurs, any state law is inapplicable to an issue which arises in that "field." *Meyers v. Beverly Hills Federal Savings and Loan Ass'n.*, 499 F.2d 1145, 1146 (9th Cir. 1974).

The Supreme Court has indicated that when a State's exercise of its police power is challenged under the Supremacy Clause, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 92 L.Ed. 1447 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978). The relevant inquiry is whether Congress has either explicitly or implicitly declared that the States are prohibited from regulating the loan instruments of federal savings and loan association chartered by the Federal Home Loan Bank Board. *See Ray v. Atlantic Richfield Co., supra*, 98 S.Ct. at 994. As the Court stated in *Rice, supra*, 67 S.Ct. at 1152:

"[The Congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. * * * Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws of the same subject. * * *

Likewise, the object sought to be obtained by the federal law and the character of obligation imposed by it may reveal the same purpose. * * *" *Accord, Ray v. Atlantic Richfield Co., supra*, 98 S.Ct. at 994; *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 93 S.Ct. 1854, 1859, 36 L.Ed.2d 547 (1973).

Even if Congress has not entirely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. *Ray v. Atlantic Richfield Co., supra*, 98 S.Ct. at 994. A conflict exists "where compliance with both federal and state regulation is a physical impossibility . . .," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowcitz*, 312 U.S. 52, 67, 62 S.Ct. 399, 404, 85 L.Ed. 581 (1940); *Jones v. Rath Packing Co., supra*, 97 S.Ct. at 1310, 1316-17; *Ray v. Atlantic Richfield Co., supra*, 98 S.Ct. at 994-95.

When the Bank Board promulgates regulations, such as 12 C.F.R. §545.6-11(f) and (g), those regulations have the force and effect of a federal statute. *See Community Federal Savings and Loan Ass'n. v. Field*, 238 F.2d 705, 707 (8th Cir. 1942); *Rettig v. Arlington Heights Federal Savings and Loan Ass'n.*, 405 F.Supp. 819, 825 (N.D. Ill. 1925);

People of California v. Coast Federal Savings and Loan Ass'n., supra, 98 F.Supp. 314, 316 (S.D. Cal. 1951).

An anlysis of federal H.O.L.A. and its conflict with state law in the context of Iowa legislation is contained in *Central Savings and Loan Assn. of Chariton, Iowa v. Federal H.L.R. Bd.,* 422 F.2d 504 (8th Cir. 1970). In that case, the Circuit Court was reviewing the decision of the United States District Court Judge Ray L. Stephenson rendered in favor of various federal savings and loans in Iowa against an action by various competitors. The Circuit Court held that the Home Loan Bank Board's grant of authority to a federal savings and loan association to establish and operate mobile facilities at three of eleven sites was not an abuse of discretion.

In the initial decision, in *Central Savings and Loan Assn. of Chariton, Iowa v. Federal Home Loan Bank Board,* 293 F.Supp. 617 (S.C. Iowa 1968), the Court recognized the federal regulatory scheme:

Plaintiffs first seek a declaration that section 545.14-4 is illegal, invalid and void. It is abundantly clear that *the Act, as amended, granted authority to the Board,* incidental to its expressly conferred statutory power *to organize, charter and regulate such associations,* to permit federal savings and loan associations, regularly chartered, to establish branch offices. [Emphasis supplied].

293 F.Supp. at 621.

In affirming the District Court decision, the Court of Appeals recognized in *Central Savings, supra,* that, regardless of the policy implications, the federal regulation will prevail.

The ultimate effects of the operation of mobile facilities, *be they beneficial or detrimental, fall within the scope of those issues statutorily committed to the exclusive discretion of the Board.*

See Bridgeport Federal Savings and Loan Association v. Federal Home Loan Bank Board, 307 F.2d 580 (3rd Cir. 1962), *cert. denied,* 371 U.S. 950, 83 S.Ct. 504, 9 L.Ed.2d 499 (1963); *Federal Home Loan Bank Board v. Rowe,* 109 U.S. App. D.C. 140, 284 F.2d 274 (1960); *First National Bank of McKeesport v. First Federal Savings and Loan Association, supra.* [Emphasis supplied].

422 F.2d at 507.

The courts throughout the United States have continually recognized on various issues that the H.O.L.A. and the regulatory scheme bar general state regulation of the federal savings and loans. *See, e.g., Meyers v. Beverly Hills Federal Savings and Loan,* 499 F.2d at 1147 (9th Cir. 1974); *People of California v. Coast Federal Savings and Loan Association,* 98 F.Supp. 311, 318-19 (S.D. Cal. 1951); *Kupiec v. Republic Federal Savings and Loan Association,* 512 F.2d 147, 152; *KASKI v. First Federal Savings and Loan Assn. of Madison,* 250 N.W.2d 367 (Wisc. 1976). *Greenwald v. First Federal Savings and Loan Assn. of Boston,* 446 F. Supp. 620, 623-625 (D. Mass. 1978), *aff'd.,* 591 F.2d 417 (1st Cir. 1979); *Rettig v. Arlington Heights Federal Savings and Loan Assn., supra,* at 823; *City Federal Savings and Loan Assn. v. Crowley,* 393 F.Supp. 644, 655 (E.D. Wis. 1974); *Lyons Savings Assn. v. Federal Home Loan Bank Board,* 377 F.Supp. 11, 17 (N.D. Ill. 1974); *Elwert v. Pacific First Federal Savings and Loan Assn.,* 138 Supp. 395, 399-400 (D. Ore. 1956); *Washington Federal Savings and Loan Assn. v. Balaban,* 381 So.2d 15, 17 (Fla. 1973).

As stated in *Merrill, Lynch, Pierce Fenner, Smith v. Ware*, 414 U.S. 117, 139 (1973), "it is where there is in existence a persuasive and comprehensive scheme of federal regulation *that preemption follows* in order to fulfill the federal statutory purpose."

Three recent decisions contain relevant analysis which support a conclusion that federal law preempts state law in this particular matter. In *Glendale Federal Savings and Loan Association v. Fox*, 459 F.Supp. 903, 922-23 (C.D. Cal. 1977), after an extensive review of the legislative history of H.O.L.A., the Court held that state (California) regulation of the validity and exercisability of "due-on-sale" clauses contained in loan instruments of federal savings and loan association executed on or after June 8, 1976 was preempted by federal law:

The language, history, structure, and purpose of the Home Owners' Loan Act evidence a clear Congressional intent to delegate to the Bank Board complete authority to regulate federal savings and loan associations and to preempt state regulation. Whenever the Bank Board, pursuant to that plenary authority, promulgates a regulation governing an aspect of the operation of federal savings and loan associations, that regulation governs exclusively and preempts any attempt by a state to regulate in that area.This conclusion is in accordance with the clear preponderance of authority in this and other circuits. *See Meyers v. Beverly Hills Federal Savings and Loan Ass'n., supra*, 499 F.2d 1145, 1147 (9th Cir. 1974); *Kupiec v. Republic Federal Savings and Loan Ass'n.*, 512 F.2d 147, 150 (7th Cir. 1975); *Rettig v. Arlington Heights Federal Savings and Loan Ass'n.*, 405 F.Supp. 819, 823 (N.D. Ill. 1975); *City Federal Savings and Loan Ass'n. v. Crowley*, 393 F.Supp. 644, 655 (E.D. Wis. 1974); *Lyons Savings and Loan Ass'n. v. Federal Home Loan Bank Board, supra*, 377 F.Supp. 11, 17 (N.D. Ill. 1974); *Elwert v. Pacific First Federal Savings and Loan Ass'n.*, 138 F.Supp. 395, 399-400 (D. Or. 1956); *People of California v. Coast Federal Savings and Loan Ass'n.*, 98 F.Supp. 311 (S.D. Cal. 1951).

In *People v. Coast Federal, supra*, the California Attorney General sought an injunction and recovery of statutory penalties against a federal savings and loan association for violation of state banking laws on advertising. 98 F.Supp. at 315. The court found that the HOLA established a uniform national system and that state law could not be applied to the federal association:

"Not only does the act of Congress [HOLA] which authorized the creation, operation and supervision of federal savings and loan associations by the Home Loan Bank Board, embrace the entire field, but the comprehensive rules and regulations adopted by the Board clearly meet the test of covering the subject matter of the [state] statute. . . . It seems clear that Congress has preempted the field, making invalid the state statutes plaintiffs rely upon . . . when attempted to be invoked against a Federal savings and loan association.

. . .

. . . [A]s to federal savings and loan associations, Congress made plenary, preemptive delegation to the Board to organize, incorporate, supervise and regulate, leaving no field for state supervision." 98 F.Supp. at 318-19; *accord Meyers v. Beverly Hills Federal Savings and Loan Ass'n. supra*, 499 F.2d at 1147.

This language of *People v. Coast Federal* has been echoed in decisions regarding federal preemption of state regulation of federal savings and loan associations.

The Ninth Circuit has taken the position that Congress, in the HOLA, delegated to the Bank Board the authority to regulate the operations of federal savings and loan associations to the exclusion of state regulation. In *Meyers*, the court addressed the issue whether a Bank Board regu-

lation specifically covering the area of prepayments of real estate loans, 12 C.F.R. Section 545.6-12(b), exempted federal associations from California law dealing with prepayment penalties. The court held that "federal law preempts the field . . ., so that any California law in the area is inapplicable to federal savings and loan associations operating within California." 499 F.2d at 1147.

Pursuant to the plenary authority delegated to it by Congress, the Bank Board has promulgated specific regulations regarding the provisions which a federal association shall and may include in their loan contracts. 12 C.F.R. §545.6-11. In particular, the Bank Board has promulgated a regulation specifically confirming the validity of due-on-sale clauses in mortgage loan contracts executed by federal associations. 12 C.F.R. §545.6-11(f). Further, the Bank Board has specifically provided that the only non-contractual limitations on the exercisability of such clauses are those enumerated in 12 C.F.R. §545.6-11(g). 12 C.F.R. §546.6-11(f). The regulations on their face indicate the Bank Board's intent to exercise the authority to preempt delegated to it by Congress and to govern exclusively the validity and exercisability of due-on-sale clauses in the lending instruments of federal associations.

In the very recent case, *Bailey v. First Federal Savings and Loan Association of Ottumwa,* F.Supp. (C.D. Ill., Oct. 2, 1979) No. 78-1272, plaintiff sought declaratory and injunctive relief against enforcement of due-on-sale clauses in two mortgages. Defendant counterclaimed, and after removal to federal court pursuant to 28 U.S.C. §1441, joint motions for summary judgment on the issue were considered. The court held in part that "due-on-sale" clauses are valid contractual provisions in federal savings and loan mortgage instruments as a matter of federal law, using the following analysis:

In promulgating this regulation [12 C.F.R. §545.6-11(f) 1979] the Board appears to have complied with its Congressional mandate in that due-on-sale clauses appear to represent the "best practices" of local lending institutions in the United States . . .

The due-on-sale clauses in the mortgages here were agreed upon five and seven years before the effective date of the regulation. However, the plain language of the regulation, *i.e.*, "continues to have the power" clearly indicates that the Board approved such clauses prior to 1976. In *Glendale,* 459 F.Supp. at 906, the Board took the position that prior to 1976, due-on-sale clauses were authorized under its general regulation requiring that loan contracts be fully protected. Words in a government regulation by the government agency involved, even if not controlling, is [sic] to be given deference. *Chrobak v. Metropolitan Life Insurance Company,* 517 F.2d 883, 886 (7th Cir. 1975).

In discussing the implementation of the new regulation, the Board stated:

"*Finally, it was and is the Board's intent to have late charges and due-on-sale practices governed exclusively by Federal law.*" [Emphasis supplied].

These statements by the Board indicate that with respect to due-on-sale clauses, federal law preempted state law prior to the effective date of the specific authorizing regulation. As recognized in *Rettig v. Arlington Heights Federal Savings and Loan Association,* 405 F.Supp. 819, 826 (N.D. Ill. 1975):

"the consistency and universality inherent in applying a single federal standard to the federal savings and loan system, whether it be statutory, regulatory or derived from federal common law, is in keeping with the underlying objective of the Home Owners Loan Act, which contemplates a uniform set of policies for federally chartered associations which does not vary with quirks of local law."

Considering the clear language of the regulation itself, the deference given to administrative bodies in the interpretation of their own regulations, and the Congressional intent in creating the Board and granting it the power to make appropriate regulations, there can be no doubt that the due-on-sale clauses involved in this case are valid contractual provisions as a matter of federal law. Whether it be termed giving retroactive effect to the 1976 regulation or as a matter of federal common law, the Association could proprely include due-on-sale clauses in its loan instruments in 1969 and 1971.

In a decision issued November 2, 1979, *Conference of Federal Savings and Loan Associations, et al. v. Alan A. Stin, et al.*, No. 78-55-P.C.W. (E.D. Cal. Nov. 2, 1979), the United States District Court, Eastern District of California, reached a similar conclusion. The exact issue reviewed by the court on joint motions for summary judgment was whether the federal savings and loan associations must comply with California statutes and law with respect to the validity and exercisability of due-on-sale clauses. Portions of the decision stated:

. . .

8. The Congress of the United States in HOLA granted to the Bank Board plenary powers to provide, under such rules and regulations as the Bank Board may prescribe, for the organization, incorporation, operation, examination, and regulation of the plaintiff Federal associations and the Congress directed the Bank Board to give primary consideration to the best practices of local mutual thrift and home financing institutions in the United States. 12 U.S.C. Section 1464(a). *Meyers v. Beverly Hills Savings and Loan Association*, 499 F.2d 1145 (9th Cir. 1974).

9. The language, history and structure of HOLA evidence a clear Congressional intent to delegate to the Bank Board the exclusive authority to regulate the lending practices of the plaintiff Federal associations and the regulations of the Bank Board have the full force and effect of law. *Meyers v. Beverly Hills Savings and Loan Association*, 499 F.2d 1145 (9th Circuit 1974); *Glendale Federal Savings and Loan Association v. Fox*, 459 F.Supp. 903 (C.D. Cal. 1978).

10. It was the intent of Congress that Federal law and regulation exclusively govern the validity and exercisability of due-on-sale clauses in the loan instruments of Federally-chartered savings and loan associations. *Glendale Federal Savings and Loan Association v. Fox*, 459 F.Supp. 903 (C.D. Cal. 1978) and *Nalore v. San Diego Federal Savings and Loan Association*, Civil No. 77-0660-N. See also, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988 (1978).

11. 12 C.F.R. §545.6-11(f) and (g) are Federal regulations which have the force and effect of law and which exclusively govern the validity and exercisability of due-on-sale clauses in loan instruments of the plaintiff Federal associations which were executed on and after June 8,

. . .

14. Federal law exclusively governs the validity and exercisability of due-on-sale clauses included in the loan instruments of Federally-chartered savings and loan associations whether such instruments were executed before or after the effective date of 12 C.F.R. §545.6-11(f) and (g).

17. The Secretary has no power or authority to require or enforce compliance by the plaintiff Federal associations with California statutes and law relating to due-on-sale clauses and practices.

In Iowa, both the Federal Home Owners Loan Act, 12 U.S.C. §1464 (a) and ch. 1190, as amended, regulate federal savings and loan associations. The H.O.L.A. regulates only federal savings and loan associa-

tion. (*See* discussion in Part I). The state regulates lenders as defined in H. F. 658, 1979 Session, §2(1):

"Lender" means a bank, *savings and loan association* or credit union which is organized *under the laws* of this state or of *the United States* and which is authorized to engage in business in this state. [Emphasis supplied].

The holdings in the three principal cases cited above that the Bank Board's statutory and regulatory scheme generally bars state regulation of federal savings and loan associations' employment of due-on-sale provisions in home mortgage interests seems settled. The state cannot void due-on-sale clauses in federal savings and loan home mortgage agreements because Congress has, with respect to federal savings and loan associations, preempted the field by passage of the federal H.O.L.A. and pertinent regulations. The United States Congress did not intend to regulate state-chartered savings and loans. The discussion contained in Part I evidences the primary intent of the H.O.L.A. was to create and regulate a federal savings and loan association as an alternative national system of home owner financial institutions. Consequently, we must conclude that the federal law and regulations allowing due-on-sale clauses in the context of federal savings and loan instruments preempts the state laws voiding such due-on-sale clauses.

Further, such state regulation of federal savings and loan associations is unconstitutional to the extent that it seeks to regulate federally-chartered savings and loan associations and void due-on-sale clauses contained in their home loan mortgage instruments and agreements. This does not mean, and the federal law does not require, that such due-on-sale clauses must be included in such instruments. Federally-chartered savings and loan associations may or may not employ such clauses. However, the state may not by legislation void such due-on-sale clauses organized under the laws of the United States because Congress has, with respect to federal institutions, preempted the field by passage of the federal Act and adoption of the recent federal regulations.

III.

IF CH. 1190, AS AMENDED, IS UNCONSTITUTIONAL IN PART, CAN THE STATUTE BE SEVERED SO AS TO PRESERVE THE REMAINING PROVISION OF CH. 1190?

Whether the invalidity of the coverage of federal financial savings and loans renders the entire statute unconstitutional is the final question. The test of separability is legislative intent.

It is a recognized principle that the objectionable part of a statute may alone be voided when the remaining portion is complete and enforceable by itself and when it appears the legislature intended the remainder to stand even if a part was invalid.

State v. Books, 255 N.W.2d, 322, 325 (Iowa 1975).

As stated in *State v. Monroe*, 236 N.W.2d 24, 35 (Iowa 1975), quoting approvingly from 82 C.J.S. Statutes §93, pages 154-155:

A statute may be unconstitutional in part and yet be sustained with the offending part omitted, if the paramount intent or chief purpose will not be destroyed thereby, or the legislative purpose not substantially affected or impaired, if the statute is still capable of fulfilling the apparent

legislative intent, or if the remaining portions are sufficient to accomplish the legislative purpose deducible from the entire act construed in the light of contemporary events.

Chapter 1190, as amended, does not contain a separability clause. "When there is no such clause, the presumption is that the statute was meant to stand or fall in its entirety." *Motor Club of Iowa v. Department of Transportation*, 251 N.W.2d 510, 519 (Iowa 1977); *State v. Books*, 225 N.W.2d 322, 325 (Iowa 1975). In *Motor Club*, the administrative rules in question were found to be interdependent since the invalid provisions were conditions precedent to the remaining provisions and there was legislative history that the commission had previously refused to pass the resolution without the invalid conditions. However, "[T]he presumption against separability in absence of a separability clause is a weak one." 2 Sutherland, Statutory Construction §44.09, p. 353. "In all cases, the determining factor is legislative intent." *State v. Books*, 225 N.W.2d at 325. *Books* held such presumption was overcome where the amendment to a long-standing enactment was invalid and the effect of total invalidation would be to have no regulation covering gifts to public officials.

The central question is whether the legislature would have enacted ch. 1190, and not have included the federally-chartered financial institutions. The invalid part cannot be separated if the provisions in ch. 535A are "connected and dependent upon each other so that if you reject the unconstitutional part you destroy the legislative intent . . .", *Smith v. Thompson*, 219 Iowa 888, 258 N.W. 190, 196 (1934).

The regulations of state financial institutions is basic to state and Iowa laws. Chapters 1190 as amended by Senate File 158 and further amended by House File 658, upon review, detail comprehensive intervention in the domain of financial institutions and in particular the single and double-dwelling residency lending market. House File 658, §15 creates an affirmative duty on the part of state regulatory agencies:

An agency of this state which is required by the laws of this state to regulate a lender shall enforce the provisions of this chapter with respect to the lender. The regulatory agency may petition the district court for Polk county in an action in equity to obtain such relief as may be necessary to obtain compliance with this chapter.

A regulatory agency may promulgate rules as necessary to administer or enforce this chapter.

In light of such comprehensive state regulation of these financial transactions and H.O.L.A., one must presume that the state legislature was aware of the federal Act, 12 U.S.C. §1464(a) when it amended ch. 1190. *See Hubbard v. State*, 163 N.W.2d 904 (1969). The precise federal regulation creating the conflict, 12 C.F.R. §545.6-11(f) and (g), while the equivalent to federal law, could be withdrawn by the Federal Home Loan Board, and may be altered at any time by the federal agency. Consequently, in view of the broad state intent evident in the legislation to control all state and federal financial institutions engaged in lending in the home loan market, we conclude that the legislature would have passed the same legislation applying to state-chartered lenders, including savings and loans, and when not preempted to federal financial institutions. To conclude otherwise would make the action of the Iowa legislature redundant, unnecessary, and absurd and would ignore the dual system

of federal-state regulation. It is our conclusion that the statute is preserved even though the state's attempt to void due-on-sale clauses in home mortgage instruments issued by federal savings and loan associations is preempted by the H.O.L.A.

January 4, 1980

COMMON CARRIERS: Scheduled penalty: Chs. 327C to 327G, Code of Iowa (1979). Violations of Chapters 327D and 327F are criminal in nature. These actions should be pursued by the county attorney. (Gregerson to Connors, State Representative, 1-4-80) #80-1-5(L)

January 4, 1980

ADMINISTRATIVE PROCEDURE ACT; Costs: Witness fees and mileage expenses in agency contested case hearings. §§17A.13(1), 622.69, 622.71, 622.74, 622.79, 625.1, 625.14, The Code 1979. Op. Att'y Gen. #78-2-2, #79-4-30. Witnesses subpoenaed to agency contested case hearings are entitled to the same fees and mileage expenses as witnesses in civil actions. The cost of compensating the witness must be borne by the party who subpoenas the witness and, like all costs incurred in agency contested case hearings, cannot be taxed. (Huber to Pillers, Clinton County Attorney, 1-4-80) #80-1-6

Mr. G. Wylie Pillers, Clinton County Attorney: You request our opinion as to whether counties are responsible for the payment of witnesses subpoenaed to testify at agency contested case hearings held in the respective counties. This request presents two issues: 1) whether witnesses subpoenaed to administrative hearings are entitled to witness fees and mileage expenses, and 2) if so, upon whom the obligation lies to compensate the witnesses.

The Iowa Administrative Procedure Act (IAPA), §17A.13(1), The Code 1979, empowers agencies to issue subpoenas in contested cases. Agency subpoena power, however, is limited:

Agency subpoenas shall be issued to a party upon request and shall not be subject to the distance limitation of section 622.66. On contest, *the court shall sustain the subpoena . . . to the extent that it is found to be in accordance with the law applicable to the issuance of subpoenas . . . in civil actions.* In proceedings for enforcement, the court shall issue an order requiring the appearance of the witness . . . under penalty of punishment for contempt in cases of willful failure to comply. (emphasis added) §17A.13(1), The Code 1979.

Not only must the agency subpoena comply with the provisions of Ch. 622, The Code 1979, but its enforcement has been entrusted to the district courts. Agency subpoenas, therefore, are subject to the limitations of the Ch. 622 provisions relating to subpoenas to the extent that those provisions are not inconsistent with or superseded by §17A.13(1).

One of the limitations of enforcing subpoenas in civil actions is the responsibility of paying witness fees, §622.69, The Code 1979. Before the court can find a subpoenaed witness liable for contempt for failing to appear, "it must be shown that the fees and travelling expenses allowed by law were tendered to him, if required," §622.77, The Code 1979. Such fees are required if demanded in advance, §622.74, The Code 1979, by a witness who is neither a peace officer nor an on-duty police officer, §622.71, The Code 1979. *See* Op. Att'y Gen. #79-4-30.

This same responsibility for witness fees applies to parties in agency contested case hearings. A party applying to the district court for the

enforcement of a subpoena, *See* §17A.13(1), The Code 1979, will be successful only if he or she has paid the requisite fees and travelling expenses.

Witnesses not requesting their fees in advance are entitled to compensation by implication. Not only is there a due process problem in denying them compensation, *Dickerson v. Maugham*, 22 S.E. 2d 88, 91 (Ga., 1942), but denying them fees and mileage would lead to impractical and unworkable results. If only those requesting fees in advance were granted fees, all subpoenaed witnesses would be encouraged to request fees in advance; the resulting administrative problems would be enormous and, if payment were not made and the witness failed to appear, would effect the fairness of the hearings.

Denying witness fees and expenses is unfair and burdensome and creates a strong incentive for a witness not to appear. A person living in Dubuque and subpoenaed to a hearing in Sioux City would be required to bear the complete loss of any wages foregone or expenses incurred, yet that same person would be subject to the court's contempt powers for disobeying that subpoena.

A previous attorney general's opinion, Op. Att'y Gen. #78-2-2, denied fees to witnesses subpoenaed to Iowa Merit Employment Commission hearings. This denial was based upon the agency's lack of inherent authority to tax the costs of administrative hearings. Any liability to tax costs, however, affects only the final source of compensation and not the witness's entitlement to that compensation. The part of that opinion relating to witness fees is hereby overruled.

The remaining question is upon whom the obligation lies to compensate the witnesses subpoenaed to agency contested case hearings. In civil actions each party must pay the fees of the witnesses he or she subpoenas and those fees are then taxed as costs against the losing party, §§625.1 and 625.14, The Code 1979. In agency contested case hearings, absent a statutory provision or agency rule to the contrary, the parties themselves must therefore pay the fees of the witnesses they subpoena.

Unlike successful parties in civil actions, however, successful parties in agency contested case hearings cannot, without specific statutory authority, recover their costs by having them taxed against the losing party. In *State Line Democrat v. Keosauqua Independent*, 161 Iowa 566, 143 N.W. 409 (1916), the court considered the issue of the taxation of witness fees in an administrative hearing absent statutory provision for the taxing of costs. The statute there examined authorized hearings before county boards of supervisors but made no provision for the taxing of costs. The court stated:

> As costs were not taxable at common law, it is fundamental that they cannot now be taxed in the absence of a statute providing therefor, and as a rule, statutes granting the power are strictly construed, and implied authority to tax is not generally recognized . . . [citations] . . . *there being no statute, each pays his own costs and expenses.* (emphasis added) *Id.* at 143 N.W. 410.

The court searched other taxation provisions of the Code to find authority for the board of supervisors to tax costs. It found none of them applicable because none of them made specific reference to the board of supervisors. Each party to the hearing, therefore, had to pay their own costs.

The Iowa Supreme Court continues to strictly construe statutes allowing the taxation of costs. *See Dole v. Harstad*, 278 N.W. 2d 907 (Iowa, 1979); *State Line* must here control. Since there is no statutory authority for taxing costs in agency contested case hearings, the parties must each bear the costs they incur in the hearings. These costs include the compensation of subpoenaed witnesses.

Accordingly, we are of the opinion that witnesses in agency contested case hearings are entitled to the same fees and expenses as witnesses in civil actions and that parties must bear the costs of compensating their own witnesses. A county, therefore, is only responsible for the fees and expenses of its own witnesses in the agency contested case hearings in which it is a party.

January 7, 1980

WELFARE: VETERANS AFFAIRS FUND: STRIKERS: §250.1, The Code 1979. Whether an applicant is on strike is not a factor contained in the criteria established by §250.1 to be used to determine eligibility for assistance from the veteran affairs fund. To deny an applicant benefits simply because he or she happens to be on strike would add a condition of eligibility not contained in the Code. A person involved in a strike should be granted assistance if he or she is otherwise qualified under §250.1. To the extent that 1971 Op. Atty. Gen. 62 conflicts with this opinion, it is withdrawn. (Formey to Kauffman, Director, Iowa Department of Veterans Affairs, 1-7-80) #80-1-7

Mr. Ray J. Kauffman, Director, Iowa Department of Veterans Affairs: We are in receipt of your request for an opinion of the Attorney General in which you inquire whether disbursements can be made from the veteran affairs fund established by ch. 250, The Code 1979, to individuals involved in a labor strike. It is our opinion that such disbursements can be made.

As established by §250.1, The Code 1979, the veteran affairs fund is created ". . . for the benefit of, and to pay the funeral expenses of honorably discharged, indigent men and women of the United States who served in the military or naval forces . . . and their indigent wives, widows and minor children not over eighteen years of age, having a legal residence in the county." The provision delineates the time periods during which the individual must have served in order to be eligible. An applicant for benefits would be deemed eligible if he or she was: 1) honorably discharged; 2) indigent; 3) had served in the military or naval forces during the speciifed period of time; and 4) had a legal settlement in the county to which the application was presented.

Clearly, the fact that an individual is on strike does not alter his or her status as an honorably discharged veteran. Nor does it have any bearing on the time period during which the person served the United States. Equally apparent is the fact that a person's legal settlement is not effected by the commencement of a labor dispute. The question then narrows to the issue of whether one can be considered "indigent" if one is also involved in a strike.

Chapter 250 does not provide a definition of the term "indigent" and the term is not defined in any other context in the Code. However, reference to case law indicates that the term is generally thought to relate to one's financial resources and means. " 'Indigent' is a term commonly

used to refer to one's financial ability, and ordinarily indicates one who is destitute of means of comfortable subsistance so as to be in want." *Powers v. State*, 402 P.2d 328, 194 Kan. 820 (1965); *Juneau County v. Wood County*, 85 N.W. 387, 109 Wis. 330 (1901). While there have been no Iowa cases defining the term "indigent", the term has been assigned a meaning by a number of earlier opinions of the Attorney General. In these decisions, Iowa has adopted the definition given to the term by the case authority cited above. See 1932 Op. Atty. Gen. 163.

If the term "indigent" is to be construed as relating to one's financial means and resources, it would have a meaning distinct from a definition concerned with employment status. This distinction was discussed by the court in *Strat-O-Seal Manufacturing Company v. Scott*, 218 N.E.2d 227 (Ill. App. 1966). The court explained:

It seems to us that need arising initially and solely from participation in a strike is purely a theoretical phantom. Present employment terminates through participation or acquiescence in a strike. It may be a factor contributing to the ultimate creation of an economic need, but it cannot solely, and standing alone, create such a need; nor does it do more initially than set the stage. Economic need is not then ipso facto born. It does not arise until economic reserves, other available resources, if any, and the inability or refusal to find other suitable employment is exhausted. The need for aid does not arise solely and initially from participation in a strike. 218 N.E.2d 227, 230.

The position that strikers who are otherwise eligible are permitted to receive benefits under state-funded assistance programs is the majority view in the United States. In fact, over 30 states allow some form of public assistance to those participating in a strike. *Note, Welfare for Strikers: ITT v. Minter*, 39 U.Chi.L.Rev. 79, 97, n. 104 (1971). As the court observed in *Strat-O-Seal*:

Labor union membership or activity and the right to strike in proper cases and under proper circumstances is an accepted fact in our industrial community. Plaintiffs would ask us to exact by judicial interpretation as the price of exercising that right a forfeiture of the benefits available to others under the Public Assistance Code. By so doing, we exact a quid pro quo and impose economic sanctions not specifically required by the Code. The strong arm of the State is thus employed to strangle otherwise authorized activity and State neutrality ends. We do not see how the legislature has or how we should create a blanket classification when the Code itself conveys the thought that the propriety of assistance rests on individual need and individual performance. 218 N.E.2d 227, 230.

It can, of course, be argued that to allow veterans who are on strike to receive assistance through the veteran affairs fund is to do away with the neutrality which the State attempts to maintain in private labor disputes. However, as was pointed out by the court in *Lacaris v. Wyman*, 292 N.E.2d 667 (N.Y. 1972), "the State may not be acting in a strictly neutral fashion if it allows strikers to obtain public assistance, it may not, on the other hand, be seriously maintained that the State adopts a neutral policy if it renders strikers helpless by denying them public assistance or welfare benefits to which they would otherwise be entitled." 292 N.E.2d 667, 672.

The Iowa Legislature established the criteria by which a person's eligibility for assistance from the veteran affairs fund is to be measured. Whether an applicant is on strike is not a factor contained in the specified criteria found in §250.1. To deny an applicant benefits simply be-

cause he or she happens to be on strike would add a condition of eligibility not contained in the Code. A person involved in a strike should be granted assistance under §250.1 if he or she is otherwise qualified.

Upon reconsideration, an earlier opinion on this issue, 1971 Op. Atty. Gen. 62, is clearly erroneous. To the extent that the earlier opinion conflicts with this opinion, the earlier opinion is withdrawn.

January 11, 1980

LICENSING: Licensee reporting requirements. Chapters 116, 258A; Sections 258A.1(c), 258A.3, 258A.4(1)(f), 258A.9(2), The Code 1979; 10 I.A.C. §15.1. A licensee of the Iowa Board of Accountancy is under a mandatory continuing obligation to report acts or omissions of another licensee of the Iowa Board of Accountancy as required by §258A.9(2), The Code 1979, regardless of the manner in which such acts or omissions come to the attention of the reporting licensee. (Hyde to Gronewold, Chairman, Iowa Board of Accountancy, 1-11-80) #80-1-8(L)

January 11, 1980

LIQUOR, BEER AND CIGARETTES: Manufacturer's Licenses Required for Holders of Bureau of Alcohol, Tobacco, and Firearms Experimental Distilled Spirits Plant Permit. §§123.1, 123.2, 123.3(8), 123.3(15), 123.41, The Code 1979. The Iowa Beer and Liquor Control Act regulates and controls the production of all alcohol capable of being consumed by humans, therefore §123.41 requiring manufacturer's licenses applies to holders of federal permits for the production of ethyl alcohol for use as fuel. (Hamilton to Gallagher, Director, Beer & Liquor Control Department, 1-11-80) #80-1-9(L)

January 15, 1980

JUVENILE LAW: Access to confidential Juvenile Court records by school officials. Section 232.147, The Code 1979. Confidential Juvenile Court records are not available to school officials without court order, because schools are not agencies legally responsible for the care, treatment and supervision of children. (Morgan to Gratias, State Senator, 1-15-80) #80-1-10

Honorable Arthur Gratias, State Senator: We received your November 16, 1979, request for an opinion concerning access to confidential Juvenile Court records by school officials pursuant to ch. 232, The Code 1979. Specifically, you have asked:

Is an Iowa public school an agency, association, facility or institution legally responsible for the care, treatment or supervision of the child within the meaning of §232.147(3)(e), to whom official Juvenile Court records may be released without court order?

With the exception of certain records of delinquency, Juvenile Court records are outside of the purview of Iowa's public records laws and are confidential, not subject to inspection or disclosure. Sections 232.147(1) and (2), The Code 1979. Access to Juvenile Court records is provided through three parts of the statute.

First, official Juvenile Court records of delinquency are public records. Section 232.147(2), The Code 1979. Second, Juvenile Court records may be released at the Court's discretion by order to persons conducting research, or to those with "a direct interest" in the proceedings or the Court's work. Section 232.147(4). Third, court records, other than delinquency records, may be disclosed without order to a list of persons, including the court staff and the parties and their representatives, as well as to

An agency, association, facility or institution, which . . . is legally responsible for the care, treatment or supervision of the child.

Section 232.147(3)(e).

Official court records regarding delinquency are available to public school officials because they are public records. Other court records are not available to public school officials without a court order because the public schools are not agencies which are legally responsible for the care, treatment or supervision of the child within the meaning of §232.147(3)(e).

We reach this conclusion after reviewing the statute, relevant case law, and the American Bar Association standards for juvenile records.

The statute authorizes release of Juvenile Court information without a court order to an agency legally responsible for the care, treatment or supervision of the child. While schools are to an extent responsible for providing care and supervision of children, the level of care and supervision required is that minimal level related to the educational function schools perform .Schools must exercise a sufficient degree of care and supervision so that children avoid injury to themselves or others. In contrast to a family or custodial institution, however, it would be highly unlikely that a child would be found a Child in Need of Assistance based on a lack of treatment or care from school officials. Thus, as we have previously opined, the care, treatment and supervision contemplated by the juvenile records sections of the Code is that primary care, treatment and supervision to be provided by the child's parents or custodian, rather than the minimal care provided by schools. *See* Op. Att'y Gen. #79-7-18 (Appel to Horn), holding that teachers are not persons "responsible for the care of the child" within the meaning of Section 232.68 relating to child abuse.

Moreover, this interpretation of the language of the statute is consistent with the policy rationale for treating certain Juvenile Court records as confidential. Such records are generally held confidential because of the danger of labelling children which can affect their ability to become productive members of society. Labellling a child a juvenile offender may affect job or educational opportunities and have other adverse effects upon a particular child. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Labelling of children is a particular concern in the school setting, because a school age child spends a substantial portion of the day at school and gains a sense of identity from the perception of school officials. Iowa's new Juvenile Justice Code reflects a strong social policy of protecting the child and suggests that the child's interest in privacy must be balanced against the interest of particular persons or agencies in having access to Juvenile Court records.

The American Bar Association Juvenile Justice Standards Project establishes a "need-to-know" test for balancing these conflicting interests. *See* Standards Relating to Juvenile Records and Information Systems, Juvenile Justice Standards Project, Institute of Judicial Administration, American Bar Association (1977) at pp. 116-121.

A school has a legitimate need to know whether a child may present a danger to himself or to others. This information may be reflected in an adjudication that a child is delinquent. The statute makes delinquency

records public and this information is thus available to school officials. School officials may also have a legitimate interest in discerning whether a child has special needs which would require a special educational program. While helpful information may be available in court records, information relating to special needs is also available from the child's parents or from public or private agencies working with the child upon release of the parents. For children in state custody, the Department of Social Services may release such information to the school, if it is needed for the child's educational program. Because there are other sources of information available to school officials concerning the special educational needs of the child, the legislature apparently resolved the balance of interests in favor of maintaining the confidentiality of such information in the absence of a court order. Thus, we conclude that the statute would require amendment if it is determined that information other than records relating to delinquency in Juvenile Court records should be made available to schools without a court order.

January 15, 1980

COUNTIES AND COUNTY OFFICERS: Taxation; Iowa Const., Art. III, ch. 39A, §§327H.23, 332.3(32), The Code 1979. A county board of supervisors is not authorized under §327H.23 and §332.3(32), or under the County Home Rule Amendment of the Iowa Constitution, to abate levied railroad taxes as a means of providing financial assistance to railroads. (Mull to Kliebenstein, Grundy County Attorney, 1-15-80) #80-1-11(L)

January 16, 1980

SCHOOLS: Educational program, requirement of a multicultural, nonsexist approach in teaching. Sections 257.9, 257.25, The Code 1979. The State Board of Education may promulgate rules to be applied in the process of approving public schools which require a multicultural, nonsexist teaching approach. These rules do not apply to nonpublic schools which seek approval by the State Board. (Norby to Carr, State Senator, 1-16-80) #80-1-12(L)

January 18, 1980

SCHOOLS: COUNTIES AND COUNTY OFFICERS: County treasurer's duties regarding distribution of taxes collected to school corporations. Sections 298.13, 445.37, The Code 1979. 1979 Session, 68th G.A., ch. 68, §19. County treasurers must each month distribute to school corporations their appropriate share of all tax payments received prior to the end of the preceding month. This includes tax payments made by check, if the check is received prior to the end of the month, even if the check is not actually paid to the county prior to the end of the month. (Norby to Benton, Superintendent, Department of Public Instruction, 1-18-80) #80-1-13(L)

January 22, 1980

MUNICIPALITIES: Retirement Systems—§§97B.3, 97B.7, 97B.11, 97B.42, 97B.53, 97B.68, 400.7, 400.12, 411.3 and 411.8, The Code, 1979. When a city goes under civil service, the retirement funds pursuant to Chapter 410 can be transferred to a Chapter 411 system. Seniority is determined from the date of employment. City employees under IPERS who fall within a Chapter 411 system are entitled to a refund of their accumulated contributions. (Blumberg to Readinger, State Senator, 1-22-80) #80-1-14(L)

January 22, 1980

CIGARETTES: Sales by distributors to wholesalers. Sections 98.1(12), 98.1(13), 551A.2(3), 551A.3, and 551A.5, The Code 1979. Chapter 98 licensed distributors performing wholesaler functions, as defined in §551A.2(3), can make sales to other wholesalers under the circumstances set forth in §551A.5. Op. Att'y Gen. #78-12-25 which reached a contrary result is withdrawn. (Griger to Bair, Director, Iowa Department of Revenue, 1-22-80) #80-1-15(L)

January 22, 1980

ATTORNEY GENERAL: ADVICE AND OPINIONS: §13.2, The Code 1979. The Governor, the Lieutenant Governor, the Supreme Court of Iowa, the Iowa Court of Appeals, the Iowa District Courts (including magistrates), the Secretary of State, the Auditor of State, the Treasurer of State, the Secretary of Agriculture, and the heads of boards, commissions and departments, as listed in the Iowa Official Register are state officers to whom opinions of the Attorney General may be issued. Opinions may also be issued to county attorneys pursuant to the duty of the Attorney General to supervise county attorneys. (Fortney to Brunow, 1-22-80) #80-1-16(L)

January 30, 1980

STATE OFFICERS AND DEPARTMENTS: Designation of smoking areas. §§17A.2(7)(i), 18.10, 98A.2(6), 98A.4, The Code 1979. The provisions of the Iowa Administrative Procedure Act pertaining to rulemaking apply to designation of smoking areas in public buildings by the department of general services. (Haskins to McCausland, Director, Iowa Department of General Services, 1-30-80) #80-1-17(L)

January 30, 1980

CIVIL RIGHTS: LOCAL HEARING OFFICERS. Local civil rights commissions must employ hearing officers separate from their investigators and adjudicators of discrimination at the cause determination level of the processing of a civil rights complaint. §§601A.15(3)(a-c); 601A.19, The Code 1979. (Herring to Carr, State Senator, 1-30-80) #80-1-18(L)

January 30, 1980

TAXATION: Property Acquisitions By Tax Exempt Political Subdivisions. §§427.1(2) and 441.46, The Code 1979, and 1979 Session, 68th G.A., ch. 68, §6. Section 6 of ch. 68 (Senate File 159) imposing the property tax upon property acquisitions by political subdivisions, whether those acquisitions be by voluntary transfer or condemnation, is effective for acquisition after July 1, 1979, but is not effective for such acquisitions made in the 1978-1979 fiscal tax year. (Griger to Kenyon, Union County Attorney, 1-30-80) #80-1-19(L)

January 30, 1980

STATE OFFICERS AND DEPARTMENTS: State Records Commission: Code Editor: §§14.6, 14.13, 304.3, 304.17. Any agency which is granted an exemption from the Records Management Act pursuant to §304.17 is not subject to any of the provisions of the Act. The exemption contained in §304.17 is conferred on the entire Department of Transportation, and not simply on the highway division of the Department of Transportation. (Fortney to Synhorst, Secretary of State, 1-30-80) #80-1-20(L)

February 5, 1980

COUNTIES: Brucellosis Fund Claims. Sections 164.21, 164.23, 164.24, 164.27, The Code 1979, 1979 Session, 68th G.A., Ch. 12, §2, 1979 Session, 68th G.A., Ch. 12, §3. The $5,000.00 limitation on payments to individual claimants found in 1979 Session, 68th G.A., Ch. 12, §2, applies only to moneys paid from this appropriation, and not generally to payments from county brucellosis eradication funds. (Benton to Shepard, Butler County Attorney, 2-5-80) #80-2-1 (L)

February 15, 1980

SCHOOLS: Sale or rental of musical instruments. Iowa Const., art. III, §31; §§274.1, 274.7, 279.8, 301.28, The Code 1979. Commercial salesmen of musical instruments may, in the discretion of the local school board, be permitted access to school facilities for the purpose of displaying and disseminating information regarding sale or rental of musical instruments. The local school board may not, however, select a certain store or salesman and deny access to others. A public school music instructor may recommend a particular instrument to a student, so long as the recommendation is based on a personal or professional preference and the instructor is not acting as an agent for the seller of the instrument. (Norby to Kudart, State Senator, 2-15-80) #80-2-2(L)

February 19, 1980

MUNICIPALITIES: Contracts In Which A City Official Has An Interest —§§141, 362.5, 362.6, 384.99, The Code, 1979. A city council person-elect would have an interest in a contract between the city and an engineering corporation in which the city official's spouse is a stockholder. If the requirements of §362.5(5) can be met, the contract in question would be validated. Otherwise, the contract in question would be rendered void by reason of the general provisions of §362.5. (Swanson to Noah, Floyd County Attorney, 2-19-80) #80-2-3

Mr. Ronald K. Noah, Floyd County Attorney: You have requested the opinion of The Attorney General regarding the interpretation of Section 362.5, The Code 1979, and the application of that section to a specific situation arising in Floyd County. The factual situation as set out in your opinion request can be summarized as follows:

The spouse of a council person-elect of the city of Charles City is a member of an engineering corporation that occasionally performs services for the city of Charles City. You state that on the occasions that this particular engineering firm does perform services for the city, the council person-elect's spouse presents the firm's proposal to the council. You further state that the engineer-spouse does not participate in the actual preparation of the contract and that the engineering firm would be able to arrange to have someone other than the engineer-spouse make the presentation to the city council. Finally, you state that the engineer-spouse is one of eleven stockholders in the engineering corporation, that he owns nonvoting stock on which no dividend has even been paid and that this stock amounts to approximately six percent (6%) of all of the outstanding stock of the corporation. Based on the foregoing factual situation, you have requested an answer to the following questions:

1. Would the spouse of the engineer—when she is sworn in as a council person of the city of Charles City—have an interest in a contract for services to be furnished by the engineering corporation to the city and would that interest be violative of §362.5?

2. If that interest would be generally violative of §362.5, would the interest fall under any of the exceptions enumerated in §362.5(1)-(10)?

3. Would it make any difference if the engineer-spouse was not directly involved in any part of the procurement of the contract?

4. Would it make any difference if the council person abstained from participating in any discussion or voting on a contract proposed by the engineering corporation?

It is the opinion of this office that the situation described in your opinion request would not constitute a violation of §362.5, provided certain procedural steps and substantive requirements are followed in the contracting process.

To begin with, §362.5 (the successor to §368.A22) provides a general rule rendering void any contract with a city in which a city officer or employee has a direct or an indirect interest. After stating this general rule, §362.5 goes on to enumerate ten exceptions to the rule. Section 362.5 provides in full:

362.5 *"Contract" defined.* When used in this section, "contract" means any claim, account, or demand against or agreement with a city, express or implied.

A city officer or employee shall not have an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for his city. A contract entered into in violation of this section is void. The provisions of this section do not apply to:

1. The payment of lawful compensation of a city officer or employee holding more than one city office or position, the holding of which is not incompatible with another public office or is not prohibited by law.

2. The designation of a bank or trust company as a depository, paying agent, or for investment of funds.

3. An employee of a bank or trust company, who serves as treasurer of a city.

4. Contracts made by a city of less than three thousand population, upon competitive bid in writing, publicly invited and opened.

5. Contracts in which a city officer or employee has an interest solely by reason of employment, or a stock interest of the kind described in subsection 9, or both, if the contracts are made by competitive bid, publicly invited and opened, and if the remuneration of employment will not be directly affected as a result of the contract and the duties of employment do not directly involve the procurement or preparation of any part of the contract. The competitive bid requirement of this subsection shall not be required for any contract for professional services not customarily awarded by competitive bid.

6. The designation of an official newspaper.

7. A contract in which a city officer or employee has an interest if the contract was made before the time he was elected or appointed, but the contract may not be renewed.

8. Contracts with volunteer firemen or civil defense volunteers.

9. A contract with a corporation in which a city officer or employee has an interest by reason of stockholdings when less than five percent of the outstanding stock of the corporation is owned or controlled directly or indirectly by the officer or employee or the spouse or immediate family of such officer or employee.

10. A contract made by competitive bid, publicly invited and opened, in which a member of a city board of trustees, commission, or administrative

agency has an interest if he is not authorized by law to participate in the awarding of the contract. The competitive bid requirement of this subsection does not apply to any contract for professional services not customarily awarded by competitive bid.

I

In answer to the first question contained in your opinion request, it appears from a reading of the statute and from comparing previous opinions of this office that the council person-elect, as a city official, *would* have an interest in a contract for services to be provided by the engineering firm in question.

In order to determine the applicability of §362.5, it must be ascertained whether the city official has an interest in the contract and whether any such interest can be termed a direct or an indirect interest. A review of the legal authorities will not be attempted here, as a previous opinion of this office, #79-7-23 (1979), thoroughly reviews the treatment that this issue has received in the courts.

It is sufficient for our purposes to state that the existence of the marital relationship creates an indirect interest in the contract on the part of the city official. In other words, because the engineering firm would profit from a contract with the city and the spouse of the city official will then own six percent (6%) of a more profitable corporation, the city official will also benefit from her spouse's share of a more profitable corporation. In this case the city official's interest would be termed an indirect one, as it is not possible nor is it necessary to be able to directly trace the profit from the corporation to the spouse's share of stock and then to the city official's benefit. It is enough that because of the marital relationship the city official will be in a better financial position as a result of the awarding of the contract.

Previous opinions of this office have concluded that the mere existence of a familial relationship, without more, is not enough to trigger the application of §362.5 (or its predecessor, §368A.22). *See*, 1966 O.A.G. 38, 1972 O.A.G. 338, 1973 O.A.G. 127 and #79-7-23 (1979). These general statements, however, should be contrasted with another previous opinion, 1976 O.A.G. 551. In that opinion, a factual situation very similar to the instant situation, in that it involved stock ownership by the spouse of a council person, was interpreted to constitute a violation of §362.5. Based on the above reasoning and the analysis found in the 1976 opinion cited above, we would conclude that the council person-elect in the instant case would have a sufficient indirect interest to constitute a violation of §362.5 in any contract negotiated by the city with the engineering firm.

II

The next question contained in your request is whether the fact situation that you described falls within one of the ten enumerated exceptions to the general rule of §362.5. It appears that one of the exceptions may operate to validate a contract under the situation presented.

To begin with, §§362.5(1), (2), (3), (4), (6), (7) and (8) are not applicable to the facts of this question. Section 362.5(9) speaks to stock ownership in the contracting corporation by the city official or the official's spouse or immediate family. According to your rendition of the

facts, the city official's spouse owns six percent (6%) of the outstanding stock of the engineering corporation and that would be above the "less than five percent" required by §362.5(9) to qualify as an exception to the general rule of §362.5. The fact that the stock in this case is nonvoting stock does not appear to make any difference, as the statute does not draw a distinction based on classes of stock. Section 362.5(10) would also not apply, as the city council person-elect *is* authorized by §384.99 to participate in the awarding of a contract.

That leaves only §362.5(5) to be considered. That exception is relevant to the instant situation in that it speaks to stock ownership. Under the provisions of §362.5(5), a contract involving stock ownership of the kind described in §362.5(9), but not satisfying the less than five percent cutoff of that subsection, may still be valid if certain procedural requirements are followed. *See Note, Remedies for Conflicts of Interest Among Public Officials in Iowa*, 22 Drake L. Rev. 600, 618 (1973). Those requirements are: that the contract be made by competitive bidding that is publicly conducted, that the remuneration of employment not be directly affected as a result of the contract and that the duties of employment do not directly involve the procurement or preparation of any part of the contract.

It is unknown whether these requirements can be met in the instant situation. There would apparently be no obstacle to following the public bidding procedure in awarding a contract that would eventually go to the engineering firm in question. The remuneration of employment would not be directly affected in the absence of a raise in salary or a bonus going directly to the engineer-spouse for the procurement of a contract with the city. You have stated in your opinion request that arrangements could be made by the engineering firm so that the engineer-spouse would not be involved in the procurement or preparation of any part of the contract. Accordingly, if all of the above requirements are satisfied, a contract between the City and the engineering firm would come under the exception set out in §362.5(5) and the contract would be valid. It should be noted that the requirements of §362.5(5) are stated in the conjunctive so that each and every one of them must be satisfied.

It should also be noted that §362.5(5) excepts contracts "for professional services not customarily awarded by competitive bid" from the public bidding procedure normally required. Engineering services are treated by Chapter 114, The Code, 1979, as professional services, so the question then becomes whether the City customarily requires competitive bidding when contracting for engineering services. The answer to this question is not known to us, so depending on the practice customarily followed by the City, competitive bidding may or may not be required to validate the contract in question. The remuneration questions and the employment duties question would still have to be answered even if competitive bidding were not required.

III

The next question set out in your opinion request is whether §362.5 would still apply if the spouse of the city official was not directly involved in the procurement of any part of the contract. As shown above, subsection five would be the only exception available to validate a con-

tract involving an invalid indirect interest under the facts as presented. The engineer-spouse would have to have no part in the procurement or preparation of the contract in question.

IV

The final question presented in your opinion request is whether it makes a difference if the council person-elect abstains from discussion or from voting on a contract proposed under the fact situation that you have set forth. Having determined that §362.5(5) could operate to save a contract that involves an otherwise invalid indirect interest, we need go no further. If that exception validates the contract, abstention is not required. If the exception is inapplicable, it is specifically provided that a contract found to violate §362.5 is void, so no manner of abstention by the City official would operate to save the contract. Section 362.6, The Code 1979,[1] would not apply to validate this contract, as it is a broader provision that would not be applied to deny effect to the narrower provisions of §362.5, which deals specifically with contracts of this nature. Therefore, because §362.5 declares a contract that is in violation of its provisions to be void, an abstention by the city official in question would be of no effect.

In conclusion, it is the opinion of this office that the factual situation described by you in your opinion request would not constitute a violation of §362.5, provided that the procedural steps and substantive requirements found in §362.5(5) are satisfied. If the provisions of §362.5(5) cannot be met, the city official's interest would render the contract void.

February 19, 1980

PHARMACY BOARD; WHOLESALE DRUG LICENSE: §§155.1, 155.3 (5), 155.23, 155.25. Only those drug wholesalers who make direct sales to Iowa pharmacies and retailers, or who maintain manufacturing or distribution facilities in Iowa, are required to obtain an Iowa wholesale drug license. Wholesalers outside of Iowa may make sales to licensed Iowa wholesalers without obtaining an Iowa license. (Norby to Johnson, Executive Secretary, Board of Pharmacy Examiners, 2-19-80) #80-2-4(L)

February 21, 1980

COUNTIES AND COUNTY OFFICERS; ELECTIONS: Sections 39.3(2), 331.3, 331.9, The Code 1979. Signatures on a petition presented to a county board of supervisors requesting elections to reduce the number of supervisors or select an alternative supervisor representation plan should be obtained subsequent to the last previous general election to be counted toward determining whether a proposition should be submitted to the electors. (Hyde to Miller, Guthrie County Attorney, 2-21-80) #80-2-5

Thomas H. Miller, Guthrie County Attorney: We have received your request for an opinion from this office concerning the validity of signa-

[1] 362.6 *Conflict of interest.* A measure voted upon is not invalid by reason of conflict of interest in an officer of a city, unless the vote of the officer was decisive to passage of the measure. If a specific majority or unanimous vote of a municipal body is required by statute, the majority or vote must be computed on the basis of the number of officers not disqualified by reason of conflict of interest. However, a majority of all members is required for a quorum. For the purposes of this section, the statement of an officer that he declines to vote by reason of conflict of interest is conclusive and must be entered of record.

tures on petitions requesting two elections concerning the Board of Supervisors of Guthrie County. On December 31, 1979, the Guthrie County Auditor received petitions to present propositions to the electors to reduce the number of supervisors from five to three, pursuant to §331.3, The Code 1979, and to select an alternative supervisor representation plan, pursuant to §331.9, The Code 1979. Both petitions included signatures obtained prior to the last general election held November, 1978. You have inquired whether signatures on petitions predating the last general election may be counted toward the total required to cause the propositions to be submitted to the electors.

Section 331.3, The Code 1979, provides in part:

In any county where the number of supervisors has been increased to five, the board of supervisors shall, *on petition of one-tenth of the qualified electors of the county having voted in the last previous general election* for the office of president of the United States or governor, as the case may be, or may on its own motion by resolution, submit to the qualified electors of the county, at any regular election, a proposition as to whether or not the number of supervisors should be decreased to three. [Emphasis supplied].

Section 331.9, The Code 1979, provides for a special election to be called by the board of supervisors:

. . . when *petitioned by ten percent of the number of qualified electors of the county having voted in the last previous general election* for the office of president of the United States or governor, as the case may be, . . . [Emphasis supplied].

There are few explicit statutory requirements to be met when presenting a petition to the board of supervisors, pursuant to §§331.3 and 331.9, The Code 1979. The signatures on the petition must be those of "qualified electors", defined by §39.3(2), The Code 1979, as "a person who is registered to vote pursuant to chapter 48." *See* 1940 Op. Atty. Gen. 223. A petition filed pursuant to §331.9, The Code 1979, must be filed with the county auditor by January 1 of a general election year.

While there is no express statutory authority or case law dealing with the specific question you present, inferences can be drawn from the language of §§331.3 and 331.9, The Code 1979. Thus, in our opinion, a further requirement is implied: the signatures on the petitions counted toward determining whether a proposition should be submitted to the electors must have been obtained subsequent to the last previous general election. The *number* of signatures required is determined by reference to the previous general election; the *signatures themselves* should also have been obtained during that time frame. It is reasonable to conclude that the legislature intended that those qualified electors who sign a §331.3 or §331.9 petition currently desire that the propositions be submitted to the electors, and will compose the group of citizens advocating the proposed change. To allow signatures predating the last previous general election to be counted could easily result in expenditures for an election that was no longer desired or supported by at least ten percent of the active electorate.

It is not an appropriate function of this office to determine the validity of any particular petition presented to a county board of supervisors pursuant to §331.3 and/or §331.9, The Code 1979, or the validity

of any subsequent election. *See West v. Whitaker*, 37 Iowa 598 (1873); 26 Am.Jur.2d Elections §192 (1966). It is our opinion, however, that signatures on such a petition should have been obtained subsequent to the last previous general election, to be counted toward determining whether a proposition should be submitted to the electors.

February 22, 1980

FINANCIAL INSTITUTIONS: REAL ESTATE CONTRACTS. 1979 Session, 68th G.A., H. F. 658, §16(c), 1979 Session, 68th G.A., ch. 130, §22(1), 1978 Session, 67th G.A., ch. 1190, §12(1), §535, The Code 1979. A real estate contract is not a "loan", for purposes of 1979 Session, 68th G.A., H. F. 658, §16(c), and therefore the prohibitions contained inthi s section do not apply to real estate contracts. (Where applicable, §16(c) prohibits the enforcement of certain provisions in real estate loans which prohibit the borrower from transferring his/her interest in the real estate, or which allow the lender to vary the terms of the loan as a result of such a transfer). Section 16(c) does not apply retroactively. (Norby to Smalley, State Representative, 2-22-80) #80-2-6

Honorable Douglas R. Smalley, State Representative: You have requested an opinion of the Attorney General concerning the interpretation of H. F. 658, 1979 Session, 68th General Assembly, §16(c). (Section 16(c) amends a prior session law, 1979 Session, 68th G.A., ch. 130, §22(1), which was an amendment to the Iowa usury statute. Ch. 535, The Code 1979). Section 16(c) concerns provisions in real estate loans which prohibit the transfer of the buyer's interest in the real estate to a third party, or which provide for a change in the interest rate, repayment schedule, or term of a loan as a result of a sale to a third party. Specifically, you have asked the following two questions:

1. Section 16(c) applies only to a "loan", this term being specifically defined for purposes of §16(c) in 1979 Session, 68th G.A., ch. 130, §22(1). Is a real estate contract a "loan" as this term is defined?

2. Section 16(c) amended 1979 Session, 68th G.A., ch. 130, §22(2)(c), by striking words which stated that a loan agreement "shall not contain any provision" which is prohibited. Does this amendment give the statute a retroactive effect?

Your second question was addressed by an earlier Attorney General's opinion. Op. Atty. Gen. #79-8-23. This opinion states that §16(c) should be given prospective effect only. Accordingly, §16(c) does not apply to real estate transactions which were executed prior to July 1, 1979. As further explanation, it appears that the language prior to passage of §16(c) provided for a total prohibition of the specified provisions. *See* 1979 Session, 68th G.A., ch. 130, §22(2)(c). In contrast, §16(c) allows the enforcement of such a provision if the lender can show that his or her security interest or the likelihood of repayment is impaired by the sale to a third party. Accordingly, §16(c) provides that the specified provisions "*shall* not be enforceable except as provided in the following sentence", which describes the exceptions referred to above. The change in language brought about by §16(c) appears not to require a retrospective application, but to have been made to accommodate the change from a total prohibition to a less than total prohibition of the specified loan provisions.

Your first question concerns whether a real estate contract is a "loan", as this term is used is §16(c). A real estate contract, as generally under-

stood, is a sale of real estate by a contract which provides for periodic payments of principle and interest, but the lender is not secured by a mortgage. In contrast with loans secured by a mortgage, which usually involve a financial institution, real estate contracts often involve private individuals as buyer and seller. If §16(c) applies to real estate contracts, the prohibitions of §16(c) would apply to transfers by the original buyer to a third party, including assignments of the contract.

"Loan" was originally defined to include only transactions involving a mortgage. 1978 Session, 67th G.A., ch. 1190, §12(1). This language was amended, however, and loan is now defined as follows:

As used in this section, the term "loan" means a *loan of money* which is wholly or in part to be used for the purpose of purchasing real property which is a single-family or a two-family dwelling occupied or to be occupied by the borrower. "Loan" includes the refinancing of a contract of sale, and the refinancing of a prior loan, whether or not the borrower also was the borrower under the prior loan, and the assumption of a prior loan. [Emphasis supplied].

1979 Session, 68th G.A., ch. 130, §22(1). This amendment clearly expands the range of transactions considered as loans, as loans are no longer limited to transactions involving a mortgage. Real estate contracts are not, however, expressly included. (Application of the prohibitions to "refinancing of a contract of sale" does not imply application to an initial contract of sale. A refinancing, as we understand, involves a loan of money to discharge the obligation remaining on the initial contract. Accordingly, a refinancing involves an advance of money and would be likely to involve a financial institution as the lender. As discussed below, these characteristics would make application of the §16(c) prohibitions appropriate.)

Initially, it appears that real estate contracts are subject to some of the other provisions of ch. 535, the Iowa usury statute. *See State ex rel. Turner v. Younker Bros., Inc.*, 210 N.W.2d 550, 559 (1973). For example, §535.4, which prescribes limitations on interest rates, applies to both a "loan of money" and to a "contract founded upon any sale of real . . . property". The language defining a loan for purposes of §16(c), however, applies only to "a loan of money". Ch. 130, §22(1). This appears to require that the lender make an actual advance of money to the borrower to make a "loan" for purposes of §16(c), even though a real estate contract does involve a forbearance from the collection of a debt and consequently is subject to other provisions of ch. 535. *See Turner v. Younker Bros., Inc.*, 210 N.W.2d at 561. As a narrower definition of a loan was adopted for §16(c), it appears that §16(c) applies only to transactions involving an advance of money, and to the refinancing, assignment, or assumption of loans as specified in ch. 130, §22(1). Accordingly, it appears that a real estate contract is not a "loan", as this term is used in §16(c), and the prohibitions of §16(c) do not apply to real estate contracts.

Under this interpretation, the prohibitions of §16(c) will apply primarily to loans involving a financial institution. A financial institution is generally more capable than an individual of handling the uncertainty which may be caused by a sale to a third party. Additionally, a financial institution will, in most instances, hold a security interest in the real estate involved in the transaction. In contrast, an individual who sells

through a real estate contract is not prohibited by §16(c) from enforcing one of the clauses specified therein.

This opinion is limited to a consideration of the scope of §16(c). No inference is intended regarding whether the clauses specified in §16(c), if contained in a real estate contract, will withstand attacks based on other legal theories.

February 22, 1980

TAXATION: Unapportioned Net Income Tax upon Multistate Farm Corporations. U.S. CONST. art. I, §8, cl. 3 and amend XIV; Iowa Const. art. I, §9; §422.33(1), The Code 1979. Section 422.33(1), as applied to a farm corporation whose property is located entirely within Iowa and which carries on its business partly within and partly without Iowa, would produce an inherently arbitrary result and would attribute to Iowa income out of all appropriate proportion to business transacted in Iowa by subjecting such corporation to an unapportioned net income tax on its entire net income, in violation of the applicable constitutional due process and commerce clauses. (Miller and Griger to Hinkhouse and Schnekloth, State Representatives, 2-22-80) #80-2-7

Herbert C. Hinkhouse, Hugo Schnekloth, State Representatives: This will acknowledge receipt of your recent letter in which you requested an opinion of the Attorney General as follows: "We request an Attorney General opinion on the constitutionality of 422.33, subsection 1 of the Iowa Code, pertaining to agricultural corporations paying income tax on products sold out of the state of Iowa."

The relevant provisions of §422.33(1), The Code 1979, imposing the Iowa income tax upon the net incomes of Iowa and foreign corporations, state:

1. If the trade or business of the corporation is carried on entirely within the state, *or if the trade or business consists of the operation of a farm and the property is located entirely within the state,* the tax shall be imposed on the entire net income, but if such trade or business is carried on partly within and partly without the state, *or if the trade or business consists of the operation of a farm and the property is located partly within and partly without the state,* the tax shall be imposed only on the portion of the net income reasonably attributable to the trade or business within the state, said net income attributable to the state to be determined as follows:

* * *

Where income is derived from the manufacture or sale of tangible personal property, the part thereof attributable to business within the state shall be in that proportion which the gross sales made within the state bear to the total gross sales.

The gross sales of the corporation within the state shall be taken to be the gross sales from goods delivered or shipped to a purchaser within the state regardless of the f.o.b. point or other conditions of the sale, excluding deliveries for transportation out of the state. (emphasis supplied).

An examination of §422.33(1), as above quoted, clearly discloses that non-farm corporations carrying on their entire business activities in Iowa are required to pay Iowa income tax upon their entire net incomes, but those non-farm corporations carrying on their businesses of sale of tangible personal property partly within and partly without Iowa are required to attribute to Iowa a portion of their entire net income from

such sales by use of the Iowa single sales factor formula.[1] The constitutionality of the Iowa income tax apportionment scheme contained in the Iowa single sales factor formula has been upheld by the Iowa and United States Supreme Courts. *Moorman Mfg. Co. v. Bair*, 254 N.W.2d 737 (Iowa 1977), aff'd 437 U.S. 267, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978).[2]

Section 422.33(1), as applicable to farm corporations, requires such corporations to attribute to Iowa their entire net incomes as long as the property of such corporations "is located entirely within" Iowa. In the event that the property of farm corporations is located partly within and partly without Iowa, the farm corporations will attribute their net incomes from the sale of farm products by the same apportionment scheme utilized by non-farm corporations carrying on business partly within and partly without Iowa.

In the situation you pose, the farm corporations are presumably operating their farm entirely within Iowa and their properties are located entirely within Iowa. However, these corporations are making sales of their products outside of Iowa. For example, such corporations could be selling their products in Illinois through employee salespersons who are located there and who have authority to enter into sales agreements. Notwithstanding that such corporations may be engaged, therefore, in business activities outside of the State of Iowa in selling their farm products, as long as their properties are located wholly within Iowa, §422.33(1) requires them to pay Iowa income tax upon their entire net incomes. Under such circumstances, the imposition of an unapportioned net income tax upon the entire net incomes of such multistate unitary farm corporations would be in violation of due process as required by the United States Constitution (U.S. CONST. amend XIV) and the Iowa Constitution (Iowa Const. art. 1, §9) and in violation of the commerce clause (U.S. CONST. art. I, §8, cl. 3) of the United States Constitution. A separate analysis of the two due process clauses in the United States and Iowa Constitutions is unnecessary "under the general principle that similar constitutional guarantees are usually deemed to be identical in scope, import and purpose." *Moorman*, 254 N.W.2d at 745.

In *Moorman*, the United States Supreme Court set forth the following limitations which due process places upon a state's ability to tax net income derived from interstate business in 437 U.S. at 272-3:

> The Due Process Clause places two restrictions on a state's power to tax income generated by the activities of an interstate business. First, no tax may be imposed unless there is some minimal connection between those activities and the taxing state. National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 756, 18 L.Ed.2d 505, 87 S.Ct. 1389. This requirement was plainly satisfied here. Second, the income attributed to the state for tax purposes must be rationally related to 'values connected with the taxing state.' Norfolk & Western R. Co. v. State Tax Comm'n, 390 U.S. 317, 325, 19 L.Ed. 1201, 88 S.Ct. 995.

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[1] Provision is made in §422.33(2), The Code 1979, for granting of an alternative method for division of a corporation's income earned from business or sources within and without Iowa. There is no need for this statute to be discussed in this opinion.

[2] The provisions in §422.33(1) pertaining to farm corporations were adopted in 1977 Session, 67th G.A., Ch. 122, §1 (1977) and were not considered by the Courts in *Moorman*.

The second restriction quoted above is also a requirement under the commerce clause. In *Norfolk & Western R. Co. v. State Tax Comm'n*, 390 U.S. 317, 88 S.Ct. 995, 19 L.Ed.2d 1201 (1968), the Supreme Court stated in 390 U.S. at 325 (footnote 5):

We have said: 'The problem under the commerce clause is to determine what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions. Nashville, C. & St. L. R. Co. v. Browning, 310 U.S. 362, 365 [84 L.Ed. 1254, 1256, 60 S.Ct. 968]. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state. See Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 [85 L.Ed. 267, 270, 61 S.Ct. 246, 130 A.L.R. 1229]. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state.' Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 174, 93 L.Ed. 585, 589, 69 S.Ct. 432 (1940). Neither appellants nor appellees contend that these two analyses bear different implications insofar as our present case is concerned.

Considerations underlying the use of formulary apportionment of net income of an interstate business were succinctly stated by the Iowa Supreme Court in *Moorman* in 254 N.W.2d at 744:

When a corporation's trade or business is carried on partly within and partly without the state its tax base generally cannot satisfactorily be identified or segregated on a geographical basis. Due to the impracticability of so identifying or segregating the tax base of such a unitary business resort is made to apportionment formulae as a rough means of attributing a reasonable share of the tax base to the taxing state. These considerations are especially pertinent to the taxation of net income. . . .

While a state is given wide leeway in its choice of an attribution of income scheme to corporate business activities connected with the taxing state, such a scheme will not be upheld if it is inherently arbitrary or attributes to the taxing state income out of all appropriate proportion to business transacted in such state. *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165 (1920); *Moorman*, 437 U.S. at 274. If a farm corporation carries on its business partly within and partly without Iowa and all of its property is located entirely in Iowa, §422.33(1) would attribute to Iowa the entire net income of such corporation.[3] However, in such a situation, it cannot be maintained that all of the income producing activities of the farm corporation occurred wholly in Iowa. The principles established by the cases cited herein clearly require that a state income tax scheme make an honest effort to apportion the unitary multistate net income of farm corporations engaged in business partly within and partly without the taxing state of Iowa. As applied to such corporations, an unapportioned net income tax will not withstand scrutiny under the due process and commerce clauses.

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[3] If farm and non-farm corporations conducted all of their business operations in Iowa and shipped their goods outside of Iowa, the mere shipment of such goods to non-Iowa destinations would not render these corporations' businesses to be partly within and partly without Iowa so as to require apportionment of income by the Iowa sales formula. Under such circumstances, the corporations' entire net incomes would be derived from business carried on exclusively in Iowa. *Georgia v. Coca-Cola Bottling Co.*, 214 Ga. 316, 104 S.E.2d 574 (1958). Therefore, this opinion assumes that the farm corporation would be engaged in business activities outside of Iowa as well as within Iowa.

Therefore, §422.33(1), as applied to a farm corporation whose property is located entirely within Iowa and which carries on its business partly within and partly without Iowa, would produce an inherently arbitrary result and would attribute to Iowa income out of all appropriate proportion to business transacted in Iowa by subjecting such corporation to an unapportioned net income tax on its entire net income, in violation of the applicable constitutional due process and commerce clauses.

February 25, 1980

CITIES AND TOWNS, HOME RULE, ZONING: Historic Zoning Ordinances. Art. III, §38A, Iowa Constitution; §§303.20-33, §364.1, §§364.2 (2) and .2(3), §364.3(3), §§414.1-3, and §414.21, The Code 1979. The zoning power granted to municipalities by Chs. 364 and 414 includes the power to zone for historic purposes. Such zoning ordinances would not be in conflict with local historic districts created under §§303.20-33. (Hamilton to Adrian Anderson, Director, Division of Historic Preservation, 2-25-80) #80-2-8

Mr. Adrian D. Anderson, Director, Division of Historic Preservation, Iowa State Historical Department: This letter is in response to your request that our office conduct a formal review of an earlier Attorney General's opinion dated November 19, 1976. That opinion, 1976 Op. Att'y. Gen. 844, held that:

1. Sections 303.20-.33 of the Code 1979, establishing historical district authority, preempt similar action by a municipality.

2. That a municipality may not use Chapter 414 zoning power to control the use of historic buildings.

3. That aesthetic purposes alone cannot be the reason for a zoning ordinance.

After a formal review of that opinion, the Attorney General concludes that the prior opinion should be withdrawn. What we now view as the correct analysis of the questions presented in the 1976 opinion request are set forth below.

The basic concern in this controversy is the power of the government, state or local, to control the use and alteration of historically significant areas. The felt need to preserve those buildings and districts that have a special historical significance is increasingly perceived to be substantial as society attempts to preserve the record of its cultural development. The Iowa legislature in 1976 undertook to address this felt need, at least in part, by the passage of H.F. 1498, now codified at §§303.20-.32, The Code 1979.

This legislation provides a mechanism for the establishment of historical preservation districts whereby ten percent of the eligible voters in an area of historical significance could petition the division of the Iowa State Historical Department. To create a district, a hearing and election are required, which, if successful, result in the formation of a commission which administers various controls over building activity within the district. However, apparently because of problems with the petition and referendum process and the lack of an existing coterminous taxing authority to fund the districts, the statute has never been used by an Iowa city. Legislative attempts to resolve this deadlock have not been completed to date.

The 1976 opinion request from Senator Glenn posed the following question:

Is a city permitted by the Home Rule Amendment to the Iowa Constitution and Section 364.1 to adopt as part of its zoning ordinance provisions providing for and regarding Historical Preservation Districts, landmark sites and landmarks; or has the General Assembly, by enactment of H.F. 1498 (now §302.20-.33) preempted the area and thereby precluded the city in so doing?

This question essentially poses two interrelated issues:

1. Does the existence of the Historical District Act preempt municipalities from creating similar districts under local ordinances based on the Home Rule Amendment and §364.1?

2. Regardless of the resolution of the home rule question, do cities have the inherent power to zone to create historic districts under Chapters 414 and 364.

The answers to these questions are:

1. The existence of Ch. 303.20-.33 may not preempt cities from passing local ordinances of a similar nature under Ch. 364 home rule powers because the two acts are not necessarily irreconcilable. Section 303.20-.33 does not show a clear intention to preempt the field.

2. However, even if the answer to the first question were yes, that cities are preempted under Ch. 364, the zoning power of Ch. 414 includes the power to zone to preserve historic districts. The zoning power, delegated to the cities by the Home Rule amendment, and as limited by Ch. 414 is not removed merely by the enactment of §302.20-.33.

The reasons for these answers are basically straightforward. First, the Municipal Home Rule Amendment is found at Art. III, §38A of the Iowa Constitution and Ch. 364. The far-reaching significance of the concept of home rule as it applies to local government, both city and county, was given extensive treatment in a recent opinion of our office, dated April 6, 1979, Hagen to Danker *et al.* concerning county home rule. Because the effect of the county home rule and municipal home rule provisions are roughly equivalent, the teachings of that opinion are applicable to the present situation.

Section 364.1 of the Code sets out the scope of city home rule power that:

A city may . . . exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or its residents and to preserve and improve the peace, safety, health, welfare, comfort and convenience of its residents.

These powers are subject to several limitations, the operative one in this situation being that a city may act only "if not inconsistent with the laws of the general assembly." §364.1. Section 364.2(3) states that "[A]n exercise of city power is not inconsistent with a state law unless it is irreconcilable with the state law". *See Green v. City of Cascade*, 23 N.W. 2d 882, 890, (Iowa 1975). This provision is thus seen as essentially incorporating the equivalent of the doctrine of preemption.

The 1979 county home rule opinion discussed the concept of preemption as it relates to county home rule powers. In that opinion, we said that preemption "is to say that in any given area the state, by broad and comprehensive legislation has intended to exclusively regulate the subject matter." Thus, unless existing legislation is so complete or pervasive as

to demonstrate the state's total dominance of a subject area, a city or county may still act.

The home rule preemption question then is whether the existence of a state procedure for establishing Historic Districts, §§302.20-.33, prevents the enactment of local ordinances for the establishment of historic districts.

Insofar as a city would consider adopting the historic district by referendum approach vis-a-vis historic preservation by zoning then Ch. 303 would have some preemptory effect. The extent of the effect cannot be set forth in the abstract but would depend on the nature of the local ordinance. But, this does not complete the inquiry as to local authority to forward historic preservation.

This is true because in our view Ch. 364 and Ch. 414 empower the cities to enact zoning ordinances designed to preserve and protect historically significant areas. The exercise of the zoning power by a city would not conflict with the existence of a historical district created under Ch. 303. If a local historic district has been created and a city also wished to zone for historic purposes, any conflict in the standards created by the two forms of regulations would be resolved by §414.21. This section essentially provides that whenever "any other statute or local ordinance or regulation" requires standards higher than those set by Ch. 414, that the higher standards apply and vice versa. Therefore §414.21 would prevent historic district regulations under §303.20-.33, and historic zoning regulations under Ch. 414 from ever being "inconsistent" or "irreconcilable". *See* also §364.3(3).

Historic district laws and historic zoning regulations have basically different purposes. The former are a mechanism whereby individuals can attempt to place controls on themselves concerning the facades of the buildings, while the latter are powers granted to governmental units to exercise the police power in the public interest to control the use of property. Although both may use districts to enforce the controls they are basically different approaches. Given this difference it is functionally appropriate that both forms of control be available to a city wanting to preserve its historic areas. This difference in purpose is one reason why the existence of §§303.20-.33 does not preempt Chs. 414 and 364.

The broad scope of power given the cities by Ch. 364 and municipal home rule, if in no way limited, would in effect give the cities full power to conduct their affairs. Section 364.2(2) provides that "[T]he 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." Obviously zoning and the preservation of historically significant areas would be contained in the full set of general powers conveyed by Ch. 364. But as was noted earlier, muncipal home rule powers are limited by, *inter alia*, the "inconsistent with the laws of the general assembly" provision. Because the legislature retained Ch. 414 when it revised the chapters dealing with the powers of cities the zoning power of cities is limited in that it cannot be inconsistent with Ch. 414. *See* Vestal, *Law Land Use and Zoning Law*, §2.07(c) (1979).

Therefore, if cities had unlimited home rule, they would clearly be able to zone for historic reasons, but since the home rule zoning power is limited by Ch. 414, we can only say cities do not have such power if zoning for historic purposes is inconsistent with the provisions of Ch. 414. To answer this question we must turn to an analysis of Ch. 414 to see if it would bar historic zoning.

Once the starting point for consideration of any zoning law in this state was the rule that since zoning is an exercise of the police power delegated to the municipality by the state, such power must be narrowly construed. *Kordick Plumbing and Heating Co. v. Sarcone*, 190 N.W.2d 115 (1971), *Anderson v. City of Cedar Rapids*, 168 N.W.2d 739 (1970). This rule, which is in a reality a restatement of the Dillon Rule, has been repeated as dicta in Iowa zoning cases as recently as 1977, *see Peterson v. City of Decorah*, 259 N.W.2d 553, 554 (1977 Iowa Ct. of App.). But, since the Dillon Rule was expressly overruled by the Municipal Home Rule Amendment, Art. III, §38A, we believe Iowa courts would not actually apply the analysis if now confronted squarely with the question. Instead, the analysis must simply be whether the exercise of the zoning power is inconsistent with the language of Ch. 414. Because the operative language of §414.1, which states the purposes for which a city may zone is clearly identical to the operative language of §364.1, which sets out the scope of the power of cities, Ch. 414 places little if any restriction on the zoning power of Ch. 364.[1]

For the purposes of this opinion, however, we have closely analyzed the language of Ch. 414 to demonstrate that cities clearly have power to zone for historic purposes and that nothing in Ch. 414 bars this exercise of police power.

Section 414.1 provides:

> . . . any city is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, . . . the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

For any of the regulatory modes set forth in §414.1, §414.2 provides that the local legislative body may divide the city into districts and within such districts may uniformly "regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land".

The purposes for the regulations that may be established under §414.2 are set forth in §414.3. These purposes include, "to promote health and the general welfare;" and may include a reasonable consideration "as to the character of the area of the district and the peculiar suitability of such area for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city."

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[1] This opinion is limited to an analysis of the potential inconsistency of the grants of power under §364.1 and §414.1. This opinion should not be understood as suggesting that a city is unrestricted in using zoning authority for historic purposes. To the extent that Ch. 414 imposes substantive and procedural limitations on the exercise of the general zoning power, those limitations are applicable to zoning for historic purposes.

When these three sections are considered together, it becomes clear that a municipality has the power to establish historic zoning districts based upon the historic significance of the land, structures and buildings contained in those districts. To fit such action into the specific code language, the creation of the historic district would be "for the purpose of promoting . . . the general welfare of the community" based on a restriction of the use of the buildings, structures, and land. §414.1. Based on the historic purpose of the district, the city could "regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of the buildings, structures or land" in a uniform manner. §414.2. This regulation would be to promote "the general welfare" and would be based on a reasonable consideration "as to the character of the area of the district and the peculiar suitability of such area for particular uses, and with a view towards conserving the value of the buildings. §414.3.

This exercise in fitting the normal justification of creating a historic zoning district into the specific language of Ch. 414 evidences the statutory authority for such action. Moreover, precedent from other jurisdictions clearly establishes that municipalities may zone for historic purposes.

At this point in the development of American jurisprudence, it would be difficult to hold that preserving historically significant values is not within the contemplated shelter of the police power. The basic justification for such an interpretation comes from a liberal reading of the "general welfare" clause found in the enabling statutes of most zoning laws. A recent United States Supreme Court case, *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), which upheld New York City's Landmark Preservation Law, is an important precedent due to the strong support that it provides for interpreting such regulations as within the public interest and not as a taking of private property. In *Penn Central*, the Court said:

> This Court has recognized, in a number of settings, that states and cities may enact land use restrictions or controls, to enhance the quality of life by preserving the character and desirable aesthetic features of a city. 98 S.Ct. at 2662, citing *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed. 511 (1976).

Prior to the *Penn Central* decision concerning a landmark ordinance, the federal courts had faced challenges on the closely related matter of the validity of historic zoning ordinances.[2] One important case in the development of preservation law is the Fifth Circuit's decision in *Maher v. City of New Orleans*, 516 F.2d 1051, *cert. denied*, 426 U.S. 905, 96 S.Ct. 225, 48 L.Ed.2d 830 (1976). In that case, the Court upheld the constitutionality of the New Orleans municipal zoning ordinance regulating the preservation and maintenance of a historic district, the French Quarter.[3]

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[2] The main difference is that landmark laws are applicable to single pieces of property and may result in diminution in value while historic preservation laws apply to larger areas and are generally seen as enhancing the value of properties within the district.

[3] *See* "Requiring Preservation and Maintenance of Historical District Is Within Zoning Power," 28 Mercer L.R. 591 (1977).

In *Maher*, the Court noted that "proper state purposes may encompass not only the goal of abating undesirable conditions but of fostering ends the community deems worthy." 516 F.2d at 1060.

In addition to the strong support given historic preservation laws by the federal courts, the Congress has acknowledged our debt to the past in the National Historic Preservation Act of 1966:

The Congress finds and declares

(a) that the spirit and direction of the Nation are founded upon and reflected in its historic past;

(b) that the historical and cultural foundation of the Nation should be preserved as a living part of our community life and development in order to give a sense of direction to the American people . . . 16 U.S.C. §470 (1974).

While the federal government has played a role in the development of historic preservation law, the majority of that development has transpired at the state level, for it is local authorities that must act to preserve individual areas. The state authorities supporting historic preservation laws comprise a long list. *See, e.g. South of Second Associates v. Georgetown*, 580 P.2d 807 (Colo. 1978); *Figarsky v. Historic District Commission of the City of Norwich*, 171 Conn. 198, 368 A.2d 163 (1976); *Rebman v. City of Springfield*, 111 Ill. App.2d 430, 250 N.E.2d 128 (1969); *M & N Enterprises, Inc. v. City of Springfield*, 111 Ill. App.2d 444, 250 N.E.2d 289 (1969); *Trustees of Sailors of Snug Harbor v. Platt*, 29 A.D.2d 378, 288 N.Y.S.2d 314 (1968); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964); *Opinion of the Justices to the Senate*, 333 Mass. 773, 128 N.E.2d 557 (1955); *Opinion of the Justices to the Senate*, 333 Mass. 783, 128 N.E.2d 653 (1955); *City of New Orleans v. Levy*, 223 La. 14, 64 S.2d 798 (1953).

In each of these cases state courts have upheld legislation designed to preserve historical areas as a legitimate exercise of the police power.

The Illinois Appellate Court in *Rebman*, *supra*, after being directed to many of the above cases, noted:

We see no useful purpose in discussing the details of these cases or distinguishing one from the other because of a muncipal ordinance under a constitutional provision authorizing city preservation of historical areas, or state statutes contemplating the same result. The common denominator to all of these cases and to this case . . . is the fact that preservation of historical areas under reasonable limitations as to use is within the concept of public welfare and may be affected by the exercise of the usual police power attendant upon zoning.

We find the *Rebman* case persuasive and conclude that the values promoted by historic zoning, be they economic, cultural, educational or aesthetic, more than justify its inclusion within the police power of the state delegated to the cities in Ch. 364 and 414. Thus, it is the opinion of the Attorney General that a city zoning ordinance designed to preserve historically significant areas would promote the "general welfare".

This conclusion prevails even when the state has not expressly granted authority to zone for historic purposes. The Supreme Court of New Mexico in *City of Santa Fe v. Gamble Skogomo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964), ruled that the state need not have given the city specific

authorization to zone for historic reasons. The Court noted that a city had no inherent right to exercise the police power, that power being derived solely from the state. The Court then examined the general grant of zoning power, which was similar to §§414.1-.3, to see if it authorized preservation of a historic area. The New Mexico Court determined that to be within the authorized purpose, the zoning ordinance must bear some reasonable relationship to the "general welfare". *City of Santa Fe*, 389 P.2d at 15. While noting the problems of defining a phrase which reflects the constant and ever changing conditions of the social and economic structure, the New Mexico Court cited *In the Opinion of the Justices to the Senate*, 333 Mass. 783, 128 N.E.2d 563, 566, an advisory opinion which upheld two early historic preservations acts. In that case the Massachusetts Supreme Court said, "We are of the opinion that in a general sense the proposed act would be an act for the promotion of the public welfare." The New Mexico Court concluded that "[S]ince the legislature can preserve such historical areas by direct legislation as a measure for the general welfare, it follows that municipal ordinances protecting such areas are authorized under enabling legislation granting power to zone for the public welfare." 389 P.2d at 17.

The logic in *City of Santa Fe* is persuasive and applicable to the situation at hand. Based on the strong public purpose served by the use of the zoning power to preserve historically significant areas, the service to the "general welfare," and the broad mandate of municipal home rule we conclude that the Iowa Courts would uphold the use of Ch. 364 and 414 to enact historical zoning laws and would hold that it is not necessary for the state to enact specific enabling language for the cities to enact such regulations.

February 26, 1980

MUNICIPALITIES; HOME RULE; PLATS: Art. III, §38A, Constitution of Iowa, §§364.2, 364.3, and Chapter 409, Code of Iowa 1979. A municipal ordinance requiring platting of land within its jurisdiction upon being subdivided into two or more parts is not thereby constitutionally inconsistent with statute requiring such platting upon division into three or more parts. (Peterson to Welsh, State Representative, 2-26-80) #80-2-9 (L)

February 27, 1980

ELECTIONS; MUNICIPALITIES. Chapter 376; 376.4, 376.6(1), 376.8(2), 376.9, 376.11, The Code 1979. A city which by ordinance chooses the runoff method of elections is required to hold a runoff election only for those positions unable to be filled in the regular election because a sufficient number of candidates failed to receive a majority vote. Regardless of the number of candidates nominated by petition or write-in vote vying for a position to be filled, it is the failure of any one candidate to receive a majority of votes cast which determines whether a runoff election is held. (Hyde to Synhorst, Secretary of State, 2-27-80) #80-2-10

Honorable Melvin D. Synhorst, Secretary of State: We have received your request for an opinion from this office concerning the significance of write-in votes in a city runoff election under ch. 376, The Code 1979. Specifically, you have inquired:

There has been a great deal of uncertainty at every city election when the runoff method has been chosen by the council [pursuant to §376.9,

The Code 1979] and when petitions have *not* been filed for more than twice the number of positions to be filled, but write in votes have been cast at the regular city election for enough additional persons to increase the number of persons being voted upon at the regular city election to more than twice the number of positions to be filled. When this happens, must the runoff formula . . . be used?

Chapter 376, The Code 1979, which regulates city elections, provides for a primary to be held for offices for which the number of individuals for whom valid nominating petitions are filed is more than twice the number of positions to be filled, *except*, "[t]he council may by ordinance choose to have a runoff election, as provided in section 376.9 in lieu of a primary election." Section 376.6(1), The Code 1979. A primary election narrows the field of candidates prior to the general election. When a city has by ordinance chosen the runoff method, the provisions contained in ch. 376 concerning conduct of a primary election have no application. Rather, the runoff election mechanism, as set forth in §376.9, The Code 1979, results in the general election serving as a "primary", narrowing the field of candidates.

A runoff election is not always required. Section 376.9, The Code 1979, provides in part:

A runoff election may be held only for positions unfilled because of failure of a sufficient number of candidates to receive a majority vote in the regular city election. . . . Candidates who do not receive a majority of the votes cast for an office, but who receive the highest number of votes cast for that office in the regular city election, to the extent of twice the number of unfilled positions, are candidates in the runoff election. . . . Candidates in the runoff election who receive the highest number of votes cast for each office on the ballot are elected to the extent necessary to fill the positions open.

An eligible elector may become a "candidate" for a city elective office in one of two ways: by filing a valid nomination petition with the city clerk prior to the election, pursuant to §376.4, The Code 1979, or by executing and filing an affidavit in substantially the form required by §45.3, The Code 1979, after being nominated by a write-in vote . . . in a regular city election in a city where the council has chosen a runoff election in lieu of a primary." Section 376.11, The Code 1979.[1] In a mayoral contest held in a city which has selected the runoff method, the "candidate" receiving the highest number of votes, which total a majority of the votes cast, would be declared the winner. *See* §376.8, The Code 1979. It would be immaterial how that candidate's name was placed on the ballot, *i.e.*, by nomination or by write-in vote, or how many candidates received votes in the election. As long as one nominated or write-in candidate received the highest vote total, and that total was greater than half of the votes cast, the position would be filled, and no runoff election would be authorized. *See* 1976 Op. Atty. Gen. 322, 323.

[1] If a person nominated by write-in vote fails to file the required affidavit by 5:00 p.m. of the day after the canvass of the election, he or she is not a "candidate" and those write-in votes cast are disregarded in determining whether a runoff election is required. Section 376.11, The Code 1979.

If no one candidate in that mayoral race receives a majority of the votes cast for the office, however, a runoff election may be held. Again, it would be immaterial how any candidate's name was placed on the ballot, or how many candidates received votes. It is the failure of any one candidate to receive a majority of votes cast for a position that triggers a runoff election for that position. Section 376.8(2), The Code 1979. The runoff election would be held only for those positions where a sufficient number of candidates failed to receive a majority vote. Section 376.9, The Code 1979. Thus, in a mayoral contest where no one candidate received a majority of votes cast, the two candidates, nominated by petition or write-in vote, who received the highest number of votes in the regular election, are selected as the candidates in the runoff election. Section 376.9, The Code 1979. The candidate who received the highest number of votes in the runoff election is elected, whether or not the total is a majority of votes cast. Section 376.9, The Code 1979.

In the example you set forth in your request, five persons file valid nominating petitions to run for five at-large positions on a city council in a city which has chosen the runoff election method. At the regular city election, write-in votes were cast for six additional persons, although some received as few as 1 or 2 votes each. Only five positions can be filled, and the five candidates who receive the highest number of votes, each total a majority as set forth in §376.8(2), The Code 1979, are elected. If fewer than five persons nominated by petition or by write-in vote, receive a majority, then a runoff election would be held to fill only the positions unfilled. For example, if the three candidates receiving the highest individual total votes also each receive a majority of votes cast, they are elected. The remaining two positions must be filled through the runoff election method. The four candidates nominated by petition or by write-in vote receiving the next highest total of votes (each total less, however, than a majority of votes cast) would be the candidates in the runoff election. *See* 1976 Op. Atty. Gen. 322. Those two candidates receiving the highest number of votes in the runoff election would be declared elected.[2]

In conclusion, a city which by ordinance chooses the runoff method of elections pursuant to §376.9, The Code 1979, is required to hold runoff elections only for those positions unable to be filled in the regular election because a sufficient number of candidates failed to receive a majority vote in the election. Regardless of the number of candidates nominated by petition or write-in vote vying for a position to be filled, it is the failure of any one candidate to receive a majority of votes cast which determines the necessity for a runoff election for that position.

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[2] *See* 1976 Op. Atty. Gen. 320, 322, interpreting §49.3(4) and §376.9, The Code 1979, to require provision for write-in votes on the ballot in a runoff election.

February 27, 1980

FINANCIAL INSTITUTIONS: Savings and Loan Association; Conflict of interest of officer, director or employee. §534.8(1), The Code 1979. The restriction on interested transactions by an officer, director or employee of a savings and loan association does not prohibit the collection or receipt of fees, commissions or profit from the sale of property, goods or services, merely because the purchase price was borrowed from or guaranteed by the savings and loan association; §534.8(1), The Code 1979, requires a causal connection between any specific action sought to be taken and the pecuniary benefit received. (Hyde to Pringle, Savings and Loan Supervisor, State Auditor's Office, 2-27-80) #80-2-11(L)

February 27, 1980

COUNTIES; REAL PROPERTY — Subdivision Platting. §§409.1, 409.9, 409.12, 409.14, 409.16, 441.65, 306.21, 335.2, 592.3, The Code 1979. A proprietor of a rural tract of land of 40 acres or less need not file a plat under Chapter 409 until such time as the proprietor subdivides the tract into three or more parts. The county recorder can accept a deed for a subdivided tract even if the proprietor has failed to file a plat as required by Chapter 409, but the recorder should not accept a subdivision plat unless it meets all the requirements of Chapter 409. If a rural subdivider fails to record a plat as required by Chapter 409, the auditor may order a plat made under §441.65. (Ovrom to Neighbor, Jasper County Attorney, 2-27-80) #80-2-12

Mr. Charles C. Neighbor, Jasper County Attorney: You have asked our opinion concerning the subdivision platting requirements of Chapter 409, The Code 1979, as they relate to rural subdividers. Specifically, you inquire about the situation where a rural landowner subdivides into three or more parts without complying with the platting requirements of chapter 409. You asked the following questions:

1. Does the phrase "who shall subdivide into three or more parts" in §409.1 relate only to the preceding category of landowners (those within a city or within two miles of a city subject to the provisions of §409.14), or does it relate to all categories of landowners listed in the statute?

2. If the proprietor of a rural tract of 40 acres or less subdivides into three or more parts without complying with the platting requirements of chapter 409, can the county recorder legally accept a deed to one of the subdivided parts?

3. If the proprietor of a rural tract of 40 acres or less subdivides into three or more parts and makes a surveyor's plat in accordance with chapter 409, must the plat be accompanied by the other documents required in chapter 409 before the county recorder can legally accept the plat?

4. What is the legal effect of deeds and plats which have been recorded and filed in violation of chapter 409?

Section 409.1 establishes three categories of proprietors of land: (1) proprietors of any tract or parcel of land of 40 acres or less; (2) proprietors of more than 40 acres if divided into parcels any of which is less than 40 acres; and (3) proprietors 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 §409.14 (those over 25,000 population, or smaller cities which adopt chapter 409 by ordinance). When a landowner in any of the three categories subdivides into three or more parts, the landowner is required to record a plat and certain accompanying documents with the county recorder, and to file a copy of the plat only with the county

auditor and with the county assessor. Section 409.12, The Code 1979 (duty to record); §409.9, The Code 1979 (sets forth documents which must accompany a subdivision plat). Prior to 1976 these subdivision platting requirements applied only to city and suburban lots. Chapter 409 was amended in 1976 to require recording plats of subdivisions of tracts of 40 acres or less or of more than 40 acres if divided into parcels any of which is less than 40 acres. 1976 Session, 66th G.A., Chapter 1190, §1. Unfortunately, many of the sanctions and remedies for failure to comply with the chapter still apply only to city subdivisions, so the chapter leaves several questions unanswered with respect to rural subdivisions.

Your first question asks if the phrase "who shall subdivide into three or more parts" in section 409.1 applies only to subdivisions of land under §409.14 (cities over 25,000 population or smaller cities which adopt chapter 409 by ordinance), or to all subdivisions within a county. Section 409.1 states:

Subdivisions or additions. 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 . . . (emphasis added).

It is our opinion that the phrase "who shall subdivide into three or more parts" applies to all three categories of landowners listed in the statute. The subsequent phrase indicates that this is the correct interpretation. It requires a plat for "such subdivisions," which clearly relates back to the language regarding subdivision into three or more parts. Under §409.1 a single 40-acre tract is not a subdivision until it is divided into three or more parts, and it is at the time of such division that a plat is required.

Your remaining questions deal with the first two categories of landowners -owners of tracts of 40 acres or less and owners of more than 40 acres if divided into parcels, any of which is less than 40 acres- when that land is not subject to platting and zoning controls of cities and towns. Hereinafter such proprietors will be referred to as "rural landowners" or "rural subdividers". Chapter 409 has special requirements for urban subdividers which do not concern us here. *See* §409.4, The Code 1979 (requires plats in cities to be divided into blocks); and §409.7, The Code 1979 (requires plats in cities to be certified by the town council).

The second question asks if a county recorder can legally accept a deed to one of the subdivided parts from a rural tract of 40 acres or less if the original landowner has not filed a plat of the area as required by §409.12. It is our opinion that the recorder can accept such a deed without violating chapter 409.

The plat-recording mandates established in chapter 409 are directed to the proprietor of the subdivided land, not to the recorder. Section 409.1, *supra,* states that "Every proprietor" of subdivided land shall cause a plat to be made. Section 409.12 states:

Record-filing. The signed and acknowledged plat (and accompanying documents) . . . 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 . . .

These sections place the duty to record and file a plat and accompanying documents on the rural subdivider. They do not impose a duty on the county recorder to see that such plats are filed.

Section 335.2, The Code 1979, sets forth the general duties of the county recorder. That section states that "The county recorder shall keep his office at the county seat, and shall record, and as speedily as possible, all instruments in writing which may be delivered to him for record, in the manner directed by law . . ." The Supreme Court, interpreting the predecessor to §335.2, stated that the county recorder is a ministerial officer who cannot arbitrarily refuse to record an instrument which is in proper form and eligible to record under the recording acts. *Wayrauch v. Johnson*, 201 Iowa 1197, 1201, 208 N.W.2d 706 (1926) (Court ordered a county recorder to record a chattel mortgage which was in proper form but which the county recorder thought was an improper chattel mortgage.) Thus, it appears that if a deed is in proper form, the county recorder should accept and record it even if the conveying rural landowner has not filed a surveyor's plat. *Accord*, Op. Att'y Gen. #77-12-16.

Your third question asks whether a county recorder can legally accept the plat of a rural subdivision if the plat does not comply with the other provisions of chapter 409. It is our opinion that under chapter 409, a county recorder cannot accept a subdivision plat unless it is accompanied by the documents required by that chapter.

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 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, . . ., and from the recorder of the county that it is free from encumbrance. . . .

The language of the section is clear: *every plat* is to be accompanied by an abstract, an attorney's opinion, and certificates from the treasurer, clerk and recorder. It is the county recorder's duty to record all instruments delivered to him or her in the manner directed by law. Section 335.2, The Code 1979, *supra*. The law requires that every plat be accompanied by the documents set forth above. If the documents are not present, the instrument is not in the form directed by law and should not be accepted by the recorder. However, Chapter 409 provides no sanction against a county recorder who accepts a subdivision plat which is unaccompanied by the necessary documents.

It should be noted that all rural subdivision plats must be approved by the county board of supervisors and the county engineer before the subdivision is laid out and platted. §306.21, The Code 1979. County recorders who accept *city* subdivision plats which are not approved by the city council commit a simple misdemeanor. §409.14, The Code 1979. However, since Chapter 409 contains no similar provision concerning recording unapproved rural subdivision plats, it is our opinion that the legislature did not intend to make acceptance of an unapproved rural plat

a misdemeanor. First of all, in determining legislative intent one must go by what the legislature said, rather than what it might have said. *In the Interest of Clay*, 246 N.W.2d 263, 265 (Iowa 1976). Also, the expression of one thing in a statute implies the exclusion of others. *In re Wilson's Estate*, 202 N.W.2d 41, 44 (Iowa 1972); 2A Sutherland, *Statutory Construction*, §47.23-25 (1973). Furthermore, penal statutes are strictly construed, and will not be interpreted to include charges outside the fair scope of the language used. *State v. Davis*, 271 N.W.2d 693, 695 (Iowa 1978). The misdemeanor provision in §409.14 is directed only to recording unapproved city subdivision plats and not to recording rural plats. When the statute was amended in 1976 to require recording of plats of rural subdivisions the legislature did not amend the misdemeanor provision to include unapproved rural plats. This evidences a legislative intent not to make recording an unapproved rural subdivision plat a misdemeanor.

Your last question asks what the effect is if a rural subdivider has conveyed away pieces of land without recording the surveyor's plat, or has recorded only a surveyor's plat and not the accompanying documents which are required by §409.9. We will first examine the situation where the landowner has subdivided and has not filed a plat.

Section 409.45 provides that persons who sell land in cities or towns without filing a plat as required in chapter 409 shall forfeit $50.00 for each lot sold. There is no similar sanction for rural landowners who sell land without a plat.[1] So the legislature, by including city subdividers and excluding rural ones in §409.45, apparently intended not to subject rural landowners to the $50.00 penalty if they subdivide without filing a plat.

However, the county auditor may order the landowners to file a plat when a person has subdivided land without filing a plat as required by chapter 409, and if the landowners fail to do so the auditor may order a plat to be made in accordance with the provisions of chapter 409. §441.65, The Code 1979. Section 441.65 states:

> [W]henever the 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 the owners and demand compliance. If the owners fail to execute and file the plat within 60 days after issuance of such notice to execute and file said plat for record, the auditor shall cause a plat to be made as the auditor deems appropriate in accordance with the provisions of chapter 409 . . . .

The auditor then certifies that the plat has been executed by the auditor because the owners have failed to do so, and files it in the offices of the assessor, recorder and auditor. Section 441.66, The Code 1979. Such plats are for assessment and taxation purposes only. Section 441.71, The Code 1979.

We will next examine the legal effect of plats which have been recorded without the abstract, attorney opinion and certificates of the treasurer, clerk and recorder. As stated above, the recorder should not

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[1] A consumer protection statute prohibits proprietors from advertising or offering subdivision lots for sale which do not conform to the subdivision plats filed under §306.21 and chapter 409. §714.16(2)(d), The Code 1979.

accept a subdivision plat which is unaccompanied by these documents. However, your question assumes that an improper filing of a plat has been made and asks the legal effect of such a filing.

Initially, it is problematical whether the auditor can order an abstract, attorney's opinion and certificates from county officers to be made when he or she orders a plat under §441.65. Section 441.65 says that when the proprietor of a subdivision has failed to file for record a plat "as provided in chapter 409," the auditor may have one made "in accordance with the provisions of chapter 409." As stated above, chapter 409 requires that all plats be accompanied by the abstract, attorney's opinion and county officers' certificates. §409.9, The Code 1979. Construing §§441.65 and 409.9 together, one could interpret §441.65 as requiring the auditor to have a plat and all accompanying documents made.

However, in our opinion §441.65 contemplates only that the auditor can order a plat to be made, and does not authorize the auditor to obtain an abstract, attorney's opinion and certificates from the treasurer, clerk and recorder. The section mentions only the plat, and not the other documents. Section 441.67 authorizes the county board of supervisors to pay for the plat, survey and record, but does not authorize payment for an abstract and attorney's opinion. Finally, §441.71 states that an auditor's plat is for taxation and assessment purposes only. Taxation and assessment can be accomplished by reference to the subdivision lots as set forth in the plat without any reference to the abstract, attorney's opinion and county officers' certificates. Therefore we conclude that §441.65 authorizes the auditor to have a plat made and recorded when the proprietor or the owners of the subdivided parts have failed to do so, but does not authorize the auditor to order the other documents which would be required if the proprietor had complied with chapter 409. *Accord*, Op. Atty. Gen. #77-8-3.

Chapter 409 does provide in several cases that plats are invalid. *See* §§409.12 (plat which is not filed with county auditor and assessor is invalid) and 409.16 (city plat filed without city council approval is void). However, it does not provide that subdivision plats filed without the abstract, attorney's opinion or county officers' certificates are void or invalid, so the legislature apparently did not intend that such plats are void. However, we do think that since §409.9 requires every plat to be accompanied by certain documents, a plat which is filed without them is voidable. That is, if such a plat is challenged it could be voided for failure to comply with §409.9.

A subdivision plat in a city or town, which is unaccompanied by an abstract, attorney's opinion or county officers' certificates, was filed prior to 1950, and has been on record over 20 years, and has not been vacated, such plat is considered to be in proper form. §592.3, The Code 1979. We find no similar legalizing provisions for rural subdivision plats. So it is our opinion that the legislature did not intend that rural subdivision plats filed prior to 1950 be legalized as are city subdivision plats.

The Supreme Court has held that a conveyance made by reference to a recorded plat is not affected by the validity or invalidity of the plat. *Pearson v. City of Guttenberg*, 245 N.W.2d 519, 526 (Iowa 1976).

Chapter 409 does not state whether rural subdivision plats filed without an abstract, attorney's opinion and county officers' certificates are void, although in our opinion they are not. However, even if the plat were invalidated, deeds which describe property by reference to such a plat would not be affected.

As stated earlier, prior to 1976 the subdivision platting requirements of chapter 409 applied only to city and suburban lots. This opinion points out various provisions of chapter 409 which still apply only to city subdivision plats and not to rural ones. As presently written, chapter 409 requires rural subdividers to file plats, but provides no specific sanctions if they fail to do so. Nor does it set forth the recorder's duties with respect to improper rural subdivision plats which are offered for recording, or the legal effect of such plats when they have been recorded. Due to these deficiencies and others, chapter 409's subdivision platting requirements are often ignored. *Marshall's Iowa Title Opinions & Standards*, §14.1(J). Chapter 409 would be much improved if it were amended to fill the gaps which exist with regard to rural subdivision platting. Until that happens, the county might wish to exercise its power under the County Home Rule Amendment to clarify the county recorder's duties with respect to rural subdivision plats. A discussion of county home rule is beyond the scope of this opinion, but I am enclosing copies of Opinion No. 79-4-7 (dealing with county home rule) and No. 80-2-9 (dealing with municipal home rule and Chapter 409).

February 27, 1980

PHYSICIANS AND SURGEONS; STATE OFFICERS AND DEPARTMENTS: Advanced emergency medical technicians or paramedics. §§147A.1(1), 147A.1(4), 147A.1(5), 147A.5(1), 147A.8(1), 147A.8(2), The Code 1979. 1978 Session, 68th G.A., Ch. 1074. An advanced emergency medical technician or paramedic may administer parenteral medications inside a hospital under the direct supervision of a physician or other specifically designated individual. Other activities within the scope of advanced emergency medical care may be performed in a hospital emergency department but only until care is provided by a physician or authorized hospital personnel. (Haskins to Saf, Executive Director, State Board of Medical Examiners, 2-27-80 #80-2-13(L)

February 27, 1980

SCHOOLS: ACCUMULATION OF SICK LEAVE. §279.40, The Code 1979. A school district may impose a limitation on the accumulation of unused sick leave, but the limit may not be less than 90 days. School districts may contract to pay for unused sick leave, but this payment is not required by statute. (Norby to Anderson, State Representative, 2-27-80) #80-2-14 (L)

March 3, 1980

CONSTITUTIONAL LAW: JUVENILE JUSTICE: PROBATION OFFICERS. Iowa Const. Art. III, §1. Chapter 231, §§231.8, 231.10, Chapter 232, §§232.1, 232.2(24), 232.19(d), 232.28, 232.44(2), 232.45(4), 232.47, 232.48, 232.52, 232.54, the Code 1979. Juvenile probation officers are officers or employees of the District Court. The functions of juvenile probation officers cannot be neatly classified as either executive or judicial functions. Performance of the functions of juvenile probation officers by officers or employees of the district court does not violate the doctrine of separation of powers of article III, §1 of the Iowa Constitution. Appointment and supervision of juvenile probation officers by the Iowa judiciary is an administrative function. Supervision of juvenile probation officers by the Iowa judiciary does not violate

article III, §1 of the Iowa Constitution since this function is closely related to the statutory function of the juvenile court. (Redmond and Rush, State Senators, 3-3-80) #80-3-1

The Honorable James Redmond and Robert Rush, State Senators: In November, 1978, you requested advice concerning the constitutional validity of §231.8, The Code 1979, which gives the district courts appointive and certain supervisory power over juvenile probation officers. Your request asks the following questions.

1. Is the office of juvenile probation officer created by Sections 231.8 et seq. of the Iowa Code (1977) that of an employee or officer of the Iowa District Court?

2. Are the functions of the juvenile probation officers outlined in Section 231.10 of the Iowa Code executive or judicial in character?

3. If the juvenile probation officers are employees or officers of the Judicial Branch and their functions and duties found to be executive in nature, does the statutory scheme creating the position and outlining the duties constitute a violation of the separation of powers doctrine found in Article III, Section 1, of the Iowa Constitution by delegating executive functions to the Judicial Branch?

Turning from the functions of the juvenile probation officers to the duties of juvenile judges:

4. Does the supervisory relationship, including the power to appoint of the Iowa Judiciary over juvenile probation officers, all as set forth in Section 231.8 of the Iowa Code, constitute an administrative function?

5. If in fact the juvenile judge-juvenile probation officer relationship constitutes an administrative or non-judicial function, is it so unrelated to the proper judicial function as to constitute violation of Article III, Section 1 of the Iowa Constitution by extending the duties of a judge to include non-judicial, and in this case Executive Branch, responsibilities?

After analyzing the opinion request, it does appear that the juvenile probation officer is an officer or employee of the district court. However, it is impossible to neatly categorize the probation officers' responsibilities as executive or judicial. Taking into account the mandate of the court to protect the best interests of the child and the public, the probation officer's status as an officer or an employee of the district court does not violate article III, §1 of the Iowa Constitution.

With respect to the supervisory relationship of district judges and juvenile probation officers, it does appear that this is not a judicial function. However, this function does not violate separation of powers since the juvenile probation officer fulfills functions closely related to the duties of the district court judges.

I. THE JUVENILE PROBATION OFFICER IS AN OFFICER OR EMPLOYEE OF THE DISTRICT COURT.

Analysis of the statutory authority for juvenile probation officers clearly demonstrates that juvenile probation officers are officers or at least employees of the district court. Section 231.8, The Code 1979, provides:

Probation Officers—salaries. The judge designated as judge of the juvenile court in any county, or where there is more than one judge designated such judges acting jointly, may appoint such probation offi-

cers as may be necessary to carry out the work of the court. In counties where more than one officer is appointed one of such officers shall be designated as chief probation officer. The salaries of such officers shall be fixed by a probation officer committee of three judicial officers of the judicial district appointed by the chief judge of the district. One member of the committee shall be a district judge, district associate judge or magistrate regularly assigned to preside over the juvenile court within a county in that district.

Probation officers may be appointed to serve two or more counties. The salaries of such officers and their deputies, if any, shall be fixed by the probation officer committee of district court judges appointed by the chief judge or the judicial district and such salaries and the expenses of the probation offices shall be prorated among the counties served in such proportion as may be determined by the committee of district court judges appointed by the chief judge of the judicial district who shall in making such determination, consider the volume of work in the several counties.

All probation officers so appointed shall serve at the pleasure of the probation officer committee appointed by the chief judge of the judicial district and shall be selected and appointed in accordance with such rules, standards, and qualifications as shall be established by the supreme court pursuant to section 684.21. The provision of this section shall not affect in any way the appointment or term of office of any probation officer presently serving in any county or counties.

Such secretarial, clerical and other help as may be needed in the administration of any probation office may be appointed by the judge or judges of the juvenile court who may fix their salaries, subject to the approval of the board of supervisors.

The probation officer is appointed by the district judge designated as juvenile court judge. Salary is fixed by a committee of judicial officers apointed by the chief judge of the district court. The probation officer serves at the will of the same judicially appointed committee. Secretarial help is provided at the direction of the juvenile court judges. In view of these considerations, the juvenile probation officer is clearly responsible to the court.

Whether the probation officer is to be called an officer or employee of the court does not seem particularly important. Perhaps since the officer's title refers to them as officers, probation officers should be deemed to be officers. Still, regardless of title, the probation officer is clearly within the court's domain.

II. THE FUNCTIONS OF JUVENILE PROBATION OFFICERS CANNOT BE FIRMLY CATEGORIZED AS EXECUTIVE OR JUDICIAL.

In order to decide whether the functions of juvenile probation officers are executive or judicial in nature, it is necessary to define the role of juvenile probation officers. The duties of juvenile probation officers are discussed in §231.10, The Code 1979, and are also elaborated on in various portions of the Juvenile Justice Act, Ch. 232, The Code 1979. Section 231.10, The Code 1979, provides:

Powers and duties — office and supplies. Probation officers, in the discharge of their duties as such, shall possess the power of peace officers. They shall be furnished by the county with a proper office and all necessary blanks, books, and stationery. It shall be the duty of said probation officers to make such investigation as may be required by the court; to be present in court in order to represent the interests of the

child when the case is heard; to furnish to the court such information and assistance as the judge may require, and to take such charge of any child before and after trial as may be directed by the court.

Various portions of the Juvenile Justice Act provide that the probation officer can take children believed to have violated disposition orders into custody, §232.19(d), The Code 1979; perform the function of intake officer for the juvenile court, *see* §§232.2(24), 232.28, The Code 1979; request that a hearing be conducted in order to place a child in sheltered care, §232.44(2), The Code 1979; conduct waiver investigations for the court, *see* §232.45(4), The Code 1979; appear as a witness in adjudicatory hearings, *see* §232.47, The Code 1979; conduct predisposition investigations, *see* §232.48, The Code 1979; supervise children placed on probation, *see* §232.52, The Code 1979; and request termination of disposition orders, *see* §232.54, The Code 1979.

The question then is whether these roles are executive or judicial functions. In order to determine this, it is necessary to define executive and judicial functions. Taken at the most fundamental formulation, the legislative power is the power to enact laws. The judicial power is the power to interpret laws and adjudicate rights of persons under them. The executive power is the power to enforce laws. As noted in *State ex rel Hammond v. Lynch*, 169 Iowa 148, 151 N.W. 81 (1915):

> Each of the three departments of our government is equal and each should be responsible to the people whom it represents. The legislature enacts laws and is commanded by the Constitution to enact them in a certain way. The executive enforces the laws and by the Constitution it is made his duty to take certain steps looking toward such enforcement in the manner prescribed therein upon the happening of certain contingencies. The judicial department is charged with the duty of interpreting the laws, adjudging rights and obligations thereunder, 169 Iowa at 155, 151 N.W. at 83.

While this formulation of the respective powers of the three branches of government is attractively clear, it has never been an entirely accurate description of the relationship between the branches of government. As noted in the case of *Hutchins v. City of Des Moines*, 176 Iowa 189, 209, 157 N.W. 881, 888 (1916), which held valid the action of the Supreme Court in designating certain judges as members of a special "condemnation tribunal":

> Necessarily, the functions of the different departments shade into each other, as do the colors of the rainbow, and the performance of executive duties often involves the exercise of judicial functions of even the most delicate character, and the courts frequently, in the efficient discharge of their duties, must exercise the executive function. The elements are distinct in the main, even though it is often difficult to say which predominates; and in a considerable field there is enough of each function involved to preclude the charge that the exercise of the appointing power by either is an encroachment on the exclusive domain of the other.

A particularly troubling area is in enforcing court orders. Once a court has issued an order, it is arguably the law of the state, and therefore, for the executive to enforce. However, as noted in the case of *Cedar Rapids Human Rights Commission v. Cedar Rapids Community School District*, 222 N.W.2d 391, 395-396 (Iowa 1974), one of the critical elements of judicial power is the *power "to ascertain and by its officers to apply the remedy"*, 222 N.W.2d at 396 (cite omitted, emphasis in text). The *Cedar Rapids* case ruled in fact that a human rights commission which did not have the power to by its own actions enforce a decision

did not exercise judicial power. Particularly where enforcement as in the disposition and care of a juvenile extends over a period of time, both judicial and executive officers may have enforcement powers.

Despite the limits of the outlined definition, it is still a useful place to commence analysis of the functions of the juvenile probation officer. As a result, the duties of the officer will be analyzed in light of these criteria.

Some of the duties of the juvenile probation officer strongly suggest enforcement of the law. For example, taking a juvenile into custody is analogous to functions performed by police officers. Similarly, taking charge of a child after trial is analogous to roles played by correctional officers. However, these roles arguably relate to the enforcement of judicial dispositions. Furthermore, in order to decide whether to take a child into custody, the officer would have to make a tentative finding that a child has violated a court order. This involves both interpreting the law and finding facts. Similarly, while the probation officers' responsibility for taking charge of a child involves enforcement of the order and certain ministerial functions related to the care of the child, it also provides an opportunity for reporting to the court on the child's progress to assist the court in deciding on further orders.

Other probation officer's responsibilities arguably appear more analogous to judicial functions than to executive ones. The function of intake officer for the juvenile court consists of making an initial determination whether grounds to conduct delinquency proceedings exist. *See* §§232.2 (24), 232.28, The Code 1979. This role sounds similar to the role of a magistrate in making a "probable cause" finding.

Similarly, conducting waiver investigations seems like an appropriate role for judicial staff. *See* §232.45(4), The Code 1979. In conducting such an investigation, the juvenile probation officer is merely assisting the court in making the determination whether to conduct legal proceedings on delinquency allegations.

Similarly, the role of predisposition investigator, *see* §232.48, The Code 1979, is clearly directed to assisting the court in fulfilling its obligations. It is the court which has the responsibility of deciding disposition. The predisposition investigation is to provide the court with recommendations unaffected by a prosecutorial or defense motivation. As such, it does not seem a role inherently executive in character.

Other roles of the juvenile probation officer raise difficulties of classifications because the roles are unique to the juvenile court. For example, the role of the probation officer in advocating the best interest of the child at hearing is rather unique to the juvenile court. *See* §232.47, The Code 1979. This role is an outgrowth of the *loco parentis* role of the juvenile court. The juvenile probation officer is not the prosecutor, that function is reserved to the county attorney. Nor does he act on behalf of the child's wishes. That role is left to the child's own attorney. Rather, the juvenile probation officer is to function as a neutral investigator. This role assists the court but is by no means a normal judicial function. Still, it is difficult to find an executive role outside the juvenile court to which it correlates either. In view of the strong interest of the juvenile court in having a neutral investigator and advocate to aid in assessing

the interests of the child and the state, it is therefore impossible to firmly classify this function as executive or non-judicial.

Thus, while the scope of the responsibilities of the juvenile probation officer are broad, they are not uniquely executive responsibilities. Rather, they are a combination of functions which cannot in their entirety be clearly classified as executive or judicial.

III. PERFORMANCE OF THE FUNCTIONS OF THE JUVENILE PROBATION OFFICER BY EMPLOYEES OF THE DISTRICT COURT DOES NOT VIOLATE THE DOCTRINE OF SEPARATION OF POWERS OF ARTICLE III, §1 OF THE IOWA CONSTITUTION.

As the analysis to this point demonstrates, there is considerable question whether any substantial portion of the responsibilities of the juvenile probation officers are clearly executive. However, even granting that certain of the responsibilities are analogous to responsibilities normally performed by executive employees, this would not, without more, establish a violation of the doctrine of separation of powers.

The Iowa Supreme Court has long recognized that judicial department officers and employees must of necessity perform functions which are normally thought of as administrative in character. According to a long line of decisions, it is not the administrative character of a particular responsibility which establishes a violation of article III, §1. Rather, it is the lack of a relationship of the functions performed to traditionally judicial functions which establishes a constitutional violation.

The leading authority in this area is the case of *State v. Barber*, 116 Iowa 97, 89 N.W. 204 (1902). *Barber* involved a statute which provided for judicial appointment of officials of a waterworks system. The court found that the operations of a waterworks were not a judicial matter. However, the court made it clear that the mere character of the actions undertaken by judicial officers is not controlling. If a legitimate relationship of the function undertaken to proper judicial functions exists, no violation of separation of powers would exist.

In the words of the court:

> But powers not in themselves judicial, and that are not to be exercised in the discharge of the functions of the judicial department, cannot be conferred on courts or judges designated by the constitution as a part of the judicial department of the state . . . Of course, the act itself need not be judicial in character. If the general power be judicial, or if the act itself be in aid of some judicial function, it is sufficient. Thus the exercise of judicial power may be essential in the discharge of executive functions . . . And courts, in the discharge of their duties, may be required to exercise executive or administrative powers. They may be authorized to make contracts to keep court rooms in repair . . . may appoint commissioners to apportion and assess damages for the opening of a highway . . . may determine whether a municipal corporation shall be created, or adjoining territory annexed . . . But in each and all of these cases the powers are either judicial in character, or are to be exercised in the discharge of functions pertaining to the judicial department. 116 Iowa at 102, 89 N.W. at 208-209.

A fair summary of *Barber* is that in order for it to be permissible for judicial employees to perform non-judicial functions, a relationship to proper judicial functions must be shown. Thus, the question with

respect to juvenile probation officers is whether these functions are related to the proper function of the district court in its role as juvenile court. In order to determine this, it is necessary to clarify the role of the juvenile court.

The best place to begin the inquiry concerning the juvenile court is to examine the Juvenile Justice Act. As indicated in the introduction, furtherance of the best interests of the child and *not punishment* is central in juvenile justice proceedings.

Rules of construction. This chapter shall be liberally construed to the end that each child under the jurisdiction of the court shall receive, preferably in his or her own home, the care, guidance and control that will best serve the child's welfare and the best interest of the state. When a child **is removed from the control of his or her parents, the court shall secure for the child care as nearly as possible equivalent to that which should have been given by the parents. Section 232.1, The Code 1979.**

Arguably, a judge implementing such a mandate must be deemed to have a somewhat broader mandate than merely to interpret the law and adjudicate cases. He has an affirmative responsibility to make sure that what is done is in the child's best interest. While the new Juvenile Justice Act, Chapter 232, The Code 1979, adds some additional procedural protection, it does not alter the basic concept of juvenile justice, which is serving the child's best interest.

The role of the juvenile probation officer as established by Chapter 231 of The Code 1979, must be seen in this context. The juvenile probation officer in fact performs the very role of explaining to the court what the best interests of the child are. *See* §231.10, The Code 1979. It is difficult to argue that this responsibility is not related to the role of the juvenile court. It is the role of the juvenile court. The other duties of the juvenile probation officers all appear closely related to this fundamental role of the court. Thus, in view of the "related to the judicial function" standard, it is difficult to see how the status of the probation officers as judicial officers or employees is unconstitutional.

This question and related questions have in fact been litigated rather extensively in other states. Courts have consistently indicated that probation officers are legitimately within the domain of the court. One important decision is *Judges of the Third Judicial District v. County of Wayne*, 172 N.W.2d 436 (Mich. 1969). This case ruled that the court may order the appointment of additional probation officers under its inherent power.

The inherent power of the court, which was recognized in Iowa in the case of *Webster County Board of Supervisors v. Flattery*, 268 N.W.2d 869 (Iowa 1978), is the power of a court to order appropriations to be expended on the court when this is essential for the court to perform its functions. In the *Third Judicial District* case, the court found that the functions of probation officers was so vital to the proper functioning of a court that the court could order a county to appoint additional probation officers. 172 N.W.2d at 442. It is difficiult to see how persons essential to the functioning of a court are so unrelated to the court that the legislature may not make them part of the judicial branch.

Another important case is *State of Mo. v. St. Louis County*, 451 S.W.2d 99 (Mo. 1970). In that case the court ruled that the juvenile court had

power to select and control the persons serving in the administration and detention departments of the juvenile court. It also entitled the court to choose the number and compensation of these employees. Although these persons were responsible for the care and detention of juveniles, the court found no separation of powers violation in having them function as employees of the district court.

Particularly in view of the nature of the juvenile court, it therefore does not seem unconstitutional to have juvenile probation officers function as officers or employees of the district court. Their roles are closely tied to the function of the court.

IV. THE FUNCTION OF SUPERVISING JUVENILE PROBATION OFFICERS IS AN ADMINISTRATIVE FUNCTION.

Your opinion request cited the opinion of Magistrate Ronald Longstaff in *Atcherson v. Siebenmann*, 458 F.Supp. 526 (S.D. Ia. 1978), as authority that the supervisory function of juvenile court judges over juvenile probation officers is "ministerial" and not judicial in nature. It should be noted that Judge Stuart refused to adopt the term "ministerial" and preferred the term "non-judicial". 458 F.Supp. at 528. Furthermore, on appeal the case was reversed on other grounds. *Atcherson v. Siebenmann*, 605 F.2d 330 (1979). While the court felt it unnecessary to decide whether this supervisory function was judicial or not, the court refused to affirm or reverse the district court on this question. 605 F.2d at 1064.

Magistrate Longstaff's order found that a judge's action in the course of supervising a probation officer were not judicial for purposes of judicial immunity. He relied heavily on the relationship of the parties, and on the absence of judicial review of the judge's actions. Magistrate Longstaff did not rely on the character of the probation officer's responsibilities. The same arguments would surely apply to a judge's supervision of a law clerk, a secretary or a court reporter or a bailiff. In each case the judge treats the other party as an employee, and not as a litigant. Thus, it would appear that this is an administrative function.

The Iowa Supreme Court has noted that courts have the power to make appointments related to judicial functions. As noted in *Hutchins v. City of Des Moines*, *supra*, 176 Iowa 189, 205, 157 N.W. 881, 887 (Iowa 1916):

> A constitution, as said by Judge Cooley, "assumes the existence of a well-understood system, which is still to remain in force," and to ascertain what is meant by judicial power we may look into its exercise prior to the adoption of the Constitution. That each department may make such appointments as are essential to the proper and independent discharge of its functions, is not questioned. There are administrative acts essential to the discharge of legislative as well as of judicial functions, which economically and conveniently may be performed by assistants; and, as either the legislature or the judiciary might, may, or must, under the Constitution, perform such acts, they may select those who are to aid in such performance. 176 Iowa at 205, 157 N.W. 881, 887.

Thus, while it appears clear that the function of appointing and supervising a group of probation officers is administrative, this alone does not establish a constitutional question. The question is not whether it is an administrative function, but whether it pertains to the function of the court sufficiently to be constitutional.

V. BECAUSE OF THE CLOSE RELATIONSHIP OF THE PROBATION OFFICER TO THE ROLE OF THE JUVENILE COURT APPOINTMENT AND SUPERVISORS OF PROBATION OFFICERS BY JUVENILE COURT JUDGES IS NOT UNCONSTITUTIONAL.

This question raises essentially the other side of question III. As noted earlier, the role of the juvenile probation officer is closely related to the juvenile court's mandate to further the best interests of the child and the public. This is not a case where the judge is asked to appoint officials of an entity not indirectly involved with the court. *See State of Iowa v. Barber*, *supra*, 116 Iowa 96, 89 N.W. 204 (1902), holding invalid a statute authorizing judicial appointment of waterworks trustees.

Rather, this is a case where the functions of the appointed and supervised persons are in fact central to the role of the juvenile court. In such a circumstance, it is difficult to find a violation of separation of powers.

The judges' supervision of probation officers must be taken as an extension of the functions of the court. Clearly, they are administrative in nature. Furthermore, there are of course problems that may arise when a judge whose primary responsibility is adjudication becomes involved in ministerial matters. **The judge may have little expertise and time for such matters and may perform them poorly. Furthermore, time spent on supervising employees may interfere with the judge in having sufficient time for other responsibilities. Still, it does not appear that this role goes beyond the basic responsibilities of the court.**

Before concluding, it is important to indicate what is not being said in this opinion. There are arguments both for and against having juvenile probation officers supervised by the court. In favor, it could be said that the judge's close familiarity with the probation officer enables the judge to more effectively assess the probation officer's interpretation of the child's best interest. In opposition, it could be argued that the judge's supervisory relationship could lead the judge to give the probation officers too much authority. Alternative concerns could be raised as to the possible effect of employee-employer disputes between the officer and the judge on the proper functioning of the juvenile court. This opinion makes no recommendation as to what manner of supervisor of juvenile probation officers is best. That is a question legitimately addressed to the legislature. This opinion answers only the question whether the existing supervisory relationship is constitutional under article III, §1, Constitution of Iowa.

With respect to the constitutionality of the current supervisory relationship, that relationship must be analyzed in light of the obligation of the court to insure the best interest of the child and the public. The various roles of juvenile probation are closely related to insuring that the court correctly determines and implements the best interests of the child and the public. Because of this relationship between the role of the court and the role of probation officers, the supervisory role is constitutional.

March 3, 1980

MOTOR VEHICLES — Special plates — Section 321.57, The Code 1979. Dealers may not loan an inventory vehicle equipped with dealer plates to customers unless the customer has a legitimate interest in either purchasing or obtaining possession of a particular vehicle and then only for testing or demonstrating that particular vehicle. (Miller to Shimanek, State Representative, 3-3-80) #80-3-2 (L)

March 11, 1980

MOTOR CARRIERS: Section 327D.29, The Code 1979, does apply to motor carriers defined in Chapters 325 and 327A, The Code 1979, and the power, control and authority of the Transportation Regulation Board over railroads is imputed to the above defined motor carriers through Sections 321.4 and 327A.20, The Code 1979. (Miller to Small, State Senator, 3-11-80) #80-3-3 (L)

March 11, 1980

COURTS: MENTAL HEALTH: JUDICIAL HOSPITALIZATION REFEREES. §§229.21(3), 602.5, 602.32, 602.60, 602.61, The Code 1975; ch. 125, §§229.21(3), 337.3, The Code 1979. A county judicial hospitalization referee retains jurisdiction over a patient transferred to another county for treatment, and has the authority to enter an order directing the sheriff of either county to transfer the patient to an alternate treatment center. (Mann to Wilson, Judicial Hospitalization Referee, 3-11-80) #80-3-4

Mr. Denny R. Wilson, Judicial Hospitalization Referee: You have requested an opinion of the Attorney General concerning the authority of a judicial hospitalization referee to execute a pickup order for committed patients under chapters 229 and 125 of the Iowa Code to a county sheriff or police department for a county other than the county in which the referee is appointed or otherwise authorized to act.

In substance, you ask the following questions:

1. Whether the judicial hospitalization referee may enter an order transferring a patient committed to treatment in another county by prior order of the referee to an alternative treatment center where the patient (a) refuses treatment as directed by the order, or (b) the patient escapes from custody?

2. Which sheriff should be ordered to transfer the patient? Should it be (a) the sheriff of the county where the patient is currently located, or (b) the sheriff of the county where the referee had original jurisdiction, or (c) the sheriff of the county of legal settlement of the patient since all expenses would eventually be paid by that county?

In an opinion of the Attorney General, 1976 Op. Att'y Gen. 833, this office concluded, citing §229.21(3), The Code 1975, that a judicial hospitalization referee performs " 'all of the duties imposed upon judges of the district court by Sections seven (7) through twenty (20) of th[e] Act,' when an application for involuntary hospitalization is filed and no district judge is accessible in the county." The opinion further concluded that judicial hospitalization referees may perform their duties in counties other than the county for which they are appointed, when necessary and when either consented to by the parties or authorized by the chief judge of the district, citing §§602.5, 602.32, 602.60, 602.61, The Code 1975.

A similar conclusion was reached in another opinion of the Attorney General, Op. Att'y Gen. #79-8-19, where this office concluded that where transfer of an involuntary hospitalization proceeding is found, prior to

hearing, to be in the best interests of the respondent, the judge or referee is not restricted to transferring the proceedings to the county of residence or the county where the respondent is found.

We find the reasoning of the above referred to opinions especially compelling in those cases where the referee appropriately exercised original jurisdiction over a respondent. The appropriate rule is stated at 21 C.J.S. *Courts* §§93 and 94 (1940), as follows:

§93. In general, jurisdiction once acquired is not defeated by subsequent events, even though they are of such character as would have prevented jurisdiction from attaching in the first instance. So, where jurisdiction of the person or of the res has once attached, it is not defeated by a removal of the person or the res beyond the jurisdiction of the court. . . .

§94. A court, having obtained jurisdiction, retains it until the final disposition of the cause; but after final judgement or decree has been rendered and the parties dismissed, in general, the jurisdiction of the court is exhausted, and it cannot take any further proceedings in the case, at least where the judgment term has ended, except with respect to the entry of the judgment or decree, or, in a proper case, *its enforcement, correction, or vacation.* (Emphasis added.)

The courts have accepted the above propositions. *Jensen v. Jensen*, 260 Iowa 371, 147 N.W.2d 612 (1967); *Kendall v. People*, 126 Colo. 573, 252 P.2d 91 (1952); *Hobson v. Dempsey Construction Co.*, 232 Iowa 1226, 7 N.W.2d 896 (1943); *Isham v. Miller*, 80 Colo. 380, 252 P. 353 (1927); *Darrance v. Preston*, 18 Iowa 396 (1865). Accordingly, where a judicial hospitalization referee enters an order committing a patient to treatment in another county, jurisdiction of the referee is not defeated by the transfer of the patient to the second county, but continues until final satisfaction of the order, and the referee has authority to take action necessary to enforce his/her orders. Where a patient is committed to an institution for treatment, the power to commit includes the power to transfer the patient to an alternate institution for appropriate treatment.

It is the duty of the county sheriff to execute orders of the court. Section 337.3, The Code 1979, sets forth the duties of the sheriff as follows: "337.3 Execution and return of writs. The sheriff shall, by himself or deputy, execute and return all writs and other legal process issued by legal authority to him directed."

The term "legal process" within the meaning of §337.3 is equivalent to procedure and embraces any form of order, writ, summons or notice given by authority of law for the purpose of acquiring jurisdiction of a person or bringing him/her into court to answer. *Cutler v. Cutler*, 217 N.Y.S.2d 185 (1961); *Lobrovich v. Georgison*, 144 C.A.2d 567, 301 P.2d 460 (1956); *Blair v. Maxbass Security Bank of Maxbass*, 44 N.D. 12, 176 N.W. 98 (1919); *McKenna v. Cooper*, 79 Kan. 847, 101 P. 662 (1909).

Section 337.3, by its language, makes it the duty of the sheriff to execute legal process directed to him/her by any legal authority. Since the referee, on the present facts, would retain jurisdiction over a patient committed by the referee to institutional treatment in another county, the referee would constitute legal authority wihtin the meaning of §337.3 and may lawfully issue an order to the sheriff for the transfer of said patient.

Such order may be issued to either the sheriff of the county of original jurisdiction of the referee or the sheriff of the county where the patient is currently located. Although a sheriff, by virtue of his general authority, has no authority to act outside the territorial limits of his county, the sheriff may, where (s)he acts as part of the judicial machinery pursuant to an order lawfully issued, act beyond the territorial limits of his/her county. *State v. Graham*, 203 N.W.2d 600 (Iowa 1973); *State v. Lamb*, 209 Kan. 453, 497 P.2d 275 (1972); *Nass v. Nass*, 228 S.W.2d 130 (Tx. 1950); *Tice v. Tice*, 208 Iowa 145, 224 N.W. 571 (1929); *Jefferson County Savings Bank v. Carland*, 195 Ala. 279, 71 So. 126 (1916); *State v. Barr*, 173 Ind. 446, 88 N.E. 604 (1909).

The ability of the sheriff to act depends upon the receipt of an order lawfully issued. The ability of the referee to insure that the best interests of the patient are served depends upon the ability of the referee to insure that lawfully issued orders are enforced. A court that has jurisdiction to make a decision also has the power to enforce it by making such orders and entering such writs as are necessary to carry its judgment or decree into effect. *Riggs v. Johnson County*, 73 U.S. 166, 6 Wall. 166, 18 L.Ed. 768, affirmed *U.S. ex rel. v. Council of Keokuk*, 73 U.S. 518, 6 Wall. 518, 18 L.Ed. 918 (1867); *Hulburd v. Eblen*, 239 Iowa 1060, 33 N.W.2d 825, foll. 239 Iowa 1068, 33 N.W.2d 829, and 239 Iowa 1069, 33 N.W.2d 830 (1948); 20 Am.Jr.2d *Courts* §101 (1965); 21 C.J.S. *Courts* §88 (1940).

On the facts of the present case, where the referee exercises original jurisdiction in the county of appointment, and retains jurisdiction over a patient transferred to another county for treatment, the referee sitting as a court, by virtue of its jurisdiction, has the authority to issue an order to the sheriff of either county for the transfer of the patient to an alternate treatment center.

In summary, a county judicial hospitalization referee retains jurisdiction over a patient transferred to another county for treatment, and has the authority to enter an order directing the sheriff of either county to transfer the patient to an alternate treatment center.

March 11, 1980

COUNTIES: LEGAL SETTLEMENT: MENTAL RETARDATION: NOTICE OF LIABILITY: §§230.1, 252.1, 252.16, 252.17, 252.22, 252.24, 347.16 and ch. 253, The Codes 1966 and 1971; §§4.5, 252.16, The Code 1979. Under the 1966 and 1971 Codes of Iowa, the legal settlement of a mentally retarded minor changed with that of the parents, and the county of legal settlement was responsible for the costs of care and custody of said person at a county care facility. This liability of the county of legal settlement continued after the minor reached the age of majority, even though she may have been transferred to a county care facility in another county for care and custody. Secondly, it is the duty of the county auditor to provide notice to the county of legal settlement of a patient that it is providing for the care and custody of a charge of said county, and such notice must be given within a reasonable period of time from the date of admission of the patient. (Mann to Richards, Story County Attorney, 3-11-80) #80-3-5(L)

March 11, 1980

TAXATION: Compromise of Taxes of a Low Rent Housing Project. §§427.1(34) and 445.16, The Code, 1979. Boards of Supervisors do not have the authority to suspend, cancel or compromise the delinquent property taxes of a low rent housing project owned and operated by a non-profit corporation unless the requirements of §445.16 are met. (Price to Neighbor, Jasper County Attorney, 3-11-80) #80-3-6(L)

March 12, 1980

RAILROADS, FENCES: Duty to Fence Railroad Owned Rights-of-Way When Tracks Are Removed: Sections 327G.3, 327G.6, 327G.8, 327G.9, The Code 1979. Section 327G.3 requires railroad companies to fence their right-of-ways. This obligation continues for as long as the right-of-way is owned by the railroad company regardless of whether the line has been abandoned or the tracks removed therefrom. (Hamilton to Hummel, State Representative, 3-12-80) #80-3-7

The Honorable Kyle Hummel, State Representative: You have requested that our office issue an opinion concerning the meaning of Section 327G.3, The Code 1979. While your letter did not set forth any specific question regarding this section, I believe your concern is embodied in the following question:

Is a railroad company that continues to own railroad rights-of-way which are abandoned with the tracks removed therefrom obligated under §327G.3 to maintain the fences on both sides of the right-of-way?

This question presents an issue that is very timely given the current situation regarding railroad abandonments in this state. Research indicates that this question has never been directly addressed by the courts of this state and our interpretation is therefore one of first impression.

The provision of greatest concern in this analysis is §327G.3, The Code 1979, which provides that "All railway corporations owning or operating a line of railway within the state shall construct, maintain and keep in repair a fence on each side of the right of way to prevent livestock from getting upon the tracks."

In addition to §327G.3, two other pertinent Code provisions are §§327G.6 and .9, which establish penalties for violation of §327G.3.

Section 327G.6 provides that:

Any corporation operating a railway and failing to fence its right of way shall be liable to the owner of any stock killed or injured by reason of the want of such fence for the full amount of the damages sustained by the owner, unless it was occasioned by the willful act of such owner or his agent; and to recover the same it shall only be necessary for him to prove the loss of injury to his property.

Section 327G.9 provides that:

If the railroad corporation refuses or neglects to comply with any provision of this chapter relating to the fencing of the tracks, such railroad corporation shall, upon conviction, be subject to a schedule "two" penalty and every thirty days' continuance of such refusal or neglect shall constitute a separate and distinct offense.

As you noted in your letter, the phrases "tracks" and "rights-of-way" are used interchangeably in the noted Code sections, thereby creating some confusion as to the exact intent of the provisions. The question is whether §327G.3 is designed solely to provide protection to landowners

from destruction of their wandering livestock by passing trains or whether an equally important purpose is to require railroads to maintain partition fences. If the protection of livestock is the only purpose then it would seem that when the tracks are removed, the purpose of §327G.3 is mooted because no threat to livestock remains. But, if the legislative purpose was to also require railroads to maintain partition fences as part of the bargain for their acquisition of the right-of-way then the fencing requirement would retain its vitality regardless of the existence of railroad tracks on the "right-of-way." Although direct authority on §327G.3 is scarce, we do believe that the legislature and the Iowa Supreme Court have provided some guidance on the policy implicit in §327G.3.

In the case of *Stevenson v. Atlantic & Northern Railway Co.*, 187 Iowa 1318, 175 N.W. 501 (1919), the Iowa Supreme Court, in what is now cited as a definitive case on the predecessor of §327G.3, viewed the statute as doing more than merely providing protection for adjoining landowners' livestock. In that analysis, the Court faced a question similar to the one you pose. Under §2057 of the Code 1897, railway corporations were required to construct and maintain fence on each side of their tracks. But by 1913 the old §2057 had bene repealed and replaced by a provision which required railway corporations to maintain a suitable fence "on each side of the track," describing the fence in terms of "such right-of-way fence."

The Court, in pertinent part, reasoned that:

Even if it be admitted that, under the earlier statute, the requirement of a 'fence on each side of the track' was not the equivalent of a 'fence on each side of the right-of-way,' we think that distinction cannot be made in giving effect to the statute in its present form; for we find the legislature here using both forms of expression in the same section, as expressing the same idea.

* * *

In short, while it may be true that the original or paramount motive in requiring railway corporations to fence their roads was to promote the public welfare by lessening the danger of collisions between wandering domestic animals and moving trains, it is equally apparent that, at the same time, the legislature sought to make the fences so built serve the purpose of partition fences, and become a part of the enclosure of lands abutting on the right-of-way.

Thus, the Iowa Supreme Court viewed what is now §327G.3 as requiring railroads to provide the partition fences for the tracts they divided. The Court felt that this obligation on the part of the railroads was justifiable in light of the powers the state had provided to the railroads to obtain their rights-of-way.

The Court said:

Under the law of this state, a railway company may condemn a right-of-way through a farm, and, if there were no obligation upon such company to fence for the protection of the land thus exposed, the burden thereby cast upon the landowner to provide such protection for himself would be a proper and important factor in assessing his damages. But, there being a statute requiring the corporation to fence, it is a settled rule that, if the railway company is charged with the duty of fencing the road, it is presumed that such duty will be performed, and no allowance therefor can be made to the owner whose land is taken for such use. 189 Iowa at 1322.

The Court thus saw the railroad's obligation to fence for right-of-way as part of the consideration the railroad paid to obtain the right-of-way. In conclusion, the *Stevenson* Court held that what is now §327G.3 "must be held to be intended, not only to protect the track, but also to serve the purpose of a partititon fence, and that the adjoining owner is entitled to utilize it as such by extending his own fences to it, and thereby completing the enclosure of his own premises." 189 Iowa at 1330. *See also Sell v. Chicago, R.I. & P.R. Co.*, 199 Iowa 808, 810, 202 N.W. 785 (1925).

Although the Court in *Stevenson* was not considering the problem of a "trackless" railroad right-of-way, the Court's interpretation of §327G.3 as embodying a duty of railroads to provide partition fences controls the present analysis. Regardless of whether a railway company continues to operate a railroad, with or without tracks, there is a need to continue to fence the abandoned or "unused" right-of-way. The question is essentially who bears that duty.

It is the opinion of the Attorney General that the correct interpretation of §327G.3 is that all railroad rights-of-way that are owned by railway companies must be fenced by the railway company as contemplated in §327G.3. The fact that the tracks may have been removed or are no longer in use does not obviate this duty. Further this analysis does not depend on how the right-of-way was acquired.

We believe that this opinion is buttressed by the legislative intent implicit in H.F. 450, 1979 Session, 68th G.A., Ch. 79, which amended §327G to provide that whoever obtains a railroad right-of-way for any purpose other than farming has a number of specific responsibilities regarding that right-of-way. These responsibilities include the "construction, maintenance and repair of the fence on each side of the property." Thus, anyone who now obtains an abandoned railroad right-of-way bears the same responsibility as a railroad company does under §327G.3. Give this policy, which is designed to prevent gaps in the ability to determine responsibility for maintenance of partition fences, it is reasonable that railroads, while still in ownership of abandoned railroads, be required to continue to maintain the right-of-way fences under §327G.3, regardless of whether the "tracks" have been removed.

Of course, stating that a railroad is obligated to fence its rights-of-way and forcing the railroad to do so are two different matters. Chapter 327G does not obtain an effective mechanism for requirng railroads to build or maintain their fences. The greatest incentive for them to do so is the possibility of liability for injuries caused to animals, pursuant to §327G.6. In the situation where no trains are being operated, this factor is absent and the penalty provision of §327G.9 is the only mechanism to require compliance.

March 13, 1980

WELFARE: GENERAL ASSISTANCE: FOOD STAMPS: AFDC: §§239.2(4)(b), 252.1, 252.27, The Code 1979; 7 U.S.C. §2011; 42 U.S.C. §602; 7 C.F.R. §273.7; 45 C.F.R. §233.100. An individual's participation in a labor strike does not alone bar that person from receipt of general assistance or food stamps. However, a person who is on strike is not eligible for receipt of AFDC. Op. Att'y Gen. #78-11-13 and 1972 Op. Att'y Gen. 62, to the extent that they dealt with the issue of strikers' eligibility for general assistance, are hereby withdrawn as clearly erroneous. (Fortney to Cusack, State Representative, 3-13-80) #80-3-8

The Honorable Gregory D. Cusack, State Representative: You have requested an opinion of the Attorney General concerning "whether strikers are to be disqualified from receiving general assistance, food stamps, ADC, and other similar benefits, simply because they are strikers, when they otherwise meet the necessary eligibility requirements." It is our opinion that participation in a labor dispute does not, in and of itself, disqualify an otherwise eligible applicant from receipt of assistance, other than ADC.

I

The program of general assistance in Iowa is established by chapter 252, The Code 1979. Using the definition of "poor" and "poor person", the Iowa Legislature has established the criteria by which an individual's eligibility for assistance is to be determined. Section 252.1 defines these terms as follows:

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.

Section 252.1, The Code 1979.

Previous opinions of this office regarding eligibility for assistance under §252.1 dealt solely with the question of whether the individual involved was a "poor person". *See* Op. Att'y Gen. #78-11-13; 1972 Op. Att'y Gen. 62. Both of these prior opinions failed to consider whether the applicant could be eligible under the second clause of §252.1, providing that "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."

Op. Att'y Gen. #78-11-13 dealt with the issue of whether students in a private college could qualify for assistance under §252.1. In answering this question in the negative, the opinion stated: "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." This conclusion is clearly erroneous. It totally ignores the clear language of the statute. If one is not a "poor person" due to physical or mental disability resulting in inability to work, one could still be considered a "needy person", eligible for assistance at the discretion of the board.

1972 Op. Att'y Gen. 62 dealt with the very issue raised in your inquiry, *i.e.*, the eligibility of those on strike for various forms of public assistance. In the portion of the opinion dealing with general assistance, the prior opinion stated:

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.

1972 Op. Att'y Gen. 62.

As in the 1978 opinion, the 1972 opinion ignores the express language of §252.1. It fails to address the possibility that a person who is on strike may in fact be a "needy person".

As was pointed out in "Contemporary Studies Project: General Assistance in Iowa," 61 Iowa L. Rev. 1155 (June 1976), there are very few people in Iowa today who would meet the definition of "poor" or "poor person". Are there many who are possessed of no property, exempt or otherwise? A literal interpretation would mean that if an individual owned one stitch of clothing he would not be a "poor person", regardless of the fact that he was possessed of nothing else. Consequently, most assistance extended under the provisions of chapter 252 is given to those who are not statutorily "poor", but rather to those who, in the discretion of the local board, are deemed to be "needy".

The most significant test for eligibility is that based on means, the only factor directly associated with the need of the applicant. Since very few people in our society are utterly without resources of some kind, most individuals applying for general assistance in Iowa today qualify at the discretion of the county.

61 Iowa L. Rev. 1155, 1262.

The Iowa Code does not provide any direction for defining "needy persons" other than to say that they can be persons "who have some means". Can a person who is engaged in a labor dispute resulting in a strike be said to be needy? We believe that such person can be so characterized, depending on the facts of the individual's particular circumstances. A determination of need under chapter 252 is intended to be a fact question. *Polk County v. Owen*, 187 Iowa 220, 174 N.W. 99 (1919). A local board could make a determination that a striker, because of the circumstances of his particular situation, is a "needy person". To say that all strikers are ipso facto ineligible for assistance under the provisions of chapter 252, is to read into the chapter a criteria of eligibility not provided by the legislature when enacting the chapter. *See* Op. Att'y Gen. #80-1-7. This should not be done.

Further evidence that a person need not be disabled to be eligible for assistance under chapter 252 is found within the chapter itself. Section 252.27 permits the board of supervisors to require a recipient of assistance to perform certain kinds of labor. The inclusion of this provision suggests that persons capable of laboring can qualify for assistance.

The position that strikers who are otherwise eligible are permitted to receive benefits under state-funded assistance programs is the majority view in the United States. In fact, over 30 states allow some form of public assistance to those participating in a strike. *Note, Welfare for Strikers: ITT v. Minter*, 39 U.Chi.L.Rev. 79, 97, n. 104 (1971). As the court observed in *Strat-O-Seal Manufacturing Company v. Scott*, 218 N.E.2d 227 (Ill. App. 1966):

Labor union membership or activity and the right to strike in proper cases under proper circumstances is an accepted fact in our industrial community. Plaintiffs would ask us to exact by judicial interpretation as the price of exercising that right a forfeiture of the benefits available to others under the Public Assistance Code. By so doing, we exact a quid

pro quo and impose economic sanctions not specifically required by the Code. The strong arm of the State is thus employed to strangle otherwise authorized activity and State neutrality ends. We do not see how the legislature has or how we should create a blanket classification when the Code itself conveys the thought that the propriety of assistance rests on individual need and individual performance. 218 N.E.2d 227, 230.

Op. Att'y Gen. #78-11-13 and 1972 Op. Att'y Gen. 62, to the extent that they dealt with the issue of strikers' eligibility for general assistance, are hereby withdrawn as clearly erroneous.

II

The food stamp program is established by 7 U.S.C. §2011 et seq. Eligibility to participate in the program is established by the federal government pursuant to regulation.

The federal regulations specifically deal with the issue of strikers' eligibility for participation in the food stamp program. 7 C.F.R. §273.7 (j) states as follows:

Strikers shall be subject to the work registration requirement, unless exempted under paragraph (b) of this section. *A household shall not be denied participation solely on the grounds that a member of the household is not working because of a strike or a lockout at his or her place of employment* unless the strike has been enjoined under §208 of the Labor-Management Relations Act (29 U.S.C. 178) (commonly known as the Taft-Hartley Act), or unless an injunction has been issued under section 10 of the Railway Labor Act (45 U.S.C. 160). A striker so enjoined who still refuses to return to work shall be deemed out of compliance with paragraph (e) (4) of this section, which requires the acceptance of suitable employment, unless the striker is exempted under paragraph (b) of this section. (Emphasis supplied.)

In order to receive stamps, an applicant must register for work, unless the applicant otherwise qualifies for an exemption. 7 C.F.R. §273.7(a). A review of the work registration requirements makes it evident that an individual could engage in a strike and still be in compliance with the applicable regulations governing eligibility. 7 C.F.R. §273.7(a) provides that "household members are registered when a completed work registration form is submitted" to the particular agency operating the food stamp program. A person on strike has thus complied with the registration requirement by the simple act of completing the form. The fact that the person is also on strike has no bearing on the registration process. In addition to requiring that food stamp applicants register for work, the regulations impose a number of other responsibilities such as reporting for interviews, responding to requests for additional information, reporting to potential employers, and accepting and continuing to hold suitable employment. *See* 7 C.F.R. §273.7(e). The fact that an applicant was on strike would not prevent him or her from complying with these requirements. Of importance in this regard is the fact that the regulations exclude from the definition of "suitable employment" a job site which is the subject of a strike or lockout unless an injunction has been issued pursuant to the Taft-Hartley Act or the Railway Labor Act. *See* 7 C.F.R. §273.7(i).

In our opinion, if an applicant is in compliance with the registration requirements of the federal regulations, as well as the additional criteria referred to above, the fact that the applicant is also a participant in a labor strike does not disqualify the person from receipt of benefits.

III

Section 239.2(4)(b), The Code 1979, denies Aid to Families with Dependent Children (AFDC) to those engaged in a labor dispute. It is our opinion that this prohibition is valid.

The United States Supreme Court has established the principle that a state may not alter the eligibility criteria used to process AFDC applications such that an applicant who is eligible under federal standards is denied assistance under state standards. *Carleson v. Remillard*, 406 U.S. 598, 92 S.Ct. 1932, 32 L.Ed.2d 352 (1972); *Townsend v. Swank*, 404 U.S. 282, 98 S.Ct. 502, 30 L.Ed.2d 448 (1971); *King v. Smith*, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). Since Iowa has elected to participate in the AFDC program, it is bound by the applicable federal rules.

The eligibility requirements for a state program under AFDC are set forth at 42 U.S.C. §602 et seq. These provisions have been interpreted to confer on the Secretary of Health, Education and Welfare the power to devise eligibility standards for AFDC for strikers. In *Francis v. Davidson*, 340 F.Supp. 351 (Md. D.C. 1972), *aff'd*, 409 U.S. 904, 93 S.Ct. 223, 34 L.Ed.2d 168 (1972); the court held that the Congress has empowered the Secretary to adopt regulations which (1) require each state participating in AFDC to include in the program those out of work because of involvement in labor disputes, (2) require each state to exclude such fathers from the program, (3) to leave such decisions to each state. The secretary has elected to leave the decision to each state.

45 C.F.R. §233.100(a)(1) requires that the states participating in AFDC for unemployed fathers develop a definition of "unemployed father" that meets specified criteria. However, the section specifically provides that:

at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.

45 C.F.R. §233.100(a)(1)(ii).

Iowa has decided to exclude from the definition a father whose employment results from participation in a labor dispute.

Section 239.2, The Code 1979, provides that "Assistance shall be granted under this chapter to any needy dependent child who: . . . (4) is not, with respect to assistance applied for by reason of partial or total unemployment of the father, the child of a father who: . . . (b) Is partially or totally unemployed due to a work stoppage which exists because of a labor dispute at the factory, establishment or other premises at which he is or was last employed." §239.2(4)(b), The Code. Iowa has clearly made the determination, which the Social Security Act allows, to bar those engaged in a strike from receipt of AFDC. It is our opinion that this election is valid.

IV

In conclusion, an individual's participation in a labor strike does not alone bar that person from receipt of general assistance or food stamps. However, a person who is on strike is not eligible for receipt of AFDC.

Op. Att'y Gen. #78-11-13 and 1972 Op. Att'y Gen. 62, to the extent that they dealt with the issue of strikers' eligibility for general assistance, are hereby withdrawn as clearly erroneous.

March 13, 1980

JOINT EXERCISE OF GOVERNMENTAL POWERS: TORT LIABILITY OF GOVERNMENTAL SUBDIVISIONS — Chapters 28E and 613A, The Code 1979. The members of an agency or board, established pursuant to Chapter 28E, are subject to the coverage and protection of Chapter 613A. Therefore, pursuant to §613A.2, this board or agency may be held liable for its torts, and those of its officers, employees, and agents acting within the scope of their employment. (Mueller to Kenyon, Union County Attorney, 3-13-80) #80-3-9(L)

March 13, 1980

TAXATION: Property Tax Exemption Status of Church Owned Living Quarters. §427.1(9), The Code 1979. Property of a religious institution which is used as a home by an individual, regardless whether that individual pays rent or occupies the home rent-free in exchange for janitorial services rendered to the institution, would not qualify for the property tax exemption provided in §427.1(9). (Kuehn to Small, State Senator, 3-13-80) #80-3-10(L)

March 14, 1980

USURY: MORTGAGE LOANS: INTEREST: §535.2 as amended by Senate File 158, §535.4. Mortgage loans to Iowans who use Iowa real estate as collateral are governed by Iowa law. Iowa interest rates established at §535.2 govern such loans. Exceptions to this rule are provided for in S.F. 158 for certain commercial and agricultural loans. Out-of-state national banks may assess the rate of interest established in the state in which they are located. For an interim period, pursuant to Public Law 96-161, real estate loans secured by a first lien on residential real property made between January 1, 1980, and March 30, 1980, or made prior to December 28, 1981, pursuant to a commitment issued prior to April 1, 1980, have no interest rate or "points" ceiling. (Ormiston to Halvorson, State Representative, 3-14-80) #80-3-11

Honorable Roger A. Halvorson, State Representative: You have requested an official opinion of the Attorney General on the following questions:

1) Is it legal for out-of-state lending institutions to make mortgage loans to Iowans using Iowa real estate as collateral?

2) Would a mortgage loan by an out-of-state institution to an Iowan using Iowa real estate as collateral be subject to the jurisdiction of the Code of Iowa?

In answer to your first question, a mortgage loan issued across state lines using real estate from the borrower's state is perfectly legal and contract enforcement could occur as in any other contract. The law of the place where the property is situated is also held to govern generally with respect to the requisites and validity of mortgages of real estate. 15A C.J.S., Conflict of Laws, §13, p. 466.

On December 28, 1979, the Congress of the United States passed Public Law 96-161, which affects a certain aspect of your question for an interim period. This statute pre-empts applicable state law governing interest rates on real estate loans secured by a first lien on residential real property made between January 1, 1980, and March 30, 1980, or made prior to December 28, 1981, pursuant to a commitment issued

prior to April 1, 1980. Under the federal statute, the state statute controlling the applicable rate of interest is preempted and, consequently, designated loans on residential real property have no established interest rate ceilings. Please remember that this statute is restricted to a limited 90-day period of time on first liens on residential real property only.

The general rule for the applicability of the law of the situs state is set forth at 59 C.J.S., Mortgages, §12.

The validity of a mortgage of real estate is generally to be tested and determined by the laws of the state where the mortgaged property is situated although the mortgage is executed, and the parties, or one or more of them, reside in another state, and although the mortgage provides that it is to be construed and interpreted pursuant to the laws of the latter state. . . . It has generally been held that, although the mortgage may be good and valid by the laws of the state where it is executed, if it does not comply with the laws of the state where the mortgaged land is situated, it cannot be enforced there. . . .

59 C.J.S., Mortgages, §12, p. 41.

The State of Iowa has long held that the law that governs a mortgage of real estate is that of the state where the property is situated. *Manton v. J. F. Seiberling & Co.*, 107 Iowa 534, 78 N.W. 194 (1899). The United States District Court in Iowa has sustained that holding in *Federal National Association v. Kostranek*, 228 F.Supp. 777, (S.D. Iowa 1964). As a consequence, the Code of Iowa is the applicable law for the requisites, validity and construction of a mortgage on real estate situated in Iowa.

As a general rule, the rate of interest that may be assessed on a real estate loan with Iowa real estate as collateral is governed by Iowa law. Pursuant to §535.4 of the 1979 Code of Iowa, any rate of interest that exceeds the rates of interest established by §535.2, as amended, is a violation of the Iowa Usury Statute unless the loan is made under a specific exemption from Iowa law.

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.

§535.4, 1979 Code of Iowa.

There are, however, a number of variables that determine which section, if any, applies to a specific transaction. Those variables include the lender, the type of borrower, and the amount of money involved in the transaction.

With the recent United States Supreme Court decision in *Marquette National Bank v. First of Omaha Corp., et al*, 439 U.S. 299, 58 L.Ed. 2d 534, 99 S.Ct. 540 (1978), the distinction between national banks and other lending institutions has become meaningful in relation to interstate loans. The Supreme Court in that case ruled that a national bank had a "preferred lender status," and that under §85 of the *National Banking Act* federal law prevailed over any state restrictions on rates of interest. As a consequence, an Iowa borrower seeking a loan from an out-of-state national bank may be charged the rates of interest charged citizens of that state. If the lender institution is other than a national bank, Iowa law would control.

The type of borrower and the amount borrowed may create an exemption from the interest rate strictures established by Iowa law. Section 535.2 has been amended by S.F. 158 at §18.2 to exempt borrowers under certain specific conditions:

Any domestic or foreign corporation, . . . and any person borrowing money or obtaining credit in the amount of one hundred thousand dollars or more, exclusive of interest, for business purposes, and any person borrowing money or obtaining credit in the amount of five hundred thousand dollars or more, exclusive of interest, for agricultural purposes, may agree in writing to pay any rate of interest in excess of the rate permitted by this section, and no such corporation . . . or person so agreeing in writing shall plead or interpose the claim or defense of usury in any action or proceeding.

S.F. 158, §18.2.

To summarize, loans to Iowans who use Iowa real estate as collateral are governed by the Code of Iowa in determining the requisites, validity and construction of the mortgage. As a general rule, the rate of interest on such a loan is governed by §535.2 as amended. There are, however, exceptions on whether the Iowa interest rates are controlling. Under the *Marquette* decision, national banks from out of state may assess any rate of interest on Iowans that is valid in their home state. Further, certain loans in commercial and agricultural areas may be exempted under Iowa law and any rate of interest agreeable to the Iowa borrower and the out-of-state lender could be charged. Finally, real estate loans secured by a first lien on residential real property are presently controlled by federal statute which provides that on an interim basis, there is no established interest rate limit on designated loans. Following this interim federal pre-emption, Iowa law will once again govern.

March 14, 1980

GAMBLING: Electronic gaming devices — §§99B.1, 99B.6, 99B.7, 99B.10, 99B.12, 99B.15, chapters 123 and 725, The Code 1979; 730 I.A.C. §94.3. Electronic gaming devices such as "video blackjack" or "21 machines" are not social games under the social gambling provisions of chapter 99B. Such devices are available to a qualified organization licensee under §99B.7 or as an "electrical or mechanical amusement device" under §99B.10. Pursuant to §99B.7(1)(b), sale or lease agreements for these machines must be based solely on a flat fee independent of their take. A liquor licensee or beer permittee may hold both a social and a qualified organization gambling license. However, when any gambling is being engaged in under the latter, games being played under the former must immediately cease. Casino-type games may be conducted by a qualified organization but are not available for play as "social games." The privileges of lawful gambling under the various sections of chapter 99B operate independently of each other. (Richards to Holetz, Department of Public Safety, 3-14-80) #80-3-12

Acting Commissioner Robert G. Holetz, Department of Public Safety: You have requested an opinion of the Attorney General regarding electronic gaming devices such as "video blackjack" or "21 machines." This office recently opined that such devices when lawfully used according to chapter 99B, The Code 1979, are compatible with an Iowa liquor license or beer permit. Op. Att'y Gen. #79-12-24. The questions raised in your opinion request focus on the lawful use of these devices under chapter 99B. Specifically you have inquired:

1. Is blackjack/"21", as referred to in Chapter 99B.12(2)(a), also unlawful gambling taking into consideration that the game here is played

by a programmed electronic amusement device as opposed to an ordinary deck of playing cards?

2. Can more than one (1) gambling activity take place within any licensed establishment simultaneously under the authority of a qualified organization gambling license as referred to in 99B.7(1)(l)?

3. Can a person who distributes or leases the amusement devices to an establishment receive any profit or consideration from the device as referred to in 99B.7(1)(b)?

4. Can an establishment where liquor or beer is sold be licensed as a qualified organization under Section 99B.7 and thereby evade the limitations of Section 99B.6(1)(c)?

5. Can any establishment . . . be permitted to engage in bookmaking; to play any punchboard, pushcard, pull-tab, or slot machine; or to play craps, chuck-a-luck, roulette, klondike, blackjack, chemin de fer, baccarat, faro, equality, 3-card monte, or any other game which is customarily played in a gambling casino?

6. Pursuant to the Iowa Supreme Court Decision, *State, ex rel. Chwirka v. Audino,* must each numbered section of the entire Chapter 99B be read and interpreted separately by citing Section 99B.15 even though this creates conflict between various sections, including but not limited to 99B.1, 99B.6, 99B.7, 99B.9, 99B.10, and 99B.12?

In addition you have requested that our response cover four possible different gambling license situations: (1) no gambling license (*e.g.*, §99B.10); (2) a social gambling license (§99B.6); (3) a qualified organization gambling license (§99B.7); and (4) both a social and a qualified organization gambling license.

Gambling has traditionally been categorized as criminal behavior and is currently proscribed by chapter 725, The Code 1979. However, in the mid-1970's the Iowa Legislature embarked on a modification of these penal provisions apparently in recognition that "penny ante" gambling activities should not be subject to criminal sanctions. Thus, in enacting the provisions contained in chapter 99B, the legislature created several areas of *lawful* gambling and lifted the penalties of chapter 725 on games, activities or devices "lawfully possessed, used, conducted or participated in pursuant to chapter 99B." Section 725.15, The Code 1979. For purposes of this opinion, discussion is limited to those areas of lawful gambling specified in sections 99B.6, 99B.7, and 99B.10. Additionally, and in response to your sixth question, we examine these privileges according to the guidelines pronounced by the Iowa Supreme Court in *State ex rel. Chwirka v. Audino,* 260 N.W.2d 279 (Iowa 1977):

An examination of the language of chapter 99B suggests to us the legislative intent that §§99B.6 and 99B.7 should be read separately, and specifically that §99B.6 should not be deemed to apply to qualified organizations under 99B.7 who are also beer permittees or liquor licensees. Such legislative intent appears in the language contained in §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. Except as otherwise provided in this chapter, the knowing failure of any person to comply with the limitations imposed by this chapter constitutes unlawful gambling, a misdemeanor, which is punishable as provided in chapter 726."

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 the 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.*

260 N.W.2d at 284-285 (emphasis added).

Briefly, these sections create the following privileges. Section 99B.6 deals with "social gambling" in premises where liquor or beer is sold. A distinctive feature of this privilege is that a social gambling licensee [this privilege requires a license under §99B.6(1)(a)] may "*not* participate in, sponsor, conduct or promote, or act as cashier or banker for any gambling activities" [§99B.6(1)(b); *cf.*, §§99B.6(1)(f) and (g)]; in other words, the social gambling licensee is merely allowed to provide a place where other persons may engage in "social games" [§99B.6(1)(c)]. These allowable "social games" are listed in §99B.12(2) and, for purposes of this opinion, expressly do *not* include any games which are "customarily played in gambling casinos" such as blackjack, craps, and roulette. Additionally, a participant in any "social game" may *not* win or lose more than fifty dollars in a twenty-four hour period. Section 99B.6(1)(h).

Section 99B.7 deals with the area designated as "qualified organization gambling." A qualified organization is by definition [§99B.1(10)]" any licensed person [a license is required by §§99B.7(1)(a) and (3)(a)] who dedicates the net receipts of a game of skill, game of chance, or raffle" to "educational, civic, public, charitable, patriotic or religious uses in this state" [§§99B.7(3)(b)]. The obvious intent of this privilege is to allow engagement in limited forms of gambling for the purpose of philanthropic fund raising. And whereas a social gambling licensee is prohibited from conducting games, a qualified organization licensee actually "conducts" games, *i.e.*, "owns, promotes, sponsors, or operates a game or activity" [§99B.1(13)]. Any game conducted by this licensee is subject to certain restrictions: most games are limited to one dollar ($1.00) cost [§99B.7(1)(e)] and to merchandise prizes under twenty-five dollars ($25) in actual retail value [§99B.7(1)(d)]. By virtue of the Iowa Supreme Court's decision in *State ex rel. Chwirka v. Audino*, 260 N.W.2d 279 (Iowa 1977), a qualified organization licensee may conduct virtually any kind of game it desires except a slot machine. [(C)asino type games such as roulette, blackjack and craps . . . are games of chance which . . . a qualified organization was allowed to conduct if it met the other requirements for operation as a qualified organization pursuant to §99B.7." 260 N.W.2d at 284.] And according to our prior opinion, the term "slot machine" is limited to those devices commonly known as "one-armed bandits." Op. Att'y Gen. #79-12-24. Thus, for the qualified organization licensee, it is the manner of conducting rather than the type of game conducted which is crucial.

Finally, section 99B.10 creates a special designation for "electrical or mechanical amusement devices." A person may lawfully own, possess,

or offer for play such a device provided certain restrictions are met: *e.g.*, only *free games* are awarded [§99B.10(1)] but not as a reward for playing the device [§99B.10(2)]. A gambling license is not required for this privilege, and a device when used according to the enumerated restrictions "is not a game of skill or game of chance, and is not a gambling device" [§99B.1(15)].

Having generally reviewed these privileges, we turn to an examination of your questions. In response to your first question, we initially point out that the substitution of a machine for a deck of cards and a human dealer is irrelevant. The game remains the same. Thus, the social gambling licensee under §99B.6 may *not* allow wagering between individuals on the outcome of the machine's game since it is not a social game according to §99B.12(2)(a). On the other hand, a qualified organization may utilize the machine to raise money for the qualified uses of §99B.7(3)(b) *provided* it complies with the enumerated restrictions of that section (*e.g.*, no cash awards, merchandise prizes under twenty-five dollars in value, etc.). And under the provisions of §99B.10, the type of game is of no consequence if operated as an "electrical or mechanical amusement device."

We will review your fourth and second questions conjunctively. The Supreme Court has made it clear that a liquor licensee or beer permittee may obtain a license and conduct games as a qualified organization irrespective of the limits of §99B.6. *State ex rel. Chwirka v. Audino*, 260 N.W.2d at 285 ("a liquor licensee who is also a qualified licensee under §99B.7 is not bound by the limitations contained in §99B.6, and may conduct gambling pursuant to §99B.7"). Hence, in our opinion a liquor licensee or beer permittee could have both a social gambling license and a qualified organization license with which he or she could permit play of social games under the former or could conduct fund-raising games under the latter. However, the relationship between these two privileges would be governed by §99B.7(1)(l), as identified in your second question. That section provides:

During the time that games permitted by this section are being engaged in, no other gambling is engaged in at the same location.

Thus, if a liquor licensee has both a social gambling and qualified organization license and installs such a machine for play under the latter privilege, whenever a person is so engaged all social gambling must stop. In other words, when someone is playing the machine for a merchandise prize under §99B.7, anyone playing a social game such as poker under §99B.6 must stop play until the machine game is completed. Simultaneous play in violation of this provision would constitute a serious misdemeanor according to §99B.15 ("knowing failure . . . to comply with the limitations imposed"). In addition such conduct could jeopardize the liquor license under the provisions of chapter 123, The Code 1979.

Your third question poses a possible conflict between the statute and an administrative rule adopted by the Department of Revenue pursuant to §99B.13, The Code 1979. Section 99B.7 mandates that the *net receipts* from games conducted by qualified organizations be distributed as prizes or be dedicated and distributed to the specified uses. Correspondingly, the department of revenue has adopted 730 I.A.C. §94.3 which, in part, lists allowable expense deductions from an organization's gross receipts.

Included therewith is the cost of "equipment (prorated)" and "overhead expense." Thus, based on this rule, it would appear that a qualified organization could legitimately deduct the cost of a "21 machine" on a proportional basis from the gross receipts it takes in. Your question aptly points out the potential problem with rental or purchase arrangements between a machine distributor and a qualified organization caused by §99B.7(1)(b). That section provides in pertinent part:

No person receives or has any fixed or contingent right to receive, *directly or indirectly*, any profit, *remuneration*, or compensation from or *related to* a game of skill, game of chance, or raffle . . . . (Emphasis added.)

Upon review it is our opinion that these provisions are harmonious. The obvious intent of the Code section is to prevent persons from making a business or living through the operation of qualified organization gambling. Any type of rental or lease/buy agreement wherein the distributor is to be paid directly from or on a percentage of the proceeds taken in by the machine would seemingly violate §99B.7(1)(b). Any such agreement must be based on a flat fee independent of the machine's take. Pursuant to the rule, then, the licensee could reimburse itself for the fee paid to the distributor upon proof "that the expense has been incurred exclusively and directly as a result of the gambling activity."

Your fifth question appears to be based on the language of §99B.12(2)(a) which prohibits play of certain games in the social gambling area. Thus, *none* of the listed games may be played in a social gambling context. (§§99B.6, 99B.9, and 99B.12). Nor may a qualified organization conduct the first five listed games. However, under *State ex rel. Chwirka v. Audino*, 260 N.W.2d 279 (Iowa 1977), the remaining casino-type games are available to the qualified organization licensee provided the games are conducted according to the restrictions of §99B.7.

In summation, electronic gaming devices such as "video blackjack" or "21 machines" are *not* lawful for play as "social games" notwithstanding the substitution of a machine for a deck of cards and a human dealer. However, such devices are available to a qualified organization licensee or under the "electrical or mechanical amusement device" privilege. Whenever the device is being played under a qualified organization license, any other gambling at the same location must cease according to §99B.7(1)(l). A distributor who sells or leases these devices may not receive, directly or indirectly, any profit, remuneration or compensation from or related to their play. Sale or lease agreements must be based solely on a flat fee independent of the machine's take. A liquor licensee or beer permittee may legally hold both a social gambling and a qualified organization gambling license. None of the games enumerated in §99B.12(2)(a) may be played in a social gambling context. The first five listed games are also unavailable to the qualified organization. However, the remaining casino-type games may be conducted under the restrictions of §99B.7. Finally, gambling is unlawful except as specifically permitted by a given section of chapter 99B. The sections do not overlap and each one contains the privilege and the limitations applicable to a given set of circumstances.

March 13, 1980

COUNTIES: U.S. CONST. amend. XIV, IOWA CONST. Art. I, §18, IOWA CONST. Art. III, §38A, Sections 455.1, 455.2, 457.12, 462.1, The Code 1979. A county board of supervisors may, under the County Home Rule Amendment, regulate the drainage districts within the county on a county-wide basis by adopting ordinances regulating the drainage districts. Such an ordinance, restricting the tillage of farm land within sixteen feet of an open drainage ditch, would involve a valid exercise of the county's police power, and would not amount to a taking for which eminent domain procedures must be invoked. (Benton to Martin, Assistant Hardin County Attorney, 3-14-80) #80-3-13

Mr. Paul L. Martin, Assistant Hardin County Attorney: In your letter of January 10, 1980, you have requested an opinion of this office concerning the authority of the Hardin County Board of Supervisors to adopt an ordinance restricting tillage of farmland within sixteen feet of a county open drainage ditch, where the county has no easement. Specifically, you raise the following three questions:

1. Whether the Board of Supervisors of a county may, under the County Home Rule Amendment, regulate the drainage districts within a county on a county wide basis by adopting various ordinances regulating the drainage districts.

2. If not, whether the regulation of a drainage district within a county must be done by the Board of Supervisors as trustees of the various drainage districts on a district-by-district basis?

3. Whether a regulation adopted by the Board of Supervisors either as an ordinance under the Home Rule Amendment or at the regulation of the trustees of the drainage district, prohibit the farming of an area of land adjacent to an open drainage ditch without condemnation proceedings.

At the outset, it may be useful to note a few general principles concerning the nature and control of drainage districts. Drainage districts are established to provide for the darinage of surface waters from agricultural lands or to protect these lands from overflow, and these purposes are presumed to be a public benefit and conducive to the public health, convenience, and welfare. Section 455.2, The Code 1979. An organized drainage district is a political subdivision of the county in which it is located. *Voogd v. Joint Drain. Dist., Kossuth and Winnebago Cos.*, 188 N.W.2d 387, 393 (Iowa 1971); *State of Iowa ex rel. Iowa Employment Security Comm. v. Des Moines County*, 260 Iowa 341, 346, 149 N.W.2d 288 (1967). Sections 455.1 and 462.1, The Code 1979, place the management and control of drainage districts in the county board of supervisors or three trustees of the drainage district. In the case of intercounty drainage districts, such districts are managed by a joint board of supervisors drawn from each county. Section 457.12, The Code 1979. Chapters 455, 462, 457 and 332, dealing generally with the powers of county board of supervisors, provide no express authority which would empower a board to enact a county-wide ordinance such as the one you describe in your letter. The answer to your first two questions then, must necessarily turn on whether a board would be authorized to enact such a

restrictive ordinance under the authority granted county governments through the County Home Rule Amendment, Article III, [Sec. 39A] of the Iowa Constitution.

Article III, [Sec. 39A] of the Iowa Constitution provides:

Counties or joint county-municipal corporation governments are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy and tax unless expressly authorized by the general assembly. The general assembly may provide for the creation and dissolution of joint county-municipal corporation governments. The general assembly may provide for the establishment of charters in county or joint county-municipal corporation governments.

If the power or authority of a county conflicts with the power and authority of a municipal corporation, the power and authority exercised by a municipal corporation shall prevail within its jurisdiction.

The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in express words is not a part of the law of this state.

The County Home Rule Amendment expressly overrules the principle, previously the rule in Iowa, that county boards of supervisors have only such powers as are expressly conferred by statute or necessarily implied from the power so conferred. *McMurry v. Bd. of Sup'rs. of Lee County*, 261 N.W.2d 688, 690 (Iowa 1978). However, the Amendment itself contains four basic limitations. Although our office has often construed the Amendment since its adoption, the seminal opinion in the construction of Article III, [Sec. 39A] is Op. Att'y Gen. #79-4-7. In this opinion our office described the self-contained limitations within the Amendment as follows:

First, counties have no power to levy any tax unless expressly authorized by the General Assembly. Second, in the event the power or authority of a county conflicts with that of a municipal corporation, a municipal corporation's power and authority prevails within its jurisdiction. Third, the home rule power exercised by a county cannot be "inconsistent" with the laws of the General Assembly". Fourth, home rule power can only be exercised for local or county affairs and not state affairs.

Op. Att'y Gen. #79-4-7 p. 8.

Concerning these limitations, our office noted that they should be narrowly construed, while a county's powers under the Home Rule Amendment should be broadly construed and subject to liberal interpretation absent an express statutory conflict.

Op. Att'y Gen. #79-4-7 p. 24.

Turning to the ordinance described in your letter, it appears that at least two of the Amendment's limitations are clearly inapplicable. Given that the ordinance does not purport to levy any tax, and that there is no apparent conflict with any municipal ordinance, these limitations are not germane to our inquiry. The fourth limitation limits the exercise of home rule power to local or county affairs and not state affairs. Although drainage districts may cross county lines, in those situations, as discussed above, they are governed by a joint board pursuant to Section 457.12. Under this system, and considering that Chapter 455 places the control of drainage districts at the county level, we would conclude that the proposed ordinance would not involve the exercise of the county's powers in state affairs.

The third limitation upon a county's powers under the Home Rule Amendment provides that the exercise of those powers cannot be "inconsistent with the laws of the General Assembly". Our office has discussed this limitation in the following terms:

This limitation can be termed one of 'preemption'. *That is to say that in any given area the state, by broad and comprehensive legislation, has intended to exclusively regulate the subject matter.* Where 'preemption' is applicable, any local government regulation regardless of content, is inconsistent with the pervasive state legislation. [Emphasis supplied].

Op. Att'y Gen. #79-4-7 p. 9.

This limitation is also found in the Municipal Home Rule Amendment, Article III [Sec. 38A] of the Iowa Constitution. The Iowa Supreme Court has therefore had occasion to construe the limitation in specific factual contexts, and to delineate principles which we may bring to our analysis. For instance, the Court in *Chelsea Theater Corp. v. City of Burlington*, 258 N.W.2d 372, 374 (Iowa 1977), held that the city's obscenity ordinance was irreconcilable with state law. This result was premised upon the conclusion that the relevant statute indicated a clear legislative intent to deny political subdivisions the authority to enact any law regulating the distribution of obscene materials. In *Bryan v. City of Des Moines*, 261 N.W.2d 685, 687 (Iowa 1978), the Court noted that under Home Rule any limitation on a city's powers by state law must be expressly imposed. From these cases, we can conclude that the question of preemption turns on discerning the legislature's intent, and that any law purporting to limit a county's powers after Home Rule must be expressly imposed.

Given these principles, to determine whether Hardin County's ordinance exceeds the third limitation we must decide whether the state has, through broad and comprehensive legislation manifested an intent to exclusively regulate drainage districts. There is no indication in Chapters 455, 457 and 462 that the legislature has intended that the state occupy this field and regulate drainage districts to the exclusion of county governments. We would conclude therefore, that the Hardin County ordinance does not offend the third limitation within the County Home Rule Amendment.

It is true of course, that there is no express statutory authorization for the enactment of this ordinance. However, under County Home Rule, the relevant inquiry in determining whether the exercise of power by a county is authorized is not whether there is a specific grant of authority from the State, but rather whether the state has itself decided to govern the particular subject matter. An examination of two recent opinions from our office serves to illustrate this distinction. In Op. Att'y Gen. #79-9-21 our office opined that county board of supervisors may grant permits for the mining of coal underlying secondary roads where the county owns an easement, based upon the conclusion that the legislature had evinced an intent to grant as much local control as possible to local government bodies over secondary roads. By contrast, in Op. Att'y Gen. #79-5-2 our office concluded that a County Board of Supervisors does not have the authority under Home Rule to establish a mental health department within county government, because through Chapter 230A the legislature clearly demonstrated an intent to provide a comprehensive framework for the delivery of local mental health services. The chapters

concerning drainage districts manifest an intent to grant control of drainage districts to county government, therefore the state has not "preempeted" this field. In Op. Att'y Gen. #79-4-7 we offered this response to a general inquiry which is apposite to your question.

(Q) In cases where the general subject matter is discussed in the Code but the specific action or procedure that the county desires to undertake is not prohibited, is the county's action limited to what is prescribed by the Code?

(A) No, unless the General Assembly expressly states in that Code chapter or provision that the county may not engage in such action or procedure, or unless an intent to create exclusive state regulation is clearly evinced in the legislative language and history.

The Hardin County Ordinance is not "inconsistent with the laws of the General Assembly".

In answer to your first question, then, we would conclude that the Hardin County Board of Supervisors may, under the County Home Rule Amendment, regulate the drainage districts within the county on a county-wide basis by adopting various ordinances regulating the drainage districts. Given this conclusion, we need not reach your second question.

Your third question concerns whether the proposed ordinance may prohibit the farming of land within sixteen feet of a drainage ditch without the county undertaking condemnation proceedings. This inquiry requires us to focus on different considerations than those involved in your first question, where we determined that Hardin County would have authority to enact this ordinance under the County Home Rule Amendment. The third question requires us to determine whether this regulation would amount to a "taking" of private property so that eminent domain must be exercised, or whether the ordinance amounts only to an exercise of the county's police power for which no compensation would be owed to the affected landowner. Article I, §18, of the Iowa Constitution provides that private property shall not be taken for public use without just compensation being paid, and the Fourteenth Amendment of the United States Constitution prohibits a state from depriving a person of life, liberty or property without due process of law.

Before turning directly to this issue, there are some general principles relating to the problem which should be set forth. First, "police power" may be defined as the exercise of the state's right to regulate the use of property to prevent any use thereof which would be harmful to the public interest. *Iowa Natural Resources Council v. Van Zee*, 261 Iowa 1287, 1294, 158 N.W.2d 111 (1968). Secondly, the dichotomy between a taking and the exercise of a governmental unit's police power is not complete, since even the exercise of that police power may amount to a taking if it deprives a property owner of the substantial use and enjoyment of his property. *Phelps v. Board of Supervisors*, 211 N.W.2d 274, 276 (Iowa 1973). Finally, it has also been established that there may be a taking for which compensation is due without an actual invasion or direct physical appropriation of private property. *Lage v. Pottawattamie County*, 232 Iowa 944, 949, 5 N.W.2d 161 (1942). It has been held, for example, that the state is prohibited from restricting the rights of adjacent landowners or enlarging their duties in the absence of condemnation proceedings; the right to use property up to the property line is a

valuable right. *Simpson v. Iowa State Highway Commission*, 195 N.W.2d 528, 535 (Iowa 1972).

The ordinance at issue here states that its purpose is for the protection of open drains and the prevention of soil erosion into open drains. To accomplish this purpose, farmers are prohibited from tilling within sixteen feet of an open drain. For the maintenance of the right of way, the landowner or tenant may receive brush killer from the county with the cost to be billed to the applicable drainage district.

Recently, in *Woodbury Cty. Soil Conservation Dist. v. Ortner*, 279 N.W.2d 276 (Iowa 1979), the Iowa Supreme Court considered whether a state statute concerning soil conservation, Section 467A.44, The Code 1979, imposed restrictions on affected landowners so onerous as to involve a taking rendering the provision unconstitutional, or whether it was a regulation under the state's police power. The Court in *Ortner* held that Section 467A.44 amounted to a proper exercise of the state's police power. *Ortner* at 279. In reaching this conclusion the Court applied a balancing test to determine that the statute did not deprive the landowners of the substantial use and enjoyment of their property. *Ortner* at 278. According to the Court, the test must be whether the collective benefits to the public outweigh the specific restraints imposed upon the individual. *Ortner* at 278.

As noted earlier in this opinion, the purposes for which drainage districts are established are presumed to be a public benefit and conducive to the public health, convenience and welfare. Section 455.2. An ordinance enacted to preserve these ditches and to promote soil conservation would seem to be imbued with the same characteristics. We do not have before us specific evidence as to the damage resulting to each farmer affected by this ordinance. However, given the presumption of benefit according to the creation and maintenance of drainage districts, it is difficult to postulate that the sixteen feet restriction constitutes such a substantial interference as to overcome the presumpion. Under the balancing test described by the Court in *Ortner* at 278, we would conclude that the Hardin County ordinance constitutes a valid exercise of the police power and not a taking for which condemnation proceedings must be invoked.

March 14, 1980

STATE OFFICERS AND DEPARTMENTS — VITAL STATISTICS — PUBLIC RECORDS: Section 144.43, The Code 1979, provides a right to public examination or the issuance of copies of certain records 65 years old or older under Chapter 68A, The Code, only at the office of the county registrar. In addition the State registrar or county registrar may disclose certain other information less than 65 years old if a direct and tangible interest as defined in 470 I.A.C. 103.1 can be demonstrated to the satisfaction of the State or County registrar. (Lindebak to McGuire, Howard County Attorney, 3-14-80) #80-3-14

Kevin C. McGuire, Howard County Attorney: The Attorney General has received your question concerning the confidentiality of vital statistics records maintained by clerks of court throughout the state.

On November 1, 1979, Commissioner of Public Health, Norman L. Pawlewski issued a notice to all Clerks of Court which stated that the county registrar, in this case the clerk of court, should prohibit access

to vital records unless the clerk was satisfied that the applicant has a direct and tangible interest in the content of the record and that the information contained therein is necessary for the determination of a personal or property right. The notice further specifies those records to which the public may have access, *i.e.*, those vital statistics which are more than 65 years old and which do not show a birth out of wedlock or a fetal death, and applications for marriage licenses.

Attached to the notice was a letter from Commissioner Pawlewski to the clerks of court which explained the notice and attempted to clarify the law. The letter stated in part:

"Chapter 68A *does not* grant the general public, commercial or research organization access to vital records. Section 68A.2 of the *Code of Iowa* 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 letter continues:

Section 144.43 does *expressly limit* access to all vital records that are less than 65 years old except to those with *a direct and tangible interest in the contents of the record whether such* records are in the custody of the State Registrar, County Registrar, or Local Registrar.

The letter then sets out the requirements that a "direct and tangible interest" is required before a record may be inspected. That requirement is found in 470 I.A.C. 103.1.

The Commissioner indicated that certain other records which reflect adoption, paternity, legitimation or sex reassignment actions are sealed under Section 144.24, The Code 1979.

The question which is addressed in this opinion is whether the letter and accompanying notice from Commissioner Pawlewski is correct under Chapter 144, The Code, and rules promulgated thereunder. There appears also to be a question whether 470 I.A.C. 103.1 is in conflict with Section 144.43, The Code.

I.

Section 144.43 states in full:

144.43 ***Vital Records Closed to Inspection — Exceptions.*** **To protect the integrity of vital statistics records, to insure their proper use, and to insure the efficient and proper administration of the vital statistics system kept by the state registrar, access to vital statistics records kept by the state registrar shall be limited to the state registrar and his employees, and then only for administrative purposes. It shall be unlawful for the state registrar to permit inspection of, or to disclose information contained in vital statistics records, or to copy or permit to be copied all or part of any such record except as authorized by regulation.**

The provisions of this section shall not apply to the following vital statistics if they are sixty-five years old or older:

1. A record of birth if that birth did not occur out of wedlock.

2. A record of marriage.

3. A record of divorce, dissolution or marriage, or annulment of marriage.

4. A record of death if that death was not a fetal death.

However, a vital statistic, as described in this paragraph, shall be inspected and copied, as of right under chapter 68A of the Code, only when they are in the custody of a county or of a local registrar.

The Legislature amended Section 144.43 in 1974 by adding the last two paragraphs. Disagreement has risen about the intent of these two paragraphs.

It has been argued that the amendment permits the examination of records at local level even though those records are not public records in the possession of the state registrar. The conclusion reached by those who make that argument is that records which are closed at the state level would be open at the local level.

It can be conceded that the last paragraph creates an ambiguity in the statute. The last sentence, read in isolation, could be read to create a right to examine records which are in the custody of the local registrar. The manifest intent of the legislature will prevail over the literal import of the words used. *Doe v. Ray*, 251 N.W. 2d 496, 504 (Iowa 1977).

When a statute is ambiguous a court would be permitted to consider, among other things, the object sought to be attained and the legislative listing. *See* Section 4.6, The Code 1979. Some legislative intent can be found in the explanation accompanying the bill. *See, City of Altoona v. Sandquist*, 230 N.W. 2d 507, 509 (Iowa 1975) and *State ex rel. Chwirka v. Audino*, 260 N.W. 2d 279, 289 (Iowa 1977). The explanation which accompanied S.F. 1237, 1974 Session, 65th G.A., stated:

"This bill makes certain vital statistics open to public inspection if they are sixty-five years old or older. However, public inspection may be demanded only on the local level. A publication clause is included."

The clause "under Chapter 68A of the Code" was added on the enrolled bill.

The explanation makes clear the intent that no additional rights be given to the public by the amendment. Vital Statistics which are more than 65 years old are available to the public at the local level only.

The purpose of the statute construed as a whole is to protect private information contained on the records held in public offices. The original statute, the first unnumbered paragraph, prohibited access to vital statistics held by the department. The amendment relaxed this restriction to the extent that vital statistics 65 years old or older could be obtained, but only on the local level. There is a diminished privacy interest in statistics which are that old. The legislature intended to make those statistics available, but only on the local level. If the last sentence were construed to give a right to all records on the local level, it would completely defeat the privacy interest protected by the first paragraph.

Any member of the public has been given the right to inspect and copy, at the local level, records of legitimate births over 65 years old, records of marriages 65 years old or older, records of divorce, dissolution and annulment 65 years old or older, and records of death, except fetal deaths, which are 65 years old or older. No records of illegitimate births or fetal deaths are available for inspection or copying at any registrar except upon court order. All inspecting and copying may be done of right only

at the county registrar's office. The public has no right under Chapter 68A, The Code, to demand inspection or copying of records at the State registrar's office.

II.

Section 144.43 states "It shall be unlawful for the state registrar to permit inspection of, or to disclose information contained in vital statistics records, or to copy or permit to be copied all or part of any such record *except as authorized by regulation.*" (Emphasis added). It is therefor within the authority of the Department of Health to permit access to records other than those which the legislature specifically provided would be public. The Department has promulgated the following rule under that permissive clause:

470 I.A.C. 103.1 *Disclosure of Data.*

103.1(1) The State Registrar or county registrar shall permit the inspection of a record or issue a certified copy of a record or part thereof only when he is satisfied that the applicant has a direct and tangible interest in the content of the record and that the information contained therein is necessary for the determination of a personal or property right.

a. A request from the registrant, a member of his immediate family, his guardian, or their respective legal representatives shall be considered to be a direct and tangible interest.

b. For the purpose of securing information or obtaining certified copies of vital records, the term legal representative shall include an attorney, physician, funeral director, insurance company, or an authorized agency acting in behalf of the registrant or his family.

c. For the purpose of securing and obtaining data from vital records, requests from natural parents of adopted children, in the absence of a court order, and requests from commercial firms or agencies requesting listings of names and addresses shall not be considered to be direct and tangible interest.

The records to which 470 I.A.C. 103.1 refers are records which are otherwise not open to inspection, copying, or disclosure under Section 144.43, The Code. The source of the "direct or tangible interest" to which the Commissioner referred is 470 I.A.C. 103.1(1).

The rule provides for exceptions to the general rule that records less than 65 years old are not available for inspection under Chapter 68A. Section 144.43, The Code, expressly authorizes that exceptions may be made at the discretion of the department. It is the conclusion of this opinion that 470 I.A.C. 103.1 does not exceed the statutory authority of the department found in Section 144.43. The department has defined who is eligible to inspect recent records and for what purposes those records may be inspected. The letter and notice of the Commissioner correctly describes the law and the relationship of the administrative rule to the law.

— CONCLUSION —

It is the conclusion of this opinion that the records listed in Section 144.43, The Code, which are 65 years old or older, may be inspected at the office of the local registrar as a matter of right under Chapter 68A, The Code, and after compliance with requirements of the local registrar allowed in Chapter 68A.

Records listed in Section 144.43 which are not 65 years old may be inspected or the local registrar may issue a copy thereof to an applicant if the registrar is satisfied that the applicant has a direct or tangible interest as defined in 470 I.A.C. 103.1.

March 17, 1980

STATE OFFICERS AND DEPARTMENTS: Soybean Promotion Board; Beef Cattle Producers Association — §§17A.1(2), 25A.2(3), 25A.2(5)(b), 25A.21, 181.18, and 185.34, The Code 1979. Neither the Soybean Promotion Board nor the Beef Cattle Producers Association are state agencies. As a result, their members are not state employees covered by Chapter 25A for the purpose of defense and indemnification in the event of claims or litigation. (Mueller to Lounsberry, Secretary of Agriculture, 3-17-80) #80-3-15 (L)

March 18, 1980

STATE OFFICERS AND DEPARTMENTS: Council of Social Services. §§4.1(36), 217.3, The Code 1979. The Council of Social Services has a statutory duty to make a recommendation of individuals qualified to be Commissioner of Social Services. (Black to Rush, Senator, 3-18-80) #80-3-16 (L)

March 21, 1980

COUNTIES AND COUNTY OFFICERS; ROADS AND HIGHWAYS. Maintenance of partially closed secondary roads. Ch. 319; §§306.4(2), 306.10-.26, 309.67, The Code 1979. County boards of supervisors duty to maintain continuously in the best condition practicable and remove obstruction, including snow, from secondary roads under its jurisdiction extends to any portion of a road which has not been vacated and closed. (Hyde to Schwengels, State Senator, 3-21-80) #80-3-17 (L)

March 25, 1980

VITAL RECORDS—COMMON LAW NAME CHANGES. Chapter 674; Section 595.5, The Code 1979. The consistent use, by a married couple, of a hyphenated combination of their antenuptial surnames may establish that combination as the legal surname of the couple even though there was no change of name petition under Chapter 674, The Code 1979, nor was there a request for a name change on the application for a marriage license pursuant to Section 595.5, The Code. (Lindebak to Angrick, Citizens Aide/Ombudsman, 3-25-80) #80-3-18 (L)

March 25, 1980

TAXATION: Application of Partial Property Tax Exemption for Industrial Real Property. 1979 Session, 68th G.A., ch. 103 (H.F. 650). A city is given the local option in §1 of H.F. 650 to provide, by ordinance, for a partial tax exemption for all, not merely some, industrial property of the three types eligible for the exemption. Pursuant to §4 of H.F. 650, a city may, but need not, give prior approval to a specific proposed industrial project as eligible for the tax exemption, provided that the city has enacted the ordinance authorized by §1 of H.F. 650. (Griger to Murray, State Senator, 3-25-80) #80-3-19

Honorable John S. Murray, State Senator: You have requested an opinion of the Attorney General concerning the meaning of 1979 Session, 68th G.A., ch. 103 (hereinafter referred to as H.F. 650). In your written request, you state:

Specifically, Chapter 103 of the Laws of the Sixty-Eighth General Assembly, 1979 Session, states that "A city council . . . may provide for a partial exemption from property taxation of the actual value added to

industrial real estate by the new construction of industrial real estate and the acquisition of or improvement to machinery and equipment assessed as real estate . . ."

My primary question is whether or not this language permits a city council to use its discretion in providing a partial exemption to one company which builds a new building, but declines to provide the exemption to another company which builds a similar new building.

In answering this question, I would appreciate your consideration of the following questions:

(1) May a city council specify in the enacting ordinance particular geographic boundaries within the city that shall be the only areas within which they choose to provide for the partial exemptions?

(2) May a city council specify in the enacting ordinance that only certain types of new industrial construction, such as construction incorporating passive solar energy techniques, shall be granted the partial exemptions?

(3) May a city council specify in the enacting ordinance that only projects meeting certain desirable social or economic standards, such as providing at least twelve new jobs in the community upon completion, shall qualify for the property tax exemptions?

(4) May a city council specify in the enacting ordinance that all persons to receive the partial exemption must apply for prior approval to the city council as outlined in Section 4 of the chapter?

(5) In considering proposals for prior approval as outlined in Section 4 of the chapter, may the city council grant that prior approval based upon criteria such as those mentioned in questions one through three of this letter?

Section one of H.F. 650 provides as follows:

Section 1. *NEW SECTION.* A city council, by ordinance, or a county board of supervisors as authorized by section two (2) of this Act, by resolution, may provide for a partial exemption from property taxation of the actual value added to industrial real estate by the new construction of industrial real estate and the acquisition of or improvement to machinery and equipment assessed as real estate pursuant to section four hundred twenty-seven A point one (427A.1), subsection one (1), paragraph e, of the Code. New construction means new buildings and structures and includes new buildings and structures which are constructed as additions to existing buildings and structures. New construction does not include reconstruction of an existing building or structure which does not constitute complete replacement of an existing building or structure or refitting of an existing building or structure, unless the reconstruction of an existing building or structure is required due to economic obsolescence and the reconstruction is necessary to implement recognized industry standards for the manufacturing and processing of specific products and the reconstruction is required for the owner of the building or structure to continue to competitively manufacture or process those products which determination shall receive prior approval from the city council of the city or the board of supervisors of a county upon the recommendation of the Iowa development commission. The exemption shall also apply to new machinery and equipment assessed as real estate pursuant to section four hundred twenty-seven A point one (427A.1), subsection one (1), paragraph e, of the Code unless the machinery or equipment is part of the normal replacement or operating process to maintain or expand the existing operational status.

The ordinance or resolution may be enacted not less than thirty days after holding a public hearing in accordance with section three hundred fifty-eight A point six (358A.6) of the Code in the case of a county, or section three hundred sixty-two point three (362.3) of the Code in the case of a city. The ordinance or resolution shall designate the length of time the partial exemption shall be available and may provide for an exemption schedule in lieu of that provided in section three (3) of this

Act. However, an alternative exemption schedule adopted shall not provide for a larger tax exemption in a particular year than is provided for that year in the schedule contained in section three (3) of this Act.

Section two of H.F. 650 pertains to the authority of the county board of supervisors and has no relevance to the questions you raised.

Section three of H.F. 650 provides as follows:

Sec. 3. *NEW SECTION.* The actual value added to industrial real estate for the reasons specified in section one (1) of this Act is eligible to receive a partial exemption from taxation for a period of five years. "Actual value added" as used in this Act means the actual value added as of the first year for which the exemption is received, except that actual value added by improvements to machinery and equipment means the actual value as determined by the assessor as of January first of each year for which the exemption is received. The amount of actual value added which is eligible to be exempt from taxation shall be as follows:

a. For the first year, seventy-five percent.

b. For the second year, sixty percent.

c. For the third year, forty-five percent.

d. For the fourth year, thirty percent.

e. For the fifth year, fifteen percent.

This schedule shall be followed unless an alternative schedule is adopted by the city council of a city or the board of supervisors of a county in accordance with section one (1) of this Act.

However, the granting of the exemption under this section for new construction constituting complete replacement of an existing building or structure shall not result in the assessed value of the industrial real estate being reduced below the assessed value of the industrial real estate before the start of the new construction added.

Section four of H.F. 650 provides as follows:

Sec. 4. *NEW SECTION.* An application shall be filed for each project resulting in actual value added for which an exemption is claimed. The application for exemption shall be filed by the owner of the property with the local assessor by February first of the assessment year in which the value added is first assessed for taxation. Applications for exemption shall be made on forms prescribed by the director of revenue and shall contain information pertaining to the nature of the improvement, its cost, and other information deemed necessary by the director of revenue.

A person may submit a proposal to the city council of the city or the board of supervisors of a county to receive prior approval for eligibility for a tax exemption on new construction. The city council, by ordinance, or the board of supervisors, by resolution, may give its prior approval of a tax exemption for new construction if the new construction is in conformance with the zoning plans for the city or county. The prior approval shall also be subject to the hearing requirements of section one (1) of this Act. Such prior approval shall not entitle the owner to exemption from taxation until the new construction has been completed and found to be qualified real estate. However, if the tax exemption for new construction is not approved, the person may submit an amended proposal to the city council or board of supervisors to approve or reject.

Section five of H.F. 650 provides as follows:

Sec. 5. *NEW SECTION.* When in the opinion of the city council or the city board of supervisors continuation of the exemption granted by this Act ceases to be of benefit to the city or county, the city council or the county board of supervisors may repeal the ordinance authorized by section one (1) of this Act, but all existing exemptions shall continue until their expiration.

The final section of H.F. 650, §6, precludes the tax exemption authorized by this law if the property for which exemption is claimed has received any other authorized property tax exemption.

An examination of H.F. 650, in its entirety, discloses the obvious legislative purpose to permit a city (or county) to grant a partial property tax exemption to industrial property of the type set forth in §1 of the statute as an incentive to attract industrial development to the locality opting to provide for such an exemption. The statute, therefore, sets forth a local option scheme whereby a city council has the discretion to adopt the partial exemption or not.

Section one of H.F. 650 appears to set forth three different types of industrial property which the city council can make partially tax exempt in accordance with the schedule set forth in §3 of H.F. 650 or alternate schedule authorized by §1 of H.F. 650. These three types of industrial property are: (1) New industrial construction which consists of new buildings and structures or new buildings and structures constructed as additions to existing buildings and structures. (2) In the event that reconstruction is not complete replacement or refitting of an existing building or structure, the partial exemption will apply, provided that such reconstruction is required due to economic obsolescence and is necessary to implement recognized industry standards for manufacture and processing of specific products and is required for the proposed reconstructed building or structure's owner to continue competitively to manufacture or process such products. This determination must receive prior approval from the city council but only upon the recommendation of the Iowa Development Commission. (3) Acquisition of new or improvement to machinery and equipment assessed as real property pursuant to §427A.1(1)(e), The Code 1979.

The city's ordinance adopted pursuant to §1 of H.F. 650 (hereinafter referred to as §1 ordinance) must, in addition to authorizing the partial exemption of the three categories of industrial property heretofore described, designate the length of time the partial exemption will be available and may provide for an alternative, but not larger, exemption schedule in lieu of the one expressly set forth in §3 of H.F. 650.

Section three of H.F. 650 describes how the partial exemption will apply. In essence, the amount of exemption will be a percentage of "Actual value added" to a new industrial project which qualifies as the type of property made partially exempt by the city council which enacted a §1 ordinance. The "Actual value added" is partially exempt from property tax for a five year period with the amount of exemption decreasing each subsequent year for the value added in the first year.

Section four of H.F. 650 requires the filing of an application for exemption with the local assessor "by February first of the assessment year in which the value added is first assessed for taxation." Section four also provides for the submission of a proposal by a person to the city council "for prior approval for eligibility for a tax exemption on new construction." Such prior approval is given by the city council by ordinance (hereinafter referred to as §4 ordinance). No person is required to submit such a proposal and, if one is submitted, the city has no obligation to accept it.

Section five of H.F. 650 allows the city council to repeal the §1 ordinance, but if exemptions then exist because actual value has been added pursuant to §3 of H.F. 650, such existing exemptions "shall continue until their expiration."

In your opinion request, you pose six questions. The answers to your questions depend upon the city council's authority under §1 and §4 of H.F. 650. Iowa cities do not have an independent taxing power, but would derive their power to tax or exempt property from the Iowa legislature. *See Clark v. City of Des Moines*, 222 Iowa 317, 267 N.W. 97 (1936); Iowa Const. Amend. 25. Therefore, a §1 ordinance must grant the partial exemption in harmony with the provisions of §1 of H.F. 650 and cannot enlarge, modify, or restrict the exemption beyond the clear import of the statute.

Section one of H.F. 650 allows a city to grant the partial exemption to certain narrowly defined partial reconstruction projects which receive the prior approval of the city upon recommendation of the Iowa Development Commission. But, the other two types of industrial property eligible for exemption under a §1 ordinance do not need such prior approval and are not limited to only certain types of industrial new construction or certain types of new or improvements to machinery and equipment assessed as real property under §427A.1(1)(e). Moreover, §1 of H.F. 650 does not contain any language allowing the city council to specify particular geographical areas, and exclude others, in which new industrial construction would receive the partial exemption. Statutes cannot be construed so as to extend, enlarge, restrict, or otherwise change the meaning thereof. *Boyle v. Burt*, 179 N.W.2d 513, 516 (Iowa 1970). If the legislature would have intended to allow the city council, in enacting a §1 ordinance, to specify geographic boundaries for the exemption, it could have done so, as it did in the urban revitalization local option tax exemption found in 1979 Session, 68th G.A., ch. 84.

Therefore, with reference to your primary question, it is clear that a city has no authority to enact a §1 ordinance which would grant the partial exemption to one new industrial building and deny it to another new industrial building. A city is given the local option to enact a §1 ordinance or not, but if it enacts such an ordinance the partial exemption is available to all new industrial buildings constructed therein. The exemption is also available to *all* reconstruction meeting the criteria of §1 of H.F. 650, not merely some of such eligible reconstruction. The same result also is required for the acquisition of or improvement to §427A.1(1)(e) machinery and equipment.

Given the aforementioned discussion of the meaning of §1 of H.F. 650, it also follows that your questions numbered (1), (2) and (3) must be answered in the negative.

The resolution of your questions numbered (4) and (5) depend upon the meaning of the second paragraph in §4 of H.F. 650. The provisions of §4 must be considered in pari materia with the whole of H.F. 650. Statutory construction requires that each section must be construed with the statute as a whole and all parts must be compared and construed together as opposed to placing undue emphasis upon any particular part. *Goergen v. State Tax Commission*, 165 N.W.2d 782 (Iowa 1969). In the

construction of a statute, the object to be effected, the evil or mischief to be remedied, and the purpose to be accomplished should be examined in order to reach a reasonable and sensible result with the view of carrying out the intention of the enacting legislature. *Isaacson v. Iowa State Tax Commission*, 183 N.W.2d 693 (Iowa 1973).

As previously noted, the purpose of H.F. 650 was to allow cities (or counties) the local option of offering industrial business a tax incentive for new construction or improvements to industrial real property. That purpose is accomplished when a city enacts a §1 ordinance. Pursuant to §5 of H.F. 650, the city can repeal the §1 ordinance, but all existing exemptions, *i.e.* "Actual value added" to industrial real property, continue until the expiration of the five year exemption period. However, between the time when a person decides to locate new industry in a §1 ordinance city and the adding of actual value to commence the exemption as set forth in §3 of H.F. 650, a city council could repeal the §1 ordinance with the result that such person obtains no exemption at all. Such a person, however, appears to have been provided with some measure of protection against such a contingency by the §4 ordinance, if the city will enact one. In short, such a person may submit a proposal to the city council of a city which had enacted a §1 ordinance and if the proposal is approved, the exemption will be effective, even if the city should subsequently repeal the ordinance prior to any actual value added. In essence, once the city enacted a §4 ordinance, such action would be tantamount to a contract for exemption between the person submitting the proposal and the city. *Rixford Mfg. Co. v. Town of Highgate*, 102 Vt. 1, 144 Atl. 680 (1929). In the absence of a contract for exemption or a consideration for an agreement expressed or inferred in a statute, a tax exemption is a mere privilege or gratuity which can be repealed at any time. *Kimball-Tyler Company v. City of Baltimore*, 214 Md. 86, 133 A.2d 433 (1957). This conclusion that §4 of H.F.650 offers a measure of protection against the repeal of the §1 tax exemption as applied to the person seeking and obtaining such §4 ordinance is further fortified by the fact that H.F. 650 is silent on the repeal of a §4 ordinance. Section four of H.F. 650 does, however, provide that the industrial exemption is not effective until the prior approved new construction is completed and meets the qualifications of the proposal approved by the city council. Therefore, the prior approval of a §4 ordinance is binding upon the city and the person's new construction proposal must be adhered to by the person or the exemption will not be available. If such person could obtain the partial exemption for "actual value added" pursuant to §3 of H.F. 650 prior to completion of the new construction under the §1 ordinance, the prior approval would be meaningless as to that person. Therefore, in order to insure that the person adheres to the prior approved proposal, the exemption would not commence until the new construction was completed and found to be commensurate with the approved proposal. Statutes should be construed to avoid unreasonable and absurd consequences. *Isaacson*, 183 N.W.2d at 695. If §4 of H.F. 650 was construed to authorize a city not enacting a §1 ordinance to adopt a §4 ordinance, then the city would be authorized to pick and choose with unfettered and arbitrary discretion those persons whose industrial new construction projects would be approved for tax exemption and those not approved. Such a scheme would authorize tax inequality of similarly situated new industrial construction in the same city. It cannot be presumed that the legislature

would have intended to adopt a statute with such unreasonable consequences. On the other hand, even if a city did not appropve a proposal submitted pursuant to §4, the person could still receive the exemption pursuant to the existing §1 ordinance and, if that ordinance was repealed pursuant to §5, all persons with existing exemptions would retain them. If such person had not yet added value at the time of such repeal of the §1 ordinance and the city had not enacted a §4 ordinance, that person would still be treated similarly to all other persons who had not yet added value. Therefore, the view that a §4 ordinance can only be adopted by a city which had enacted a §1 ordinance does provide for substantial equality as to the availability of the exemption for all those similarly situated.

Given the aforementioned discussion of the interplay between §1 and §4 of H.F. 650, it is clear that the statutory language in §4 and the purpose of the section are not compatible with the proposition that a city council can require *all* persons seeking the partial exemption to obtain prior approval as set forth in §4. Indeed, the only prior approval absolutely required in order for the exemption to be applicable is certain partial reconstruction as set forth in §1. The fact that the legislature has enumerated when prior approval is required as a prerequisite for exemption implies exclusion of such required prior approval for new construction and acquisition of and improvement to §427A.1(1)(e) machinery and equipment under the doctrine of expressio unius est exclusio alterius. *See Dotson v. City of Ames*, 251 Iowa 467, 101 N.W.2d 711 (1960). Consequently, your question number (4) is answered in the negative.

Finally, in view of our interpretation that §4 of H.F. 650 was intended to provide a measure of protection in the event of a repeal of a §1 ordinance, and was not meant to grant to the city council unlimited discretion to restrict the tax exemption in a manner which would allow similarly situated new construction to receive unequal tax treatment, it is clear that a city council should not base its prior approval on the criteria listed in your questions (1) through (3). Of course, the city may, in its discretion, refuse to grant prior approval, but such approval or rejection should be based upon the merits of the particular industrial project and whether the city believes the project would otherwise qualify for exemption under its §1 ordinance and, if so, whether it desires to bind itself not to repeal the exemption for that project. Thus, your fifth question is answered in the negative.

March 25, 1980

COUNTIES AND COUNTY OFFICERS: Closing of Roads in Unincorporated Villages—§§306.3, 306.4 and 306.10, The Code, 1979. Counties can only close public roads under their jurisdiction and control. In order for a street or road in an unincorporated village to be public, there must be a dedication and an acceptance. (Blumberg to Hulse, State Senator, 3-25-80) #80-3-20(L)

March 25, 1980

GOVERNOR/ENERGY POLICY COUNCIL: Enforcement of emergency energy conservation measures. §93.8, The Code 1979. The Code provides no authority to punish those who violate an order of the Governor to conserve energy in an acute energy shortage; absent such authority criminal sanctions cannot be imposed. The state could seek injunctive relief in individual cases to force compliance. (Ovrom to Stanek, Director, Energy Policy Council, 3-25-80) #80-3-21(L)

March 28, 1980

WEAPONS—MACE: Sections 702.7, 704.1, and 724.1, The Code 1979. Mace, which is non-lethal and leaves no permanent physical effects, may be possessed and used by non-peace officers for the purpose of self-defense. Mace is not either an offensive weapon or a dangerous weapon. Mace, furthermore, may be used as a means of reasonable force to repel an attacker. (Pottorff to Robinson, State Senator, 3-28-80) #80-3-22 (L)

March 28, 1980

MUNICIPALITIES: Municipal Transit Systems—§§28E.6, 28E.17 and 284.12(10), The Code 1979. Cities can share use of a municipal transit system through Chapter 28E. The tax authorized by §384.12(10) can only be levied if the revenues of the municipal transit system are insufficient. (Blumberg to Kirkenslager, State Representative, 3-28-80) #80-3-23 (L)

March 28, 1980

FINANCIAL INSTITUTIONS; HOME MORTGAGES: Analysis of eight questions interpreting various state and federal statutes relating to home mortgage instruments and transactions. United States Constitution, art. I, §10, cl. 1; Pub.L. No. 96-161, §§104, 105(a)(b)(d); 12 U.S.C. §1464(a); 12 C.F.R. §545.6-11(f)(g); 12 C.F.R. 590.2; 1979 Session, 68th G.A., ch. 132, §16, further amending 67th G.A., ch. 1190, §12(2)(c), as amended by 1979 Session, 68th G.A., ch. 130, §22; 1979 Session, 68th G.A., ch. 130, §19(a); §§4.5, 535.2(3)(a), 535.2(4), The Code 1979. Iowa follows the lien theory of mortgages, a real estate contract transfers equitable title to the land. The increase of mortgage interest rates as the result of a sale of land by real estate contract by the employment of a due-on-transfer provision contained in a mortgage contract should not be based solely on the lender's economic interest (i.e., increase in maximum permissible interest rates), but should bear a rational relationship to the probable alteration of risk to security or likelihood of repayment. At no time can the rate of interest exceed the maximum permissible interest rate for mortgages which can vary from nine percent to the maximum rate under Public Law 96-161, §105, depending on the date the mortgage instrument was executed, the terms of the mortgage, the location of the property, and the type of institution (i.e., federal or state) issuing the mortgage. The Legislature can pass legislation affecting existing contracts so long as the impairment of contract does not violate the provisions of the United States Constitution, art. I, §10, cl. 1, as interpreted by the United States Supreme Court. (Miller, Hagen and Norby to Holden, State Senator, 3-28-80) #80-3-24

Honorable Edgar H. Holden, State Senator: We have received three letters from you requesting opinions from this office concerning various issues relating to the application of recent legislation to home mortgage instruments and the rights of the mortgagor and mortgagee thereunder. Your letters propound eight separate questions, which we have numbered I through VIII and address below.

As an introductory note, our response to your first three questions involves the scope of application and enforcement of mortgage provisions which provide for acceleration of the remaining balance of a mortgage upon transfer of the mortgaged real estate by the mortgagor. These provisions are known by various names, such as due-on-sale, due-on-conveyance, due-on-transfer, or acceleration clauses. For purposes of this opinion, the term "due-on-transfer" will be used. Further, we offer our response to your questions with the caveat that resolution of factual

questions is not an appropriate function of an Attorney General's opinion so that a definitive answer to a question that would address all situations may not be possible.

I.

Your first question stated:

Some conventional real estate mortgages contain a provision such as 'any transfer of real estate covered by this mortgage, or any part of said real estate shall give the Association the right to declare all indebtedness secured by this mortgage immediately due and payable.'

Some financial institutions have interpreted this provision to prohibit a mortgagor from entering into a contract to sell such real estate.

Most contracts do not transfer title until the mortgage is released. Can the word 'transfer' apply to equity as well as title?[1]

This question makes reference to the fact that in a sale of mortgaged property by real estate contract, the mortgagor will retain legal title, while the transferee will receive equitable title to the property. This situation is created in that Iowa follows the "lien theory" of mortgages, under which the mortgagor retains legal title to the mortgaged property, while the mortgagee takes only a security interest in the property. *See Fitzgerald v. Flannagan*, 155 Iowa 217, 135 N.W. 738 (1912). In a subsequent contract sale, the mortgagor will retain his/her legal title, but the contract purchaser will obtain an equitable title to the property. The question then arises whether the contract sale constitutes a transfer of such a nature as to trigger application of a due-on-transfer clause. The application of various acceleration or due-on-transfer clauses to transfer of equitable title pursuant to a real estate contract has been considered by several courts and commentators. These authorities are in agreement that in a jurisdiction which follows the lien theory of mortgages, a transfer by land contract does trigger application of a due-on-transfer clause, whether the clause specifically prohibits "transfer," 'sale," "alienation," or "conveyance." *Tucker v. Lassen Savings and Loan Assn.*, 526 P.2d 1109, 1173 (Cal. 1974); *Mutual Federal Savings and Loan Assn. v. Wisconsin Wire Works*, 58 Wis.2d 99, 205 N.W.2d 762, 765 (1973); Annot., 69 A.L.R.3d 718, 742 (1976); Dunn, *Enforcement of Due-on-Transfer Clauses*, 13 Real Prop., Prob. and Tr.J. 891, 912. Accordingly, we believe that under Iowa law, a real estate contract sale does trigger the application of the due-on-transfer clause specified in your question.

II.

Your second question is as follows:

Can a financial institution raise the interest rate on an existing mortgage in exchange for permitting a contract sale?

As we understand your question, it is, in essence, whether a lender can demand an increase in the interest rate on an existing mortgage in

[1] The due-on-transfer language contained in your question appears to be of very broad application, *e.g.*, it would be triggered by many types of transfer. It should be noted that the particular language of a clause may provide for a different result. For example, a clause which is triggered only by a transfer of fee title might not be triggered by a real estate contract sale.

exchange for a waiver of the lender's right to receive payment of the remaining balance due upon transfer of the mortgaged real estate. More specifically, can the lender demand an increase without having to show any justification for the increase, such an increase being limited only by the application of the usury limit.

For purposes of this opinion, we will refer to the lender's ability to demand an increase in interest rate wihtout a need to show a justification, or to demand acceleration of the balance, as "strict enforcement" of the due-on-transfer clause. In effect, strict enforcement would result in the mortgagor/seller continuing mortgage payments at an increased interest rate, or being required to pay the entire balance due, while receiving contract payments from the new buyer.

Initially, it should be noted that in regard to mortgages executed after July 1, 1979, 1979 Session, 68thG. A., ch. 132, §16(c), further amending 1978 Session, 67th G.A., ch. 1190, §12(2)(c), as amended by 1979 Session, 68th G.A., ch. 130, §22, controls this question. *See* Op. Atty. Gen. #80-2-6; #79-8-23. (This statute has a prospective effect only.) Pursuant to ch. 132, §16, a mortgage provision which prohibits transfer of the property, or alters the interest rate, repayment schedule, or term of the mortgage upon such transfer is enforceable only if the lender can show on reasonable grounds that its security interest or likelihood of repayment is impaired, based solely on criteria which are not more restrictive than used to evaluate a new mortgage. Thus, under ch. 132, §16, a lender has the opportunity to make a factual showing to support enforcement of a due-on-transfer clause.

This office cannot render a definitive opinion on enforcement of a due-on-transfer clause under ch. 132, §16, as resolution of any specific question would involve a factual determination in each instance concerning the proposed transferee and the exact language of the contractual agreements between the parties. An Attorney General's opinion cannot appropriately resolve a purely factual question.

In contrast to the above statute, 1979 Session, 68th G.A., ch. 130, §22(2)(c), temporarily provided for a total prohibition of enforcement of due-on-transfer clauses in mortgages executed during the period it was in effect. The effective period of this statute was April 6 to July 1, 1979, at which time permanent legislation, *i.e.*, 1979 Session, 68th G.A., ch. 132, §16, went into effect. (See pages 18 through 19 for discussion of the application of ch. 130, §22(2)(c) to mortgages executed by federally chartered savings and loan institutions.)

In regard to mortgages executed prior to April 6, 1979, no Iowa statute addresses the propriety of enforcement of due-on-transfer clauses, nor has the Iowa Supreme Court considered the propriety of such enforcement. The courts of many other states, however, have considered the issue of enforceability of due-on-transfer clauses. Historically, the common law position was that, in the absence of statutory provisions, due-on-transfer clauses were strictly enforceable. 59 C.J.S. Mortgages §113; Dunn, 13 Real Prop., Prob. and Tr.J. 891 at 897. In recent years, however, even in the absence of specific statutory provisions, the courts of several states have denied strict enforceability of due-on-transfer clauses on the basis of considerations of equity and restraint upon aliena-

tion. *First Southern Federal Savings and Loan v. Britton*, 345 So.2d 300 (Ala. Civ. App. 1977); *Patton v. First Federal Savings and Loan Assn. of Phoenix*, 578 P.2d 152 (Ariz. 1978); *Wellenkamp v. Bank of America*, 582 P.2d 970 (Cal. 1970); *Nichols v. Ann Arbor Federal Savings and Loan*, 73 Mich. App. 163, 250 N.W.2d 804 (1977); *Continental Federal Savings and Loan v. Fetter*, 564 P.2d 1013 (Okla. 1977); Dunn, p. 906. It should be noted, however, that no court has found a due-on-transfer clause to be invalid *per se*, but in all cases have required a showing that enforcement was justified in the particular situation considered.

The two major rationales offered by courts which have refused to strictly enforce due-on-transfer clauses are that enforcement results in an unreasonable restraint on alienation of land and/or that strict enforcement would be inequitable under the particular factual circumstances presented. For example, in *First Southern*, 345 So.2d at 303, the court states:

Whether the propriety of acceleration of a mortgage through a due-on-sale clause is tested as a reasonable restraint on alienation of property or as a resonable and equitable exercise of a contractual right in light of the purpose of the clause, does not strike us to be of great concern. We consider that the right of the mortgagee to exercise its option to accelerate payment because of a violation of a due-on-sale clause is to be recognized as is any bargained-for right in the contract.

Some jurisdictions have relied upon statutes which provided for prohibition of restraints on alienation. *Patton*, 578 P.2d at 158; *Tucker*, 526 P.2d at 1176; Annot., 69 A.L.R.3d at 727. The other jurisdictions refusing strict enforcement appear to rely on nonstatutory grounds. *First Southern; Nichols; Continental Federal;* Dunn, p. 905-906.

The framework for decisions in those cases denying strict enforcement requires a showing by the lender that enforcement is justified in that the transfer results in increased risk or jeopardize the security of the lender. These justifications for enforcement are weighed against the equitable considerations and the restraint on alienation caused by enforcement. In *Tucker*, 526 P.2d at 1173, the California Supreme Court summarized this process as follows:

By the foregoing language we recognized that it is not only the *justification* for enforcing a particular restraint which is relevant to the determination of whether such a restraint is 'reasonable' within the meaning of *Coast Bank;* we must also consider the *quantum of restraint*—that is, the actual practical effect upon alienation which would result from enforcement of the restraint. It is the relationship between these two factors which must govern our consideration of the enforcement of a 'due-on' clause in particular circumstances: To the degree that enforcement of the clause would result in an increased quantum of actual restraint on alienation in the particular case, a greater justification for such enforcement from the standpoint of the lender's legitimate interests will be required in order to warrant enforcement. [Emphasis in original.]

In *Continental Federal*, 564 P.2d at 1018, quoting *Ray v. Oklahoma Furniture Manufacturing Co.*, 170 Okla. 414, 40 P.2d 663, 665 (1935), the Oklahoma Supreme Court adopted the following test for determining the reasonableness of enforcement of a due-on-transfer clause.

'. . . The rule invalidating contracts in restraint of trade does not include every contract of an individual by which his right to dispose of his property is limited or restrained. * * * It seems to be clear that, like

agreements in restraint of trade, agreements restricting the use or sale of property must be reasonable to be valid. To such an agreement is likewise applicable the usual test of reasonableness, viz., whether the restriction imposed on one party is greater than is necessary for the protection of the other.' Further, it is said in 6 R.C.L. c. 194, p. 789: 'No better test can be applied to the question whether a particular contract is reasonable than by considering whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can be only oppressive, and if oppressive it is, in the eye of the law, unreasonable. It seems that the extent of the restraint imposed by the contract would be of some importance in determining its reasonableness.

The inquiry made by a court denying strict enforcement must consider both the individual transferee's credit and the type of transfer. As discussed below, a contract sale may be considered differently than an outright sale or mortgage assumption. Additionally, the type of enforcement undertaken by the lender is considered. For example, an increase in the interest rate might be sustained in a situation where acceleration of the entire balance due would be found inequitable or an unreasonable restraint on alienation.

Several rationales are commonly cited in support of strict enforcement of due-on-transfer clauses. One rationale is sanctity of contracts, which is a manifestation of judicial reluctance to modify the terms freely entered into by the parties. *Malouf v. Midland Federal Savings and Loan*, 181 Colo. 294, 509 P.2d 1240 1973); Dunn, p. 897, 904. In contrast to this concern, it has been suggested by commentators that a mortgage may well be an adhesion contract, which mitigates against strict enforcement of the contract terms. *See* 69 A.L.R.3d at 713, 725, 729; Dunn, p. 918. *See also First Southern*, 345 So.2d at 303. (As lender was the drafter of the mortgage instrument, the terms of the instrument should be construed strictly against the lender.) In *Continental Federal*, 564 P.2d at 1017, the court rejected the sanctity of contract principle, and required that enforcement be based only on those justifications considered to be the underlying purpose of the clause, stating as follows:

Acceleration clauses are bargained-for elements of mortgages and notes to protect the mortgagee from risks connected with transfer of the mortgaged property. The underlying rationale for an acceleration clause is to insure that a responsible party is in possession, to protect the mortgagee from unanticipated risks, and to afford the lender the right to be assured of the safety of his security. However, an action to accelerate and foreclose a mortgage is an equitable proceeding, and the equitable powers of the court will not be invoked to impose an extreme penalty on a mortgagor with no showing that he has violated the substance of the agreement.

As noted above, the concern usually cited as the original purpose of the due-on-transfer clause is the protection of the lender's security. *Wellenkamp*, 582 P.2d at 976; *First Southern*, 345 So.2d at 303; Dunn, p. 902. A corollary to this concern with the lender's security is a desire to avoid the necessity of foreclosure of a mortgage occasioned by transfer to a party less responsible than the mortgagor chosen by the lender. This concern reflects the idea that selection of the mortgagor is a significant step in forming a mortgage contract, and hence, continued control over the borrower, in the case of an assumption, or the possessor of the security, in the case of a sale, is a legitimate business interest of the

lender. In *First Southern*, 345 So.2d at 303, the court expressed this concern as follows:

The purpose of the clause is to insure that the party originally bargained with and upon whose economic and financial situation and reputation money was loaned, credit extended and risk of repayment assumed, will remain as owner and in possession of the security. There can be no question but that the risk of waste, failure of maintenance and resultant deterioration in the property may be greatly increased by sale to one of whom the mortgagee knows nothing. The lending of money is a personal matter between lender and borrower. It cannot be said that the conditioning of the continuation of the relationship upon the retention of the ownership of the property standing as securtiy for the debt is unreasonable or inequitable.

See also Tucker, 526 P.2d at 1175; Dunn, p. 907.

In the situation of a real estate contract sale, however, it has been suggested that the lender remains as adequately secured after the sale as before. *See Tucker*, 526 P.2d at 1174; *Nichols*, 250 N.W.2d at 808; Dunn, p. 913, *contra.*, *Mutual Federal Savings and Loan v. Wisconsin Wire Works*, 77 Wisc.2d 531, 239 N.W.2d 20, 23 (1976). In a contract sale, the mortgagor retains legal title to the property, is personally liable under the mortgage and must collect payments on the contract over a period of time. Under these circumstances, it is suggested that the mortgagor, as well as the lender, has a strong interest in insuring that a credit-worthy transferee is chosen and that the value of the property is maintained. Accordingly, the lender continues to remain secure after the sale.

Another theory supporting strict enforcement of due-on-transfer clauses is the promotion of stability of title. A transfer by contract illustrates the potential title problems. If the lender is forced to foreclose upon mortgaged property which has been transferred by real estate contract, the property will be in the possession of the transferee. The transferee will hold an equitable title to the property and the mortgagor will hold legal title. This situation will complicate the lender's ability to enforce the mortgagor's obligation as title has been partially transferred.

Another rationale relied upon in support of the lender's right to strictly enforce a due-on-transfer clause is protection of the lender's economic interest, *i.e.*, the maintenance of its loan portfolio at current interest rates. *Cherry v. Home Savings and Loan Assn.*, 276 Cal.App.2d 574, 81 Cal.Rptr. 135 (1969); *Mutual Federal Savings and Loan v. Wisconsin Wire Works*, 58 Wisc.2d 99, 205 N.W.2d 762 (1973); Dunn, p. 921. Strict enforcement of a due-on-transfer clause, as protection of the lender's economic interest, would involve either acceleration of the entire balance due, which would allow reinvestment at current rates, or an increase in the interest rate in exchange for waiver of enforcement of the clause. Protection of the lender's economic interest has been rejected by some courts as a legitimate basis for enforcement. *Wellenkamp*, 582 P.2d at 976; *Nichols*, 250 N.W.2d at 809, 69 A.L.R.3d at 730. In *Tucker*, 526 P.2d at 1173, the court states as follows:

In any event, a restraint on alienation cannot be found reasonable merely because it is commercially beneficial to the restrainor. Otherwise one could justify any restraint on alienation upon the ground that the lender

could exact a valuable consideration in return for its waiver, and that sensible lenders find such devices profitable.

and at 1175, fn. 10:

We reject the suggestion that a lender's interest in maintaining its portfolio at current interest rates justifies the restraint imposed by the exercise of a 'due-on' clause upon the execution of an installment land contract. Whatever cogency this argument may retain concerning the relatively mild restraint involved in the case of an outright sale (a matter to which we do not now address ourselves), it lacks all force in the case of the serious and extreme restraint which would result from the automatic enforcement of 'due-on' clauses in the context of installment land contracts.

In *First Southern*, 345 So.2d at 303, the court states:

. . . in this case, it is openly stated that the purpose of threatening to exercise the option of accelerating payment was to force an acceptance of an increase of the rate of interest for the remainder of the term of the mortgage. There is no indication that acceleration was due to the increase of risk of jeopardy to the security. The purpose of the clause was not being served by the threatened acceleration but the unrelated financial interest of the lender was the reason for the acceleration.

Protection of the lender's economic interest has also been rejected as a justification for strict enforcement on the basis that this was not the original purpose of the due-on-transfer clause; rather, use of the clause for this purpose began only during the recent inflationary period. *First Southern*, 345 So.2d at 302. Additionally, if the terms of the mortgage are construed against the lender, as drafter of the instrument, protection of the lender's economic interest may not be recognized as a basis for strict enforcement if the instrument does not expressly refer to such protection. In *Continental Federal*, 564 P.2d at 1019, the court expresses this concern as follows:

We, therefore, find that it was unreasonable and inequitable for appellant to impose a one percent transfer fee as a condition precedent to giving its consent to transfer the mortgage because neither the note nor the mortgage contained such a provision; it was not a bargained-for element of the note and mortgage; it bore no relationship to the actual cost of transferring the mortgage, and there was no jeopardizing of mortgagee's security.[2]

Additionally, even a court which views strict enforcement with favor may consider the rate increase in relation to current interest rates to determine if the increase creates a windfall to the lender. *Mutual Federal Savings and Loan v. Wisconsin Wire Works*, 239 N.W.2d at 24.

Another concern which has been recognized in connection with due-on-transfer clauses is the effect of the enforcement of these clauses on the alienability of real estate. Strict enforcement has been found by some courts to constitute an impermissible restraint on alienation even though the clauses do not literally prevent sale of the mortgaged property. In *Nichols*, 250 N.W.2d at 805, the Michigan Supreme Court states:

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[2] The mortgage contained the following due-on-transfer clause: "The conveyance or sale of the mortgaged premises without the written consent of mortgagee shall entitle mortgagee, at its option, to declare the entire indebtedness due and payable forthwith, and mortgagee shall be entitled to foreclose this mortgage if the balance is not paid."

Strictly speaking, as defendant points out, the 'due-on-sale' clause in question does not fit within the definition of a restraint on alienation found in the *Restatement of the Law of Property.* Neither expressly nor by implication does it prohibit plaintiffs Kempf from alienating their interest. It does not provide that they are to be divested of their interest upon alienation. An author dealing with this type of clause, however, has written:

'Although written as an acceleration clause, the due on sale clause directly and fundamentally burdens a mortgagor's ability to alienate as surely and directly as the classical promissory restraint. As such, the due-on-sale clause is truly a direct restraint insofar as the category of direct restraints can be articulated.' Volkmer, *The Application of the Restraint on Alienation Doctrine to Real Property Security Interests,* 58 Iowa L.Rev. 747, 774 (1973).

and at 806:

If the mortgage clause defendant seeks to enforce can be labeled a restraint on alienation only by expanding the restatement definition, we do not hesitate to stretch the term to include this 'due-on-sale' clause. '[I]t would appear that the due-on-sale clause is so closely akin to the promissory restraint as to justify designating it a direct restraint.' 68 Iowa L.Rev., *supra,* 773-774.

Transfers by real estate contract present a unique situation in regard to a possible unreasonable restraint on alienation produced by enforcement of a due-on-transfer clause. The mortgagor/seller will not immediately receive the entire purchase price, as in an outright sale. Accordingly, the contract seller might have a difficult time paying the entire mortgage balance if the lender sought to enforce an acceleration of the entire balance. *See Tucker,* 526 P.2d at 1174; Dunn, p. 913. In *Tucker,* 526 P.2d at 1175, fn. 10, the court distinguishes a contract sale from an outright sale as follows:

We reject the suggestion that a lender's interest in maintaining its portfolio at current interest rates justifies the restraint imposed by the exercise of a 'due-on' clause upon the execution of an installment land contract. Whatever cogency this argument may retain concerning the relatively mild restraint involved in the case of an outright sale (a matter to which we do not now address ourselves), it lacks all force in the case of the serious and extreme restraint which would result from the automatic enforcement of 'due-on' clauses in the context of installment land contracts.

If the lender will accept an interest rate increase in exchange for waiver of acceleration, however, a less restraining situation is presented. The mortgagor/seller will receive installments pursuant to the contract of sale, which will provide a source of funds from which to make the increased mortgage payments. The increase in the interest rate may, however, cause the mortgagor/seller to increase the contract price. (It should be noted that the present federal exemption from usury rates applies only to financial institutions, not to individuals. *See* Pub.L. No. 96-161, §105(a) (1979). While a lender may charge any rate to the mortgagor/seller, the mortgagor/seller may not exceed the rate prescribed by §535.2, The Code 1979, in connection with a contract sale.) To this extent, the interest rate increase does present a barrier to alienation. It may be questioned, however, whether this is in fact a restraint on alienation of the land, or simply deprives the mortgagor of selling the benefit of a lower interest rate, which might be considered a contract benefit apart from the real estate itself. Dunn, p. 925-929. In other words, the mortgagor/seller who cannot sell his/her property with benefit of a

lower interest rate is simply placed on a par with other sellers who must find buyers who will finance the sale at current interest rates. Nevertheless, several courts have found that an interest rate adjustment provides sufficient restraint to a contract sale that an increase is not enforceable without a showing that repayment is threatened or security impaired by the transfer. *Patton*, 578 P.2d at 158; *Tucker*, 526 P.2d at 1169; *Nichols*, 250 N.W.2d at 804.

As stated above, the Iowa Supreme Court has never decided a case directly involving the issue presented herein. A review of the case law of other states shows a significant trend away from strict enforcement of due-on-transfer clauses. It also appears that recent cases have shown a rejection of the lender's economic interest as a sole justification for strict enforcement of a due-on-transfer clause. It is likely that, at a minimum, the Iowa Supreme Court would reject both strict enforcement of due-on-transfer clauses and protection of the lender's economic interest as a sole basis for enforcement. Accordingly, any degree of enforcement must be justified by some factual showing of impairment of security or likelihood of repayment. If an interest rate increase were demanded in exchange for waiver of strict enforcement (acceleration of entire balance due), the increase should bear some relation to the degree of risk presented to the lender by the transfer, and such increase would not be justified merely by the fact that the interest rate for new home loans had suddenly accelerated. Additionally, strict enforcement by acceleration of the entire balance of the mortgage would appear to be justified in very few cases, as such acceleration would present a great restraint upon alienation through real estate contract and would be necessary as protection of the lender's security only in extreme situations.

As factual determinations would be involved in resolving your question, our opinion cannot be more definitive. We do believe, however, that if a transferee was shown to present no risk to security or likelihood of repayment, an Iowa court would find that strict enforcement of a due-on-transfer clause would be inequitable and an impermissible restraint on alienation.

In a case where an interest rate increase may be properly obtained, this increase is subject to the limitation imposed by the Iowa usury statute, §535.2, The Code 1979. (Temporary federal legislation provides for an exemption of financial institutions from state usury laws. Pub.L. No. 96-161, §105(a) (1979). This federal legislation applies only to mortgages executed between December 28, 1979, and March 31, 1980. *See* Pub.L. No. 96-161, §105(d) (1979). Additionally, this federal exemption may be ended at any time by state legislation which places a limit on interest rates, discount points, or other charges made in connection with a loan, mortgage, or advance. Pub.L. No. 96-161, §105(b) (1979).)

For purposes of ch. 535, The Code 1979, the definition of a "loan" includes "the refinancing of a prior loan, whether or not the borrower was also the borrower under the prior loan, and the assumption of a prior loan." 1979 Session, 68th G.A., ch. 130, §22(1). In our opinion, a rate increase which compensates for risks created by a transfer is implicitly a "refinancing of a prior loan." In the case of an assumption of a prior loan, the lender is authorized to charge a processing fee which is disregarded for purposes of determining the maximum charge allowed

under §535.2. 1979 Session, 68th G.A., ch. 130, §22(2). In regard to an adjustment of the rate occasioned by a transfer by real estate contract, the lender has no statutory authority to charge any processing fees. Ch. 130, §22(2) provides the exclusive authority for charging such fees, and makes no provision for charging a processing fee in connection with a contract sale of the mortgaged property. Therefore, any rate increase must be solely attributable to the risks created by the transfer, but must not exceed the limitation imposed by §535.2.

Section 535.2 provides for a maximum lawful rate of interest in any written agreement as follows:

The maximum lawful rate of interest which may be provided for in any written agreement for the payment of interest entered into during any calendar quarter commencing on or after July 1, 1978, shall be two percentage points above the monthly average ten-year constant maturity interest rate of United States government notes and bonds as published by the board of governors of the federal reserve system for the calendar month second preceding the first month of the calendar quarter during which the maximum rate based thereon will be effective, rounded to the nearest one-fourth of one percent per year.

Section 535.2(3)(a), The Code 197T9. Upon transfer, interest rate adjustments to mortgages executed after August 3, 1978, may be made to any rate which does not exceed the applicable usury rate, as equitable considerations discussed earlier may require. Section 535.2(4), however, provides as follows:

Notwithstanding the provisions of subsection 3, with respect to *any agreement* which was executed prior to August 3, 1978, and which contained a provision for the adjustment of the rate of interest specified in that agreement the maximum lawful rate of interest which may be imposed under that agreement shall be nine cents on the hundred by the year, any excess charge shall be a violation of section 535.4. [Emphasis supplied.] (Reenacted 1979 Session, 68th G.A., ch. 130, §17.)

This provision has the effect of limiting the rate of interest to nine percent on certain agreements entered before August 3, 1978, and raises the question whether an interest rate increase in connection with a contract sale of mortgaged property should be subject to this nine percent limitation. The essential question is whether a due-on-transfer clause is a "provision for the adjustment of the rate of interest" and, therefore, within the scope of §535.2(4).[3]

In regard to mortgage instruments which *expressly* provide for adjustment of the interest rate upon transfer of the property, it appears that nine percent is the maximum rate that may be applied after adjustment. This type of clause clearly provides for an adjustment of the interest rate upon a foreseeable contingency. The very fact that the due-on-transfer clause was included in the agreement indicates that the possibility of a transfer was contemplated by the parties. As this possibility

[3] Initially, the federal usury exemption does not suspend the effect of §535.2(4). Pub.L. No. 96-161, §105 applies to loans, mortgages, or advances made after December 28, 1979. A lender's consent to transfer of the mortgaged property by a real estate contract does not involve a loan, mortgage, or advance by the lender, so that the federal legislation does not exempt the application of §535.2(4), if in fact §535.2(4) applies to due-on-transfer clauses.

was foreseeable, the mortgagor should not be deprived of reliance on the expectation that his/her interest rate would not rise above nine percent. *See* Op. Atty. Gen. #79-10-11. Section 535.2(4) does not differentiate as to the type of contingency that causes an interest rate adjustment, so there appears to be no basis upon which to exclude due-on-transfer clauses which expressly provide for adjustment of the interest rate upon transfer of the property from the scope of this section.

In combination with the previous discussion regarding enforceability of due-on-transfer clauses, the following scheme emerges. A lender may not withhold consent to a transfer if no risk is presented to security or likelihood of repayment. An increase in interest may be allowed to compensate for a risk in security caused by the transfer. This increase may not raise the total rate to more than nine percent for mortgages executed prior to August 3, 1978, which contain an express provision in the due-on-transfer clause for the adjustment of the rate of interest in conjunction with a transfer of the mortgaged property. The lender would be justified in withholding consent to transfer if the risk presented by the transfer could not be compensated for by an increase to nine percent. The determination of the interest rate increase should, however, be made in relation to criteria applicable at the time the mortgage was originally entered. In other words, the interest rate increase for a particular transferee should reflect the interest rate which that transferee would have received at the time the original mortgage was executed. This type of determination is necessary to properly give effect to the maximum limit imposed by §535.2(4). If this determination was based upon criteria currently applied, §535.2(4) could effectively bar transfers of mortgaged property, as it may be unlikely in a time of rising interest rates that even the most credit-worthy transferee could qualify for a new mortgage at an interest rate of nine percent. This would be an absurd result in light of the purpose of §535.2(4) and the earlier discussion regarding enforcement of due-on-transfer clauses. We would, however, recommend legislation to allow a reasonable processing fee to be charged in connection with transfers by real estate contract. *See* 1979 Session, 68th G.A., ch. 130, §22(2).

Another area of consideration for resolution of this question concerns due-on-transfer clauses which do not include an express provision for the adjustment of interest rates. Such clauses do not clearly fall within the scope of §535.2(4). An interest rate adjustment is frequently made, but could be seen as consideration for waiver of the lender's right to accelerate the balance. As the earlier discussion indicates, however, strict enforcement by acceleration of the entire balance is very unlikely if equitable reasoning is applied, particularly when the transfer is a contract sale. Thus, any enforcement of this type of clause is likely to involve merely an interest rate increase. If such interest rate increase is not expressly contained in the due-on-transfer provision for the adjustment of rate in the agreement, then §535.2(4), The Code 1979, does not apply. Consequently, the rate of adjustment is not limited to nine percent, but is limited in our opinion to the equitable and legal considerations set out previously.

We would note that the federal Homeowners Loan Act, 12 U.S.C. §1464(a) and 12 C.F.R. §545.6-11(f)(g), has preempted state prohibition of such due-on-transfer clauses with respect to any federal savings and

loan mortgage executed after July 31, 1976. *See* Op. Atty. Gen. #80-1-4. The Home Loan Bank Board has specifically provided that the only non-contractual limitations on the exercisability of such clauses are those enumerated in 12 C.F.R. §545.6-11(g). Even under the federal regulations, such adjustment in federal savings and loan instruments are governed by the terms of the contract, and the exact terms of the contractual provisions are deferred to the parties. 12 C.F.R. §545.6-11(f) states that such clause:

shall be governed exclusively by the terms of the contract between the association and the borrower, and all rights and remedies of the association and borrower thereto shall be fixed and governed by said contract.

Mortgage contracts involving Iowa national and state financial institutions and Iowa property are generally governed by state law. *See* Op. Atty. Gen. #80-3-11. Whether state usury laws are applicable to federal financial institutions making loans secured by Iowa property is dependent upon whether those state laws have been preempted by federal law. Federal law, 12 U.S.C. §85, does set the interest rate for loans made by national banks, including mortgages, at the rates allowed by the state or at one percent in excess of the "discount rate on ninety-day commercial paper" in effect at the federal reserve district bank in which the national bank is located. In Iowa, the state usury rate for mortgages has generally been equal to or greater than the one percent above the discount rate so that there was effectively no preemption of the state rate except in the very recent period of an accelerating prime rate. A similar situation has existed under the Federal Home Loan Bank Board jurisdiction at 12 U.S.C. §1430 where the interest rate on such loans is set by the Home Loan Bank. In this case as well we are advised that the Board rate has not exceeded the Iowa rate except once again in the recent period of accelerating interest rates. Again, until recently there has been no effective preemption suspending the state rate. Prior to December 29, 1979, and Pub.L. No. 96-161, §104, no broad preemptive federal law covering home loan mortgage interest rates existed which suspended all state home mortgage interest rate laws except in very specific federally funded housing projects or insured homes (e.g., FHA-VA, 38 U.S.C. §1803(c)(1) and §§682.45-46, The Code 1979) not relevant to this discussion.

If Congress has not entirely foreclosed state legislation in a particular area, a state statute is void only to the extent that it actually conflicts with a valid federal statute. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978); *Glendale Fed. Savings and Loan Assn. v. Fox*, 459 F.Supp. 903, 907 (C.D. Cal. 1978). A conflict exists "where compliance with both federal and state regulation is a physical impossibility . . .," *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). Absent a federal statute or regulation effectively overriding the state rate, the interest rate restriction of §535.2(4) would still be applicable to those existing loans as the parties would have assumed that the nine percent usury limitation applied on all contracts executed prior to August 3, 1978, and such control of interest rates at that time was effectively based on the state rate.

The state's control of contract terms relating to interest rates charged by either federal or state financial institutions has been recently pre-

empted. As discussed on page 12 of this opinion, state usury laws relative to home mortgages executed or committed between December 29, 1979, and March 31, 1980, have been preempted. *See* Pub.L. No. 96-161, §104 and 12 C.F.R. §590.2(d). An exercise of a due-on-transfer clause will in all probability, at this time, relate to mortgage contracts executed prior to December 28, 1978, and consequently, the applicable state interest rate ceiling will control if the mortgagor remains the same under the instrument. However, if the original mortgagor is released and a new mortgagor (a new purchaser) is substituted in the context of a federal savings and loan mortgage, then under 12 C.F.R. §545.6-11(g)(3) and the recent H.O.L.A. Agency Interpretation #80-40, the substitution of a new obligor or mortgagor creates a new loan for the purposes of Pub.L. No. 96-161, §105(a)(1)(b). Presumably, the federal savings and loans are not subject to state usury rates in these circumstances.[4]

Even in making permissible interest rate increases, federal savings and loan associations must give consideration to the "best practices of local mutual thrift and home-financing institutions in the United States." *See* 12 U.S.C. §1464. Such practices could include, as evidenced by the cases cited herein, the equitable considerations delineated earlier. The federal regulations issued by the federal Home Loan Bank Board, 12 C.F.R. 556.9, seem to contemplate such equitable considerations including the possibility of waiving rights to any interest rate increases whatsoever in the event of extreme hardship.[5] At 12 C.F.R. 556.9, it states in part:

However, the Board believes that there *may be other situations* respecting loans made on the security of borrower-occupied homes in which, depending on the circumstances of the individual case, it will be appropriate for Federal associations to waive their contractual right to accelerate. These situations *include* transfers of title to members of the borrower's immediate family, including a former spouse in connection with a divorce, who occupy or will occupy the property (to the extent not covered by §545.6-11(g)(1)(iii)). In addition, *associations should consider waiving any right to require an increase in interest rate pursuant to a due-on-sale clause in cases of extreme hardship to the existing borrower.* [Emphasis supplied.]

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[4] This recent federal agency interpretation seems to conflict with the definition of "loans made after the date of enactment" contained in 12 C.F.R. §590.2(d) and Pub.L. No. 96-161, §104. The Agency Interpretation #80-40 also assumes that the simple alteration of of interest rates constitutes a "material change," thereby constituting the "making of a loan." Such assumptions are questionable and therefore, until a court has issued a final judgment on this matter, such an adjustment of rates is at some risk.

[5] It is expected that the federal courts will delineate these considerations in future cases. The court has already recognized such equitable considerations in *Glendale Fed. Savings and Loan Assn. v. Fox*, 459 F.Supp. 903, 911 (C.D. Cal. 1978). At footnote 13, the court states: "Section 545.6-11(g) contains the only express limitations on the exercise of due-on-sale clauses by federal associations. However, the Bank Board's Statement of Policy with respect to the use of due-on-sale clauses expresses the Bank Board's view that there may be circumstances other than those described in 12 C.F.R. §545.6-11(g)(1) where a federal association should consider waiving its contractual right to accelerate. 12 C.F.R. §556.9.

III.

Can a mortgagee restrain competition by prohibiting a contract sale of real estate?

As we understand this question, you are referring to a provision in a mortgage which absolutely prohibits the transfer of the mortgaged property, in contrast to a due-on-transfer clause (which may provide for acceleration of the balance or interest rate adjustment upon transfer). In regard to mortgages executed between April 6 and July 1, 1979, this type of clause is totally prohibited in connection with transfers where the property will be used by the transferee as his/her residence. 1979 Session, 68th G.A., ch. 130, §22(c). Such total prohibition of acceleration or due-on-transfer clauses in the context of mortgages issued by federal savings and loans is unconstitutional in that such total state prohibition has been preempted by the federal Homeowners Loan Act. *See* Op. Atty. Gen. #80-1-4.

In regard to mortgages executed after July 1, 1979, a clause prohibiting transfer of the property may be enforced only to the extent allowed by 1979 Session, 68th G.A., H.F. 685, §16(c), which provides:

A provision . . . which prohibits the borrower from transferring his or her interest in the property for use by [a] third party as his or her residence . . . shall not be enforceable except as provided in the following sentence. If the lender on reasonable grounds believes that its security interest or the likelihood of repayment is impaired, based solely on criteria which is not more restrictive than that used to evaluate a new mortgage loan application, the lender may accelerate the loan, or to offset such impairment, may adjust the interest rate, the repayment schedule or the term of the loan.

This statute appears to prohibit strict enforcement by prohibition of a transfer, but allows the lender to accelerate the loan or adjust the terms of the loan to the extent necessary to protect security and likelihood of repayment.

No Iowa statute addresses the validity of such clauses in those mortgages executed prior to April 6, 1979. Further, in contrast to the earlier discussion concerning enforceability of due-on-transfer clauses, the enforceability of absolute prohibitions of transfer do not appear to have been considered by the courts of other states. Many of the considerations discussed in connection with the enforceability of due-on-transfer clauses are equally relevant to enforceability of absolute prohibitions of transfer of mortgaged property by real estate contract.

In our opinion, rigid enforcement of an absolute prohibition of transfer clearly presents an impermissible restraint on alienation. Attempted enforcement of an absolute prohibition of transfer would present a compelling case for relief to the mortgagor in light of equitable considerations. It appears that strict enforcement of an absolute prohibition on transfer would be proper only in an extreme case where any transfer, even accompanied by acceleration of the balance or an interest rate increase, would impair security or likelihood of repayment to the lender. Such an instance seems rather improbable.

In essence, it appears that an absolute prohibition of transfer by real estate contract could be interpreted in one of two ways. First, such a prohibition could be interpreted in essentially the same manner as due-

on-transfer clauses, *i.e.*, transfers would be allowed despite the prohibition if the transfer presents no impairment of security or likelihood of repayment to the lender, or if such impairment could be compensated for by adjustment of the terms of the mortgage. Second, given the extreme restraint on alienation presented by the terms of such a clause, such clauses might be found to be unenforceable *per se*. This conclusion would effectively negate clauses absolutely prohibiting transfer of mortgaged property by real estate contract.

IV.

When the Superintendent of Banking computes and announces the usury rate for the following month, what date does that rate become effective?

Your inquiry as to effective date of usury rates refers to 1979 Session, 68th G.A., ch. 130, §19(a), effective July 1, 1979, which states as follows:

a. The maximum lawful rate of interest which may be provided for in any written agreement for the payment of interest entered into during any calendar month commencing on or after the effective date of this Act shall be two percentage points above the monthly average ten-year constant maturity interest rate of United States government notes and bonds as published by the board of governors of the federal reserve system for the calendar month second preceding the month during which the maximum rate based thereon will be effective, rounded to the nearest one-fourth of one percent per year.

On or before the twentieth day of each month the superintendent of banking shall determine the maximum lawful rate of interest for the following calendar month as prescribed herein, and shall cause this rate to be published, as a notice in the Iowa administrative bulletin or as a legal notice in a newspaper of general circulation published in Polk County, prior to the first day of the following calendar month. This maximum lawful rate of interest shall be effective on the first day of the calendar month following publication. The determination of the maximum lawful rate of interest by the superintendent of banking shall be exempt from the provisions of chapter seventeen A (17A) of the Code.

The Superintendent of Banking shall determine the maximum lawful rate of interest for the *following calendar month* on the twentieth day of each month. The rate becomes effective the *first day* of each month.

V.

Can a financial institution take application for a loan at an interest rate prior to the actual effective date?

Yes. We assume that by application you mean the taking of information or credit data for a loan which will be made after the effective date of the newly announced rate of interest or, in other words, after the first of the month. If the application is more than a mere instrument of lendee information and rises to the level of a contract, then the agreement may bind the parties to the then legal interest rate unless the agreement specifies otherwise. The language of the application must be examined so as to determine what the terms of the agreement or contract are. So long as the actual exchange of money and assessment of interest do not occur or commence prior to the first of the month of the applicable rate, such transactions are within the scope of the statutory language set out above in 1979 Session, 68th G.A., ch. 130, §19(a).

VI.

If a financial institution has given a customer a commitment for a mortgage at a maximum rate subject to the deposit of commitment fee

equal to the service charge allowable by law, and the commitment fee is not promptly submitted, can that financial institution raise the interest rate of commitment prior to the effective date of an allowable increase?

If the commitment fee is not promptly submitted, then the oral or written agreement presumed would be breached and the agreement would be null and void. The rate of interest would be open to negotiation, but in no event could exceed the maximum allowable interest rate for that month unless the loan was not made until after the effective rate had changed after the first of the month as discussed above.

We would reiterate that the Iowa law limiting rates on home mortgages has been preempted by federal legislation for mortgage loans entered into during the period of December 29, 1979, to March 31, 1980. Based on the latest available information, the federal preemption may be extended or made permanent by the United States Congress. *See* 93 Stat. 1234, §105(a). This preemption could be overriden by an act of the Iowa Legislature pursuant to 93 Stat. 1234, §105(b).

VII.

The last bill concerning usury that was passed by the General Assembly prohibited the charging of prepayment penalties by financial institutions on real estate mortgages under certain conditions, transfers of title for instance, which became law in August, 1978. Does this provision in the law prohibit a financial institution from collecting a prepayment penalty after the enactment of the law on a mortgage which was executed prior to the effective date?

No. 1979 Session, 68th G.A., ch. 130, §§24 and 25, amended ch. 1190, §13(1-2), effective July 1, 1979, relative to prepayment penalties. Sections 24 and 25 state:

As used in this section, 'loan' means a loan of money which is wholly or in part to be used for the purpose of purchasing real property which is a single-family or a two-family dwelling occupied or to be occupied by the borrower, or for the purpose of purchasing agricultural land. 'Loan' includes the refinancing of a contract of sale, and the refinancing of a prior loan, whether or not the borrower also was the borrower under the prior loan, and the assumption of a prior loan.

Whenever a borrower under a loan prepays part or all of the outstanding balance of the loan, the lender shall not receive an amount in payment of interest which is greater than the amount determined by applying the rate of interest agreed upon by the lender and the borrower to the unpaid balance of the loan for a period of time during which the borrower had the use of the money loaned; and the lender shall not impose any penalty or other charge in addition to the amount of interest due as a result of the repayment of that loan at a date earlier than is required by the terms of the loan agreement. A lender may, however, require advance notice of not more than thirty days of a borrower's intent to repay the entire outstanding balance of a loan if the payment of that balance, together with any partial prepayments made previously by the borrower, will result in the repayment of the loan at a date earlier than is required by the terms of the loan agreement.

Absent language to the contrary, a statute is presumed to be prospective in its operation unless expressly made retroactive. Section 4.5, The Code 1979. Because there is no mention made of retroactive application, this statute must be considered prospective in nature and would only apply to those home mortgages entered into after the respective effective dates of the legislature, or August 3, 1978, and July 1, 1979.

VIII.

If a financial institution can charge a prepayment penalty in the above case, can the General Assembly enact a statute which would be retroactive in nature such as Chapter 654.14 of the Code of Iowa concerning moratorium continuance?

As indicated in response to Question VII above, the legislation can expressly indicate through appropriate language that its enactments have retroactive effect, but a constitutional issue may arise when the retrospective legislation seeks to alter preexisting contractual arrangements. U.S. Const., art. I, §10, cl. 1 provides: "No state shall . . . pass . . . any law impairing the obligation of contracts."

The contract impairment clause of the Constitution does not, however, restrict absolutely the power of the state to legislate in the interest of morals, health and safety of the public. *See People of New York ex rel. New York Electric Lines v. Squire*, 145 U.S. 175, 12 S.Ct. 880, 36 L.Ed. 666 (1892); *Aetna Insurance Co. v. Chicago Great Western Railway Co.*, 190 Iowa 487, 180 N.W. 649 (1920). This concept of permissible intervention was reviewed most extensively by the United States Supreme Court in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727, *reh. denied*, 439 U.S. 86, 99 S.Ct. 233, 58 L.Ed.2d 201 (1978):

First of all, it is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.' *Manigault v. Springs*, 199 U.S. 473, 480, 50 L.Ed. 274, 26 S.Ct. 127. As Mr. Justice Holmes succinctly put the matter in his opinion for the Court in *Hudson Water Co. v. McCarter*, 209 U.S. 349, 375, 52 L.Ed. 828, 28 S.Ct. 529: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.'

438 U.S. at 241.

In the context of home mortgage financing, economic interests of the state may justify the exercise of other protective power, notwithstanding interference with existing contract. *See Home Bldg. and Loan Assn. v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934). The existence of an important public interest is not always sufficient to overcome the constitutional prohibition in the context of security instruments. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92, *reh. denied*, 431 U.S. 975, 97 S.Ct. 2942, 53 L.Ed.2d 1073 (1977).

The current standard to determine whether the state's police power impermissibly interferes with an existing private contract obligation is to analyze the "substantial impairment" of the contract by the legislative intervention. *See Allied*, 438 U.S. at 244-245. In other words, if the

impairment of the contract is minimal, the court's inquiry may be minimal; if impairment is great, the analysis by the court will be severe and careful. Other considerations include such concerns as the existence of an emergency, whether the legislation protects basic interests or special interests, deference to state legislation and whether or not the impairment alters the only remedies under the contract or the basic rights of the contracting parties. *See Allied*, 438 U.S. at 249-250, 57 L.Ed.2d at 1279. In rejecting the Minnesota state law challenged under the Contract Clause, the United States Supreme Court in *Allied*, 438 U.S. at 250, held:

This Minnesota law simply does not possess the attributes of those state laws that in the past have survived challenge under the Contract Clause of the Constitution. The law was not even purportedly enacted to deal with a broad, generalized economic or social problem. *Cf. Home Building and Loan Assn. v. Blaisdell*, 290 U.S. at 445, 78 L.Ed. 413, 54 S.Ct. 231, 88 A.L.R. 1481. It did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, but invaded an area never before subject to regulation by the State. *Cf. Veix v. Sixth Ward Building and Loan Assn.*, 310 U.S. 32, 38, 84 L.Ed. 1061, 60 S.Ct. 792. It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships—irrevocably and retroactively. *Cf. United States Trust Co. v. New Jersey*. 431 U.S. at 22, 52 L.Ed.2d 92, 97 S.Ct. 1505. And its narrow aim was leveled, not at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees. 'Not Blaisdell's case, but Worthen's (*W. B. Worthen Co. v. Thomas*, [292 U.S. 426, 78 L.Ed. 1344, 54 S.Ct. 816, 93 A.L.R. 173]) supplies the applicable rule' here. *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. at 63, 79 L.Ed. 1298, 55 S.Ct. 555, 2 Ohio Ops. 223, 97 A.L.R. 905. It is not necessary to hold that the Minnesota law impaired the obligation of the company's employment contracts 'without moderation or reason or in a spirit of oppression.' *Id.*, at 60, 79 L.Ed. 1298, 55 S.Ct. 555, 2 Ohio Ops. 223, 97 A.L.R. 905. But we do hold that if the Contract Clause means anything at all, it means that Minnesota could not constitutionally do what it tried to do to the company in this case.

Perhaps the most relevant cases to such proposed retroactive legislation relate to the remedy of foreclosure of mortgage instruments and moratoriums thereon. The early cases frequently found an impairment of existing contracts (mortgages) by state legislative action. Since the Depression, however, the United States Supreme Court's analysis adopted the considerations set out in the prior paragraphs in the context of mortgage foreclosure contract provisions. The court has not recently found any impairment of mortgage contracts when the legislative alteration of the terms of the mortgage instrument related to contractual remedies for breach, as opposed to alteration of the basic contract rights of the parties. *See East New York Savings Bank v. Hahn*, 326 U.S. 230, 66 S.Ct. 69, 90 L.Ed. 34 (1945); *Gelfert v. National City Bank*, 313 U.S. 221, 61 S.Ct. 898, 85 L.Ed. 1299 (1941); *Richmond Mortgage and Loan Corp. v. Wachovia Bank and Trust Co.*, 300 U.S. 124, 57 S.Ct. 338, 81 L.Ed. 552 (1937); *Home Bldg. and Loan Assn. v. Blaisdell* ,290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934). In analyzing these cases, it is apparent that the courts have frequently taken into consideration four basic criteria: (1) whether contractual rights or remedies are at issue, (2) the degree of impairment of the contract, (3) the impact of the impairment on the public, and (4) the economic environment in which

the legislation was promulgated. If the legislative intervention is passed in the public interest to cope with exigent economic conditions and affects a provision relating to contractual remedies and not substantial contractual rights, then there is a good probability that the courts will sustain such impairment. If the four criteria are not met, then there is an equally probable consequence of a court finding the legislative intervention unconstitutional.

As illustrated by the above discussion, your inquiry as to proposed retroactive legislation relating to contractual remedy of prepayment penalties can only be precisely answered in the context of the exact language of the proposed legislation and in relation to precise instruments affected on a case-by-case basis. While the Legislature can clearly enact retroactive legislation in the area of alteration of existing contracts, it must proceed within the constitutional framework and standards set out above.

Conclusion

A summary of the answers given to the eight questions addressed to us is inappropriate here, as most responses involve detailed considerations. We hope we have provided an overview of the relevant considerations to each question, but must again emphasize that a definitive response is made difficult, in that each question must be related to the specific and precise contractual language of the legal instrument in question and the specific factual settings in which the mortgagor, mortgagee, Legislature and citizen find themselves. Therefore, we caution the reader to apply the general legal principles set out herein to each individualized factual situation.

April 2, 1980

COUNTY ATTORNEY: Child Support Recovery Units and 28E Agreements. §§28E.1, 28E.4, 28E.12, 252B.7, The Code 1979. The county attorney, pursuant to an agreement under ch. 28E, The Code, may handle child support revovery duties for another county. The agreement may not, however, commit the full time of the county attorney to child support recovery duties. Robinson to O'Meara, Page County Attorney, 4-2-80) #80-4-1(L)

April 7, 1080

COUNTIES AND COUNTY OFFICERS. Iowa Const., art. III, §39A, ch. 344; §§332.3(5), 332.9, 332.10, 333.1-.6, 344.1, 344.2, 344.6, 344.8, 344.9, The Code 1979. A county board of supervisors cannot refuse to allow payment of a specific claim or expenditure arising within the approved budget of an elected county officeholder's office or department, as long as the expenditure is for a legitimate purpose and within budget limits. (Hyde to Fisher, Webster County Attorney, 4-7-80) #80-4-2

Monty L. Fisher, Webster County Attorney: We have received your request for an opinion from this office concerning the authority of a county officeholder to make purchases out of an approved office budget. Specifically, you have inquired:

When the Board of Supervisors has approved an officeholder's budget, can they later deny an officeholder the authority to make [specific] purchases, even though the officeholder is staying within the budget, and is making a purchase he or she deems necessary for the efficient operation of their office?

Your question requires an analysis of the roles elected county officeholders and the county board of supervisors each play in the financial management of a county's governmental operation. Ch. 344, The Code 1979, requires each "elective or appointed officer of any county having charge of any county office or department" to prepare and submit to the county board of supervisors each year a detailed, itemized budget estimate, "showing the *proposed* expenditures of his office or department for the following fiscal year." Section 344.1, The Code 1979. The board of supervisors shall then appropriate by July 31 of every year "such amounts as are *deemed necessary* for each of the different county officers and departments during the ensuing fiscal year." Section 344.2, The Code 1979. Such appropriations are to be itemized in the same manner that the accounts are itemized on the records of the county auditor.

Once budget needs are determined and approriated, §344.10, The Code 1979, provides:

It shall be unlawful for any county official, the expenditures of whose office come under the provisions of this chapter ["County Budget"], to authorize the expenditure of a sum for his department larger than the amount which has been appropriated by the county board of supervisors. Any county official in charge of any department or office who violates this law shall be guilty of a simple misdemeanor.

The county board of supervisors is empowered to authorize supplemental appropriations, §344.6, The Code 1979, transfer of funds within an office, §344.8, The Code 1979, or transfer of funds between offices or departments, §344.9, The Code 1979, in the event that actual receipts or expenditures differ from the estimated and appropriated budget during the course of a fiscal year. And the board of supervisors is empowered 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." Section 332.3(5), The Code 1979. *See also* §§33.2-333.6, The Code 1979.

Clearly, the involvement of the board of supervisors in the financial management of a county's governmental operation is extensive, from the levy of taxes and the initial budgetary appropriation to the approval of warrants for expenditures. "Determining the amount of money that may be collected from the taxpayers and the amount thereof to be expended for the maintenance of government" involves the exercise of discretion on the part of the board of supervisors, discretion that should be subject to liberal interpretation in light of the 1978 adoption of the county home rule amendment. Iowa Const. art. III, §39A; Op. Atty. Gen. #79-4-7; 1968 Op. Atty. Gen. 614. We believe, however, that the powers extended to the board of supervisors are to be exercised within a cooperative relationship with the elected county officeholders, who are accountable not to the board, but to the electorate. *See* 1940 Op. Atty. Gen. 5.

Thus, the board of supervisors exercises its discretion when it reviews submitted budget proposals from county offices or departments and appropriates those amounts "deemed necessary", pursuant to ch. 344, or when it adjusts appropriations. Once a budget is approved, the board of supervisors exercises an "oversight" function in its power of approval over the payment of expenditures made on behalf of the county, pursuant to §332.3(5) and §333.2, *et seq.*, ensuring that expenditures authorized

are within budget limits and for legitimate purposes. An earlier opinion from this office, 1968 Op. Atty. Gen. 614 reached a similar conclusion:

With the exception of items specified in §332.10, it is our view that the board of supervisors has the final decision as to what equipment is necessary to perform the functions of a given county office and consequently has the final decision as to what budget cuts can be made in all offices . . . within the limitation of the budget and receipts, it is our view that the elected officeholder rather than the board of supervisors has control over the procedures within the office to carry out the duties of such office as prescribed by statute.

This opinion should not be read to debilitate the express fiscal responsibilities vested in the county board of supervisors, which comprise a significant portion of its power to conduct county government operations. There are, however, limits on the fiscal powers of the board of supervisors set by those independent powers granted to elected officeholders and the nature of the county government system as it exists in Iowa.

The board appears to have proceeded as though our system of county government consisted of central management with subsidiary departments. With few exceptions, however, our statutes establish autonomous county offices, each under an elected head.

McMurray v. Board of Supervisors of Lee County, 261 N.W.2d 688, 690 (Iowa 1978). Consistent with admonitions delivered in *McMurray*, 261 N.W.2d at 691, and *Smith v. Newell*, 254 Iowa 496, 502-3, 117 N.W. 2d 883, 887 (1962), the board must not exercise its discretionary fiscal powers so as to unduly hamper the management of the county's affairs by eroding the independence and discretion which are to be afforded an elected officer. For example, the power of the board to adjust budget requests and to provide offices for county officers, §332.9, The Code 1979, and supplies for their operation, §332.10, The Code 1979, does not give the board of supervisors authority to budget a particular office out of existence or to unduly hinder the officer in the conduct of his or her duties. *See Meyer v. Colin*, 204 Neb. 96, 281 N.W.2d 737 (1979).

In conclusion, it is our opinion that the county board of supervisors cannot refuse to allow payment of a specific claim or expenditure arising within the approved budget of an elected county officeholder's office or department, as long as the expenditure is for a legitimate purpose and within budget limits, so that the board of supervisors does not unreasonably interfere with or unduly hinder the operation of county offices by separately elected county officials.

April 9, 1980

HIGHWAYS: WEEDS: Section 319.14 does not prevent the burning or spraying of right-of-way. Chapter 317 does not prevent destruction of weeds on right-of-way by adjoining landowners. (Gregerson to Gallagher, State Senator, 4-9-80) #80-4-3 (L)

April 9, 1980

SCHOOLS: Prohibition of smoking by students in school buildings or on school grounds. §§98A.2(6), 98A.3, 279.9, The Code 1979. A local school board may not designate smoking areas for adult high school students in school buildings or on school grounds. (Norby to Rapp, State Representative, 4-9-80) #80-4-4 (L)

April 11, 1980

COUNTIES; COUNTY HOME RULE AMENDMENT: Iowa Const., art. III, §39A; §§47.5(3), 47.7, The Code 1979. County home rule does not extend authority to a county to contract for periods of more than one year for provision of data processing services in connection with voter registration. (Hyde to Pavich, State Representative, 4-11-80)#80-4-5 (L)

April 11, 1980

SCHOOLS: Basic enrollment includes prekindergarten special education students. §§273.9, 281.2, 281.9, 282.3(2), 442.4(1). Students in prekindergarten special education programs are to be counted in calculating the "basic enrollment" figure for purposes of the school foundation program. Prekindergarten special education programs may include classroom instruction. (Norby to Benton, Superintendent, Department of Public Instruction, 4-11-80) #80-4-6(L)

April 11, 1980

PUBLIC OFFICIALS; VACANCIES IN OFFICE: Chapters 17A, 474, §§4.1(22), 17A.2(2), 17A.4(1), 17A.11, 28A.2(2), 69.15, 474.3-5, The Code 1979, 250 I.A.C. §§1.7(4), 7.1(4), 7.7. A "regular meeting" is a meeting held at the regular, or usual, time and place of meeting, such time and place being fixed by statute, order or regulation. A "special meeting" is characterized by the special purposes for which the meeting is called. A "special meeting" is called for the purpose of conducting particular business, or attaining specified objects. A "special meeting" is generally annuounced by a special notice apprising the participants of the special purpose for which such meeting is called. The missing of five meetings between January 22 and Febaruary 20 (a span of 29 days) is not a sufficient basis for invoking §69.15(1). As the February 22 ,1980 meeting of the Commerce Commission was held in Audubon, Iowa for the purpose of electing a Commission Chair, it was a "special", not a "regular", meeting. A hearing conducted by an agency cannot constitute a "regular meeting" within the meaning of §69.15. The Governor has no discretion to reject a sworn statement submitted pursuant to §69.15. There are two prerequisites to the submission of a sworn statement pursuant to §69.15. The person must both have no notice and have no knowledge. If the person in fact had either notice or knowledge, such person would be barred from submitting a sworn statement. If notice of a meeting is mailed or delivered to a member of a board or commission at the member's place of business, the agency has complied with its obligation to confer notice and notice, for purposes of 69.15, has been given. As of February 22, 1980, there was an inadequate basis on which to invoke the resignation provisions of §69.15 as applied to Mary Holstad. (Miller and Fortney to Rush and Small, State Senators, 4-11-80) #80-4-7

Honorable Bob Rush and Arthur A. Small, Jr., State Senators: You have requested an opinion of the Attorney General regarding the "resignation" of Mary Holstad from the Iowa State Commerce Commission, pursuant to §69.15, The Code 1979. You have submitted a series of seven questions, all of which go to the ultimate issue of whether Ms. Holstad presently occupies a position on the Commission. It is our opinion that as of February 22, 1980, there did not exist an appropriate basis for invoking the provisions of §69.15, and that as a result, the Governor's reliance on said section was misplaced. Whether events occurring after February 22 have altered Ms. Holstad's status as a Commissioner is a question which cannot be addressed by this opinion as it would require the making of factual determinations beyond the public record and the facts you have provided.

The seven questions you have propounded will be individually addressed following a recitation of the facts surrounding the "resignation" and the

applicable statutes and administrative rules. Your letter sets forth the following facts which, for the purposes of this opinion, shall be accepted as an accurate description of the events in question.[1]

1. Ms. Holstad began outpatient medical treatment in December 1979; and entered a treatment center on January 22, 1980.

2. She missed regular meetings of the Commerce Commission January 22, 31, February 7, 13 and 20 (a span of 29 days).

3. She missed special meetings on January 28 and February 22. (The latter was called February 20 for the purpose of electing a Chair.)

4. The Commission did not meet again until March 11.

5. Ms. Holstad missed eight hearings in this same period. She was personally notified of four of them before she was hospitalized. She did not receive personal notice of other hearings, including those scheduled for February 21 and 22.

6. On February 22, while hospitalized, Holstad was notified that her "resignation" had been accepted by the Governor.

7. Holstad submitted her sworn statement to the Governor as provided for in the Code. The Governor rejected the affidavit.

8. The Governor asserted authority to discharge her under §69.15, The Code 1979.

Section 69.15 reads as follows:

Any person who has been appointed by the governor to any board under the laws of this state shall be deemed to have submitted his resignation from such office if either of the following events occur:

1. He does not attend three or more consecutive regular meetings of such board. This paragraph does not apply unless the first and last of the consecutive meetings counted for this purpose are at least thirty days apart.

2. He attends less than one-half of the regular meetings of such board within any period of twelve calendar months beginning on July 1 or January 1. This paragraph does not apply unless such board holds at least four regular meetings during such period. This paragraph applies only to such a period beginning on or after the date when he takes office as a member of such board.

If such person received no notice and had no knowledge of a regular meeting and gives the governor his sworn statement to that effect within ten days after he learns of the meeting, such meeting shall not be counted for the purposes of this section.

The governor in his discretion may accept or reject such resignation. If he accepts it, he shall notify such person, in writing, that his resignation is accepted pursuant to this section. The governor shall then make another appointment to such office. Such appointment shall be made in the same manner and for the same term as in the case of other vacancies caused by resignation from such office.

As used in this section, "board" includes any commission, committee, agency, or governmental body which has three or more members.

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[1] Please note that the facts provided only define events through February 22. Consequently, the scope of this opinion is similarly limited to that point in time. We express no opinion on events which may have subsequently occurred, including whether Ms. Holstad's post-February 22 actions bear on her continuing status as a member of the Commission.

In addition to the foregoing statute, an administrative rule adopted by the Commerce Commission has a bearing on the resolution of the issue you raise. 250 I.A.C. §1.7(4) relates to sessions of the Commission. The regulation reads:

Sessions of the commission. The commission shall be considered in session at the office of the commission in Des Moines, Iowa, during regular business hours. When a quorum of the commission is present, it shall be considered a session for considering and acting upon any business of the commission. A majority of the commission constitutes a quorum for the transaction of business.

The above rule was adopted pursuant to the rulemaking procedures of ch. 17A, The Code 1979, as well as the authority conferred on the Commission by §§474.3-5, The Code 1979.

I.

The first question you raise is: "What constitutes a 'regular meeting' under §69.15?"

Neither §69.15 nor ch. 474 define the concept of "regular meeting". Historically, the law has defined "regular meeting" by placing it in contrast with the concept of "special meeting".

A "regular meeting" is defined by *Black's Law Dictionary* (Rev. 4th Ed. 1968, p. 1134) as "a meeting . . . held at the time and place appointed for it by statute, by-law, charter or other positive direction." In contrast, a "special meeting" as defined as "a meeting called for special purposes; one limited to particular business; a meeting for those purposes of which the parties have had special notice." *See Black's Law Dictionary* (Rev. 4th Ed. 1968, p. 1134).

39A, *Words and Phrases*, Special Meeting, p. 301 describes "special meetings" as those called for some particular purpose, and at which nothing can be done beyond the specified objects." 36A, *Words and Phrases, Regular Meeting*, p. 282 describes "regular meeting" as "such a meeting as the law requires to be held at a stated time and place."

The characteristics of a regular meeting are therefore meetings which are held at the regular, or usual, time and place of meeting, such time and place being set by statute, regulation, policy or custom. In contrast, a special meeting is characterized by the special purposes for which the meeting is called. A special meeting is called for the purpose of conducting particular business, or attaining specified objects. A special meeting is generally announced by a special notice apprising the participants of the special purpose for which such meeting is called.

The distinction which the law has drawn between regular meetings and special meetings has a long history, one extending back into prior centuries. However, it is one which modern courts have continued to recognize until the present day. In 1932, the Supreme Court of Oregon reaffirmed the distinction in *Stoddard v. District School Board for School District No. 91 in Jackson County*, 12 P.2d 309, 140 Or. 203 (1932). *Stoddard* involved a dispute as to the validity of employment contracts entered into by the plaintiff teachers and the defendant school district. In concluding that the school board had the authority to approve said contracts at either a regular meeting of the board or at a special meeting called for that purpose, the court defined the distinction between the two types of meetings. In the court's words:

. . . we cannot escape the conclusion that the well-known distinction between a regular meeting and a special meeting obtains.

A meeting called for a special purpose is a special meeting. A regular meeting is one not specially called, but one convened at a stated time and place pursuant to a general order, statute, or resolution.

12 P.2d 309, 312.

In 1968, litigation arose in New York over the validity of a local law, or ordinance of the City of Utica. *Barile v. The City Comptroller of the City of Utica*, 288 N.Y.S.2d 191, Misc. 2d 190 (1968). The law in question was adopted over the veto of the mayor by vote of the common council at a special meeting. New York's Muncipal Home Rule Law provided that after a local law is adopted by the local legislative body, the law should be forwarded to the mayor for approval or veto. If vetoed, the law is returned to the clerk of the legislative body to be transmitted to the body at its next regular meeting. Following transmittal, the legislative body can override the veto by taking appropriate action within thirty days. The court held that the local law was never legally adopted in that the requisite action by the common council could only be taken at a regular meeting. In expressly rejecting the argument that the taking of action at a special meeting, which could properly be taken at a regular meeting, constituted merely an "irregularity" which did not affect the validity of the action, the court stated:

When the statute says a regular meeting, it does not mean a special meeting. Thus, Second Class Cities Law §33, provides: 'The common council shall hold regular meetings at times to be determined by it * * * The president of the common council, or a majority of its members, may call a special meeting, etc.' A special meeting is a meeting called for a special purpose. It is a meeting at which nothing can be done beyond the specified objects of the call. C.F. 39A, Words and Phrases, Special Meetings, P. 301, and cases cited thereunder. A regular meeting is a meeting convened at a stated time and place pursuant to a general order, statute or resolution. C.F. 36A, Words and Phrases, Regular Meeting, p. 282 and cases cited thereunder. (Deletions in original.)

288 N.Y.S.2d 191, 196.

In *Kelly v. Village of Greenwood*, 357 So.2d 1182 (La. App. 2d Cir. 1978), the Court voided a local option election which had been scheduled by the village governing body at one of its regular meetings. While the dispositive issue for the court was the date on which the election was held, the court first defined "regular meeting" before addressing the controlling issue. The court defined "regular meeting" as "a public meeting with proper notice at the regular meeting place." 357 So.2d 1182, 1184, fn. 4.

To summarize our response to your first question, a "regular meeting" is a meeting held at the usual time and place of meeting, such time and place being fixed by statute, order or regulation. In contrast, a "special meeting" is a meeting called for special purposes.

II.

The second question you have submitted is as follows: "Is the missing of five meetings between January 22 and February 20 a sufficient basis for discharge ("resignation") under §69.15(1)?" It is our opinion that a sufficient basis is lacking.

Section 69.15 provides that a person appointed by the Governor to a board shall be deemed to have resigned upon failure to attend three or more consecutive regular meetings of such board. However, this provision is limited in that it "does not apply unless the first and the last of the consecutive meetings counted for this purpose are at least thirty days apart." *See* §69.15(1). Therefore, in order to invoke the application of the section, two elements must be present, *i.e.*, 1) the person must fail to attend at least three consecutive regular meetings; and 2) the first and the last of such meetings must be thirty days apart.

The computation of time limits provided in Iowa statutes is governed by §4.1(22), The Code 1979. It 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:

22. Computing time—legal holidays. *In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday,* provided that, whenever by the provisions of any statute or rule prescribed under authority of a statute, the last day for the commencement of any action or proceedings, the filing of any pleading or motion in a pending action or proceedings or the perfecting or filing of any appeal from the decision or award of any court, board, commission or official falls on a Saturday, a Sunday, the first day of January, the twelfth day of February, the third Monday in February, the last Monday in May, the fourth day of July, the first Monday in September, the eleventh day of November, the fourth Thursday in November, the twenty-fifth day of December, and the following Monday whenever any of the foregoing named legal holidays may fall on a Sunday, and any day appointed or recommended by the governor of Iowa or the president of the United States as a day of fasting or thanksgiving, the time therefor shall be extended to include the next day which is not a Saturday, Sunday or such day hereinbefore enumerated. [Emphasis added.]

Applying the method mandated by §4.2(22), it can be seen that while the question you pose presents a situation in which the officeholder has failed to attend at least three consecutive meetings, the first and the last of such meetings are not at least thirty days apart. If the first meeting counted occurred on January 22 and the last meeting counted occurred on February 20, only 29 days, and not 30 days, have elapsed. Therefore, in answer to your question, the missing of five meetings between January 22 and February 20 is not a sufficient basis for discharge ("resignation") under §69.15(1).

III.

For your third question, you have raised two specific issues: 1) Was the February 22 meeting of the Commerce Commission a regular meeting pursuant to §69.15? 2) Was the February 22 hearing of the Commerce Commission a regular meeting pursuant to §69.15?

A. THE FEBRUARY 22 MEETING

The February 22, 1980 meeting of the Commerce Commission was called on February 20. The purpose of holding the meeting was to conduct an election for Chair of the Commission. We take notice of the fact that the meeting was held in Audubon, Iowa.

The criteria for determining whether a particular meeting is a "regular meeting" were discussed in detail in Division I of this opinion. It is unnecessary to restate the analysis *in toto*. It is sufficient to state that a "regular meeting" is one held at the usual time and place of meeting, such time and place being fixed by statute, order or regulation. In contrast, a special meeting is one called for a special purpose, to attain specified objects, or to conduct particular business.

The February 22, 1980 meeting was a special meeting of the Commerce Commission. The meeting was called for the special purpose of electing a Chair. In addition, the meeting was convened in Audubon, Iowa, not in Des Moines where the Commission's own rules state that the Commission shall be in session. *See* 250 I.A.C. §1.7(4). The February 22, 1980 meeting was specially called and limited to particular business.

As the meeting on February 22, 1980 was not held at the usual time and place of meeting and was instead held for the special purpose of electing a Chair, such meeting was not a "regular meeting" within the meaning of §69.15.

B. THE FEBRUARY 22 HEARING

The question of whether the hearing conducted on February 22, 1980 would constitute a "regular meeting" within the meaning of §69.15 must be addressed from two perspectives. One must first look to whether the hearing was conducted by the Commission itself so as to constitute a "meeting" of the members. If a "meeting" of the members did in fact occur, then one must inquire whether such "meeting" was a "regular meeting".

Hearings before state agencies, such as the Commerce Commission, are conducted pursuant to the procedures outlined in ch. 17A, The Code 1979. Such hearings include "contested cases" as defined in §17A.2(2). They also include public hearings on administrative rules which an agency proposes to adopt. *See* §17A.4(1).

The rules adopted by the Commerce Commission contemplate situations in which the Commission designates staff members to conduct administrative hearings in lieu of having the Commission itself preside. For example, 250 I.A.C. §7.1(4) provides that "hearings will be conducted by the commission," however, said rule also provides that "examiners may be designated by the commission to preside at and conduct hearings . . .". (*Also see* 250 I.A.C. §7.7 which outlines the procedure to be observed at hearings and by its terms provides for either the Commission or an examiner to preside.) The Commission's use of examiners to conduct administrative hearings is in accord with the provisions of the Administrative Procedure Act. *See* §17A.11.

If the hearing conducted on February 22, 1980 was conducted by an examiner, rather than by the Commission members as a whole, the hearing clearly is not a meeting of the Commission itself. Section 474.4 provides that "a majority of the commerce commission shall constitute a quorum for the transaction of business." In addition, 250 I.A.C. §1.7(4) provides "when a quorum of the commission is present, it shall be considered a session for considering and acting upon any business of the commission. A majority of the commission constitutes a quorum for the

transaction of business." Consequently, even if a hearing were conducted by one member of the Commission,[2] such a hearing would not constitute a meeting of the Commission.

If the hearing on February 22, 1980 was in fact conducted by a quorum of the Commerce Commission, the question which is then presented is whether a hearing is a meeting of the agency, and if so, is it a "regular meeting".

If a quorum of the Commission gathers together for the purpose of conducting a hearing, such gathering constitutes a "meeting" as that word is understood in a legal context. *Black's Law Dictionary* (Rev. 4th Ed. 1968) p. 1134 defines a meeting as:

A coming together of persons; an assembly. Particularly, in law, an assembling of a number of persons for the purpose of discussing and acting upon some matter or matters in which they have a common interest.

Similarly, *Bouvier's Law Dictionary* (Baldwin's Century Ed. 1934) Vol. 1, p. 769 describes a "meeting" as:

A number of people having a common duty or function who have come together for any legal purpose, or the transaction of business of a common interest; an assemblage.

If one refers to the "Open Meetings Law", ch. 28A, The Code 1979, one finds a "meeting" defined as:

A gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policymaking duties.

§28A.2(2).

Employing the above definitions, one would conclude that a hearing conducted by a majority of the members of the Commerce Commission would constitute a meeting of the Commission. Such event would represent a coming together of a majority of the members of a governmental body to discuss or act upon matters within the scope of matters committed to their jurisdiction. Having determined that such a hearing is a "meeting" of the body in quesiton, one must address the issue of whether such hearing constitutes a "regular meeting".[3]

As explained in Division I of this opinion, a "regular meeting" is one held at the usual time and place of meeting, such time and place being fixed by statute, order or regulation. In contrast, a special meeting is

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[2] Section 17A.11(1) provides that a hearing can be conducted by one member of a multimember agency.

[3] The records of the Commerce Commission disclose that the February 22 hearing was conducted by a majority of the Commission members. The hearing conducted on February 21 was also conducted by a majority of the members. As February 21, 1980 would be the thirtieth day for purposes of §69.15, the analysis applied to the February 22 hearing should also be applied to that of February 21. If a hearing conducted by an agency majority constitutes a "regular meeting" under §69.15, both hearings would be regular meetings.

one called for a special purpose, to attain specified objects, or to conduct particular business. Employing this distinction, a hearing is a special meeting. It is a meeting called solely for the purpose of addressing the factual and legal issues presented by the subject of the hearing. A hearing is not the forum in which general agency business can be properly addressed. The agency is limited in a hearing to the matters for which the hearing is called. For example, the agency cannot conduct routine agency business in the context of a contested case proceeding. The agency is limited to the issues raised solely in the contested case. In addition, if an agency's rules authorize the use of hearing examiners to conduct hearings, the decision of the agency to conduct the hearing represents affirmative action on the part of the agency members to come together for a special purpose, *i.e.*, the conduct of the hearing. Consequently, a hearing, whether conducted by the Commission itself or by a hearing examiner, is not a "regular meeting" for purposes of §69.15.

IV.

The fourth question you raise is "what authority, if any, does the Governor have to reject a sworn statement under §69.15?"

Section 69.15 provides, in pertinent part:

If such person received no notice and had no knowledge of a regular meeting and gives the governor his sworn statement to that effect within ten days after he learns of the meeting, such meeting shall not be counted for the purposes of this section.

It is our opinion that the Governor has no discretion to reject a sworn statement submitted under the above section. This conclusion is based on two lines of reasoning.

First, the express language of the provision mandates that the missed meeting *shall not* be counted. The Legislature employed explicit language when it provided that "such meeting shall not be counted." Use of the words "shall not" creates a situation in which no room for discretion can be found to exist.

Second, the sentence immediately following the above quoted paragraph of §69.15 provides that "the governor in his discretion may accept or reject such resignation." The fact that the Legislature expressly made provision for discretion with regard to accepting the resignation adds increased importance to the Legislature's failure to so provide with regard to accepting the sworn statement. Applying the doctrine *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another), one must conclude that the express grant of discretion in one instance implies a legislative decision not to grant discretion where such a grant is omitted.

We, therefore, conclude that the Governor has no discretion to reject a sworn statement submitted pursuant to §69.15.[1]

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[1] Our opinion presupposes that the individual submitting the sworn statement can meet the preconditions for submitting such an affidavit, to wit: such individual both "received no notice" and "had no knowledge" of the regular meeting which is the subject of the sworn statement. This is a factual determination which cannot properly be addressed by an opinion of the Attorney General. It is also not a factual determination which §69.15 permits the Governor to make. However, if the Governor

V.

By way of a fifth question, you have inquired whether a Commission member is "charged with knowledge of all special meetings and hearings although she did not have actual notification." Section 69.15 distinguishes between "notice" and "knowledge". The section provides, in pertinent part:

If such person received no notice *and* had no knowledge of a regular meeting and gives the governor his sworn statement to that effect within ten days after he learns of the meeting, such meeting shall not be counted for the purposes of this section.

At the outset, it should be noted that there are two prerequisites to the submission of an affidavit. The person must *both* have no notice *and* have no knowledge. If the person in fact had *either* notice or knowledge, such person would be barred from submitting a sworn statement pursuant to §69.15. As a result, the question you raise should properly be addressed in terms of what constitutes "notice" and what constitutes "knowledge".

From the fact that the statute requires the official to claim a lack of notice, one can fairly infer an obligation on the part of the agency involved to give notice of the meeting. However, the section does not define the type of notice required. A review of the Code and the administrative rules reveals that they too fail to prescribe the type of notice of meetings which is to be given to members of the Commerce Commission. Under these circumstances, it would be expected that the notice given to Commission members would be one of a reasonable nature. "When notice must be given but no method is prescribed, the notice must be a reasonable one under the circumstances. It must afford a fair opportunity to appear . . .". *Buchholz v. Board of Adjustment of Bremer County*, 199 N.W.2d 73 (1972). It is not unreasonable for a notice to be given by writing which is mailed or delivered to a person's regular place of business, particularly in the absence of any statutory or administrative requirements to the contrary. This is particularly true where previous notices were routinely sent and received at a person's place of business. In addition, there is a long-established presumption of receipt of a mailed notice properly addressed and otherwise conforming to postal laws and regulations concerning postage. *See Eves v. Iowa Employment Security Commission*, 211 N.W.2d 324 (1973). If notice of a meeting is mailed or delivered to a member of a board or commission at the member's place of business, the agency has complied with its obligation to confer notice. Under such circumstances, notice for purposes of §69.15 has been given.

Notice, and whether notice has been given, raises objective questions. In contrast, whether an individual has knowledge is a subjective question, *i.e.*, whether a particular person was cognizant of a particular fact or series of facts.

Whether a particular individual had "knowledge of a regular meeting" within the meaning of §69.15 is not a question which can be appropriately

(Footnote Cont'd)

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feels that the statement is falsely submitted, he is not powerless. Such statement may constitute perjury and, if this is established, could provide independent grounds for removal from office.

answered by an Attorney General's opinion. However, for future guidance in the application of the statute, it should be noted that the law is not unwilling, in appropriate circumstances, to impute knowledge of facts to an individual if such facts are readily ascertainable and the individual had cause to make an inquiry. In 58 Am.Jur. 2d Notice §8 at 491 (1971), we find the following:

Means of knowledge and knowledge itself are, in legal effect, the same thing where there is enough to put a party on inquiry. Knowledge which one has or ought to have under the circumstances is imputed to him. When a party has information or knowledge of certain extraneous facts which of themselves do not amount to, nor tend to show, an actual notice, but which are sufficient to put a reasonably prudent man upon inquiry respecting a conflicting interest, claim, or right, and the circumstances are such that the inquiry, if made and followed up with reasonable care and diligence, would lead to the discovery of the truth, to a knowledge of the interest, claim, or right which really exists, put a reasonably prudent man upon an inquiry respecting a conflicting interest, claim or right. In other words, whatever fairly puts a person on inquiry is sufficient notice where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. A person has no right to shut his eyes or his ears to avoid information and then say that he had not notice; he does wrong not to heed the "signs and signals" seen by him. It will not do to remain wilfully ignorant of a thing readily ascertainable, and it is no excuse for failure to make an inquiry that such an investigation, if made, might have failed to develop the truth.

If a person were a relative newcomer to the governing body of an agency, such person could perhaps put forth an argument that he or she was unaware of agency procedures and routines such that ignorance of scheduled meetings and hearings might not be unreasonable. Such is not the case with a member who has served for a number of years. Such member assuredly would be aware that the agency would schedule meetings and hearings on a relatively regular basis. Minimal inquiry at the office would readily apprise the member of the dates and times of such agency business. Such member's knowledge of the workings of the agency would of necessity be such that any prudent person having similar knowledge would have been put on notice to inquire, and would thus be chargeable with constructive knowledge of such agency business.

VI.

The sixth question you have posed is as follows: "Is the exercise of power by the Governor to remove Ms. Holstad valid?" In responding to this inquiry, it is important to again state the limitations on the scope of our opinion. Our opinion is limited to the facts as you have stated them, as well as to those facts which are part of the public record. Our opinion is further limited to those events transpiring on or prior to February 22, 1980. We offer no opinion as to what may have occurred after February 22.

In order to invoke the provisions of §69.15(1), it is necessary to demonstrate that an officeholder was absent from at least three consecutive regular board meetings. In additon, the first and the last meeting counted must be at least thirty days apart. We have previously opined that a hearing, whether conducted by a hearing examiner or by a majority of the members of an agency, does not constitute a "regular meeting". We have further opined that the meeting of the Commerce Commission held on February 22, 1980 in Audubon, Iowa for the purpose of electing

a Chair does not constitute a regular meeting, as it is a special meeting. With these determinations in mind, the situation you present as of February 22, 1980, is one in which Mary Holstad had missed at least three regular meetings of the Commerce Commission since January 22 of that year. However, the first of such meetings occurred on January 20, while the last *regular meeting* occurred on February 20. This is a span of only 29, and not 30 days. Consequently, as of February 22, there was an inadequate basis on which to invoke the resignation provisions of §69.15. Therefore, the effort of the Governor to accept Ms. Holstad's "resignation" was without an adequate statutory basis.

VII.

The final question you raise is as follows: "If the exercise of power is beyond the Governor's authority, is Commissioner Holstad still a member of the Commission?" This is a question which cannot be addressed by this opinion as it would require the making of factual determinations beyond the public record and the facts you have provided. For example, it is possible that Ms. Holstad has missed further regular meetings since February 22, 1980. Further, Ms. Holstad may have acquiesced to the action taken by the Governor. Such acquiescence is a factor which cannot be ascertained by the writers. Ms. Holstad may in fact have acted affirmatively to tender her resignation. These are only a few of the possible events which may have transpired since February 22, 1980 and any of these could have created a vacancy on the Iowa Commerce Commission. As a result, all we can conclude is that the actions of the Governor on February 22, 1980 were ineffective with regard to invoking the resignation provision of §66.15. As of that date, the necessary grounds for the statute's operation were absent.

April 14, 1980

ELECTIONS: §39.3, Ch. 43, §§49.109 and 49.110, Ch. 49, The Code 1979. A precinct caucus is not considered a general election for purposes of §49.109, The Code 1979. Employees are not entitled by §49.109 to time off work to attend precinct caucuses. (Willits to Johnston, Polk County Attorney, 4-14-80) #80-4-8 (L)

April 18, 1980

CHEMICAL SUBSTANCE ABUSE; COUNTIES AND COUNTY OFFICERS: Sections 123.46, 125.34, 125.40, The Code 1979. A peace officer has a mandatory duty to take a person who (1) appears to be intoxicated in a public place and in need of help, or (2) appears to be incapacitated by a chemical substance in a public place and in need of help, to a substance abuse treatment facility in lieu of immediate arrest and incarceration. Once treatment has been initiated, such a person may subsequently be charged with public intoxication without further regard to section 125.34(1), The Code 1979. Section 125.34(1) does not place a duty on police officers to ask intoxicated persons whether they are in need of help. The failure of a police officer to comply with §125.34(1) does not preclude prosecution of the person for public intoxication. (Dallyn, Staskal to Hicks, Assistant Marion County Attorney, 4-18-80) #80-4-9

Mr. James Vernon Hicks, Assistant Marion County Attorney: You have requested an opinion from the Attorney General concerning the treatment and services to be afforded intoxicated persons pursuant to Chapter 125, The Code 1979. You pose the following questions for consideration:

1. Does section 125.34(1), The Code 1979 require a peace officer to take a person found to be intoxicated in a public place to a treatment facility, or is the language of this section merely permissive?

2. Whether a peace officer must ask an intoxicated person if he or she desires medical attention as a precondition to charging the person with pubilc intoxication?

3. Whether a person taken to a treatment facility by a peace officer pursuant to Code §125.34(1) may subsequently be charged by the officer with public intoxication in violation of either §§123.46 or 123.91, The Code 1979?

The questions you raise have been partially addressed by two earlier opinions from this office. *See* Op. Att'y Gen. #78-4-6 (April 11, 1978); 1974 Op. Att'y Gen. 590. This opinion supersedes and updates those earlier opinions as applicable to your specific questions.

Chapter 125, The Code 1979, was enacted by the 67th General Assembly during the 1977 session to revise and consolidate prior chapters of the Code regarding alcohol abuse and drug abuse. *See* chapters 123B, 224, 224A, 224B, The Code 1977. Section 125.34(1), The Code 1979 provides that:

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 proferred help, the person may be arrested and charged with intoxication.

As an initial matter, the second sentence states that certain persons "*shall be taken* to a facility by a peace officer" (emphasis added). Section 4.1(36), The Code 1979, provides that the word "shall" used in a statute enacted after July 1, 1971, imposes a *duty* to act on the designated actor. The Iowa Supreme Court has construed the statutory use of the word "shall" as follows:

"When a statute uses the word 'shall' in directing a public body to do certain acts, the word is to be construed mandatory, not permissive, and excludes the idea of discretion." *Consolidated Freightways Corp. of Del. v. Nicholas*, 258 Iowa 115, 121, 137 N.W.2d 900, 904 (1965).

The conclusion that Code §125.34 imposes a mandatory duty is buttressed by comparing the language of §125.17(1), The Code 1977 (the predecessor of Code §125.34(1) of the 1979 Code) with the present statute. Section 125.17(1) provided that a person "*may* be taken to a facility by a peace officer" (emphasis added). This language was construed to confer a permissive or discretionary power on the peace officer to so act. *See* 1974 Op. Att'y Gen. 590, 591. However, the 67th General Assembly amended this language in 1977 to read that a person "*shall* be taken to a facility by a peace officer" (emphasis added). This material change in the language of the prior section must be presumed to indicate a change in the legislative intent reflected in present §125.34(1). Hence, it must be preseumed that this change indicates a change in the legal effect of the subsequent section, *i.e.*, the imposition of a mandatory duty to act on the peace officer. *See State v. Blyth*, 226 N.W.2d 250, 259 (Iowa 1975).

Thus, it is clear that Code §125.34(1) imposes a mandatory requirement on peace officers to take certain persons to treatment facilities. This raises the issue of what persons must be afforded such treatment.

Section 125.34(1) indicates that "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" (emphasis added). There are two classes of persons within the scope of this section: (1) those persons "intoxicated" and (2) those persons "incapacitated by a chemical substance." These two terms are defined in §125.2, The Code 1979 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.

These two classifications are further modified in Code §125.34(1) by the term "in need of help." Obviously, this term must be given independent content in the context of the entire statute, for otherwise, its presence would be superfluous and inconsistent with the presumption that the legislature enacts a statute with the intent that all provisions therein be effective. *See* §4.4(2), The Code 1979; *Kelly v. Brewer*, 239 N.W.2d 109, 113-114 (Iowa 1976).

Thus, a peace officer confronted by a person apparently affected by a chemical substance [drugs or alcohol, *see* §125.2(3)] must make an initial determination of (1) whether the person is intoxicated or incapacitated, and (2) whether the person is in need of help. Obviously, giving the latter term independent content means that a person must appear to be something more than merely intoxicated in the officer's reasonable judgment. 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. Therefore, intoxication *per se* does not indicate that the intoxicated person is "in need of help." *See* Op. Att'y Gen. #78-4-6 (April 11, 1978).

However, if a person is found to be "incapacitated by a chemical substance" within the meaning of section 125.2(8), then it will be the rare occasion when that person is not also "in need of help." By practical definition, if a person is unconscious or "otherwise so completely impaired" as a result of the use of a chemical substance, he or she will probably *a fortiori* be in need of help.

The mandatory duty to take a person to a treatment facility is triggered only after a preliminary factual determination by the officer that the person is intoxicated or incapacitated by a chemical substance, and is in need of help. Section 125.34 commits this determination to the rational judgment of the officer, to be made in light of his training, experience and considered assessment of the situation. The statute does not require that the officer ask the person whether he or she is in need of help. Such a question may, as a practical matter, aid the officer in making the required determination. The answer to such question would not, however, be dispositive of the officer's decision. This is especially and obviously true in the case of a person who is incapacitated by a chemical substance since part of the definition of that phrase is that the incapaci-

tated person is unable to make a rational decision about his or her need for treatment. *See* §125.2(8). In short, your second question must be answered negatively. Section 125.34(1) does not require a peace officer to ask an intoxicated person whether he or she is "in need of help."

However, once the officer confronts a person in a public place who (1) *appears to the officer* to be intoxicated and in need of help, or (2) *appears to the officer* to be incapacitated by a chemical substance and in need of help, the officer has a mandatory duty to take such person to a substance abuse treatment facility in lieu of immediate arrest and incarceration. Only if the person refuses this initial offer of assistance may the person be immediately arrested and charged with the crime of public intoxication pursuant to either §123.46 or §123.91, The Code 1979. *See* §125.34(1), The Code 1979. As indicated by the use of the word "may" in Code §125.34(1), the decision of whether to arrest and charge a person who has refused the proffered treatment is one to be made in the discretion of the peace officer. *See* §4.1(36), The Code 1979; John Deere *Waterloo Tractor Works v. Derifield*, 252 Iowa 1389, 1392, 110 N.W.2d 560, 562 (1961).

This, then, raises your third question, *i.e.* whether a person taken to a treatment facility may be later charged with public intoxication based on the same facts that warranted the initial treatment decision. At first blush, Code §125.34(1) might appear to suggest that taking a willing, yet intoxicated and helpless, person to a treatment facility is the only remedy in such a case. However, such a reading of the statute would lead to this anomalous result: A person who had ingested sufficient alcohol to be "merely intoxicated" (but not "in need of help") would be subject to prosecution for a simple misdemeanor in violation of Code §123.46, (or, if charged with second offense public intoxication, such a person would be subject to the increased sanctions of Code §123.91, *i.e.*, a fine of between 500 and 1000 dollars and imprisonment for a period were to ingest an additional quantity of alcohol so as to render him or herself "in need of help" also, he or she would then be immune from criminal prosecution under Code §§123.46 or 123.91.

In fact, Code §125.40(3) makes it clear that §125.34(1) does not abrogate the applicability of either §§123.46 or 123.91 with respect to those persons otherwise unlawfully using alcohol in public places. Section 125.40(3) provides that "nothing in [chapter 125] affects any law, ordinance, resolution or rule . . . regarding the sale, purchase, dispensing, possessing or use of alcoholic beverages or beer at stated times and places . . ." Section 123.46 (and section 123.91) is clearly such a law, *i.e.*, "it is unlawful for any person to use or consume alcoholic liquors or beer . . . in any public place . . . and no person shall be intoxicated in a public place." Thus, the operation of either §123.46 or §123.91 is **unaffected by the treatment provisions of Code §125.34(1). Thus, the answer to your third question is yes.**

This conclusion also extends to a corollary question of your second question. That is, does the fact that a police officer abrogates his duty under §125.34(1) preclude a criminal prosecution for public intoxication? (Note that, as discussed earlier, that duty does not include asking an intoxicated person whether he or she needs help). Again, the answer is no, in light of §125.40(3). That section makes clear that nothing in

chapter 125 is intended to affect prosecutions under §§123.46 or 123.91. The remedy for an officer's violation of §125.34(1) is not an exclusionary-type rule, preventing prosecutions under the intoxication statutes. Thus, the fact that an officer does not ask an intoxicated person whether he or she needs help or fails to take a person the officer believes to be in need of help to a treatment facility, does not preclude prosecution for intoxication.

The legislative intent reflected in §125.34 is clearly twofold. First, the legislature intended to grant peace officers the additional power (not within their general statutory powers of arrest) to take certain persons to treatment facilities. This conclusion is clearly supported by §125.34(6), which provides that "a peace officer who acts in compliance with this section is acting in the course of his official duty and is not criminally or civilly liable therefor . . ." Second, the legislature intended §125.34 to mandate that peace officers first take intoxicated persons in need of help to a facility for necessary medical treatment normally unavailable in a jail. If the legislature had intended that the alternative remedy of §125.34(1) operate in lieu of criminal prosecution, it certainly would have known how to draft the statute to reflect this intent. *See* §204.409, The Code 1979 (court may conditionally discharge defendant and subsequently dismiss prosecution for controlled substances in lieu of entry of conviction and judgment); §321.281, The Code 1979 (court may commit defendant convicted of OMVUI, second offense, to treatment facility in lieu of imposition of statutory punishment for the offense).

The legislature, however, did not provide for treatment in lieu of prosecution, or as a precondition to prosecution, in §125.34, and one must look to what the legislature said, rather than what it should or might have said. *Kelly v. Brewer*, 239 N.W.2d 109, 113-114 (Iowa 1976). What the legislature did say, in Code §125.40, is that Code §125.34(1) was not intended to have any relationship whatever to criminal prosecutions under the intoxication statutes.

April 18, 1980

STATE OFFICERS AND DEPARTMENTS; GENERAL ASSEMBLY: Iowa Const., art. III, §§7, 9; §§2.7, 2.11, The Code 1979; House Rules 20, 23, 68th G.A. The House and the Senate each have the powers to carry out their duties, including the right of each house, independent of the other, to select such officers as, in the opinion of the membership, are necessary, and to assign appropriate functions and duties to such officers. Because of the inherent constitutional authority vested in each house of the general assembly to define its officers and prescribe the duties thereof, the House of Representatives is free to determine it does not wish to immediately fill the vacancy created by the resignation of the chief clerk. Further, the House can decide to instruct such other of its officers as it deems appropriate to carry out the duties normally performed by the chief clerk. When taken upon such instructions, the action of such substitute has the full force and effect of action taken by the chief clerk. (Fortney to Daggett, State Representative, 4-18-80) #80-4-10

Honorable Horace Daggett, State Representative: You have requested an opinion of the Attorney General regarding the recent resignation of the chief clerk of the House of Representatives. You have inquired whether the House, in lieu of selecting a permanent replacement at this time, may instead allow the assistant chief clerk to perform the duties of the chief clerk. It is our opinion that the House may allow the assistant chief clerk to perform the duties of the chief clerk.

An analysis of the issue you pose must begin with the applicable provisions of the Constitution of the State of Iowa. Iowa Const., art. III, §7 provides:

Each house shall choose its own officers, and judge of the qualification, election, and return of its own members. A contested election shall be determined in such manner as shall be directed by law. [Emphasis supplied.]

Iowa Const. art. III, §9 provides:

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.* [Emphasis supplied.]

The House of Representatives, therefore, has the constitutional authority to "choose its own officers" and has "all other powers necessary for a branch of the General Assembly." This broad grant of power has been codified in statute. Section 2.11, The Code 1979, reads:

Each house of the general assembly may employ such officers and employees as it shall deem necessary for the conduct of its business. The compensation of the chaplains, officers, and employees of the general assembly shall be fixed by joint action of the house and senate by resolution at the opening of each session, or as soon thereafter as conveniently can be done. Such persons shall be furnished by the state such supplies as may be necessary for the proper discharge of their duties. [Emphasis supplied.]

At present the rules adopted by the Iowa House of Representatives contemplate the appointment of a chief clerk, as well as such additional clerks as may be necessary. House Rule 20, 68th G.A., relating to the chief clerk provides:

The chief clerk of the house shall serve as parliamentarian and chief administrative officer of the house under the direction of the speaker of the house. The chief clerk shall have charge of the chief clerk's desk; be responsible for the custody and safekeeping of all bills, resolutions, and amendments filed, except when they are in the custody of a committee; have charge of the daily journal; have control of all rooms assigned for the use of the house; check all bills as to proper form prior to introduction; keep a detailed record of house action thereon; process the handling of amendments when filed and during the floor consideration of bills; insert adopted amendments into bills before transmitted to the senate and prior to final enrollment; supervise legislation printing and the distribution of printed material; and perform all other duties pertaining to the office of chief clerk.

House Rule 23, 68th G.A., provides:

All clerks and stenographers of the house shall be under the general direction of the speaker and the chief clerk. Clerks and stenographers shall be on duty at the house from 8:30 a.m. to 4:30 p.m. except when excused by the member to whom the clerk or stenographer is assigned. *Clerks and stenographers shall perform such additional duties as may be assigned to them by the chief clerk.* [Emphasis supplied.]

A synthesis of the foregoing citations, constitutional, statutory and rule, results in the following framework: The House and the Senate each have the powers necessary to carry out their duties, including the right of each house, independent of the other, to select such officers as, in the opinion of the membership, are necessary, and to assign appro-

priate functions and duties to such officers. In the only decision of the Iowa Supreme Court on the issue of the authority of the House and Senate to select officers, the Court endorsed the foregoing framework. In *Cliff v. Parsons*, 57 N.W. 599, 90 Iowa 665 (1894), a secretary of the senate who had been removed by vote of the senate sought to regain his office. He based his argument on the forerunner of what is presently §2.7, The Code 1979.[1] In rejecting the plaintiff's contention, the Court held that Iowa Const. art. III, §7 provided "undoubted authority in the senate to choose, in such way as it pleases, its own officers." 57 N.W. 599, 600. The Court went on to point out that one general assembly cannot limit the power of either house of a later general assembly to employ such officers as it chooses and that the Senate cannot control the prerogatives of the House in this regard and *vice versa*. In the Court's words:

Neither house has power to control the other in choosing its officers, nor in fixing their tenure of office, nor has any general assembly power to control the right of either house of any subsequent general assembly in this respect.

57 N.W. 599, 601.

A prior opinion of this office has interpreted *Cliff* as establishing the principle that the constitutional authority conferred on each house by art. III, §7 is so basic that any other statute or rule which infringes on the discretion of the House with regard to employment of officers can be disregarded by the membership, if the body so chooses. The opinion, dealing with officers' terms, stated:

In light of the language of the supreme court in *Cliff vs. Parsons*, supra, it is our opinion that either house or both houses could provide by rule, joint rule, resolution, joint resolution or statute that the terms of officers should carry over from the first session to the second. But even if this were done and regardless of the manner in which it were done, Article III, §7 would permit either house at any time to terminate the term of any officer and replace him with another, nor could any general assembly, as distinguished from a session thereof, bind a subsequent general assembly in these respects. Whether or not, as a practical matter, either the senate or house would have so little regard for its own rules, resolutions or acts as to do this is another question, but as a constitutional matter it would appear either of them could do so.

1970 Op. Atty Gen. 66, 70.

We concur in and adopt the language of this earlier opinion.

In addition, the position enunciated in *Cliff* and the previous opinion of the Attorney General is in conformity with the generally accepted legal principles in this area. For example, at 63 Am.Jur.2d, *Public Officers and Employees* §30, we find the following:

Except for such offices as are created by constitution, the creation of public offices is primarily a legislative function. In so far as the legislative power in this respect is not restricted by constitutional provisions, it is supreme, and the legislature may decide for itself what offices are

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[1] Section 13, The Code 1873, upon which the challenger based his claim, reads as follows: "The speaker of the house of representatives shall hold his office until the first day of the meeting of a regular session next after that at which he was elected. All other officers elected by either house shall hold their offices only during the session at which they were elected."

suitable, necessary, or convenient. When in the exigencies of government it is necessary to create and define new duties, the legislative department has the discretion to determine whether additional offices shall be created, or whether these duties shall be attached to and become ex officio duties of existing offices. An office created by the legislature is wholly within the power of that body, and it may prescribe the mode of filling the office and the powers and duties of the incumbent, and, if it sees fit, abolish the office.

Because of the inherent constitutional authority vested in each house of the general assembly to define its officers and prescribe the duties thereof, the House of Representatives is free to determine it does not wish to immediately fill the vacancy created by the resignation of the chief clerk. Further, the House can decide to instruct such other of its officers as it deems appropriate to carry out the duties normally performed by the chief clerk. When taken upon such instructions, the action of such substitute has the full force and effect of action taken by the chief clerk.

April 21, 1980

CRIMINAL LAW: Uniform Citation and Complaint: Willful Failure to Appear — Chapter 805, The Code 1979. The uniform citation and complaint provisions of chapter 805 are designed to expedite the disposition of scheduled violation offenses. To that end several statutory options exist for the immediate release of a cited person: (1) release on personal recognizance with defendant's option of admitting guilt and paying a fine by mail or appearing in court as directed, (2) release upon defendant admitting guilt and paying a fine by mail performed in the peace officer's presence, (3) release upon defendant providing bail by mail performed in the officer's presence, (4) release upon defendant's execution of an unsecured appearance bond. The simple misedmeanor offense of willful failure to appear, §805.5, The Code 1979, does not apply to a defendant who admits guilt and pays a fine (options one or two) or who forfeits bail upon nonappearance (options three or four). Under any of these circumstances, the cited person has constructively appeared and satisfied the penalty for the scheduled violation offense. Section 805.5 would apply, however, to a defendant released on personal recognizance who neither admits guilt and pays by mail nor appears in court as specified in the citation. (Richards to Holetz, Act. Commissioner, Dept. of Public Safety, 4-21-80) #80-4-11

Acting Commissioner Robert G. Holetz, Department of Public Safety: You have requested an opinion of the Attorney General regarding the relationship between the public offense of failure to appear under section 805.5, The Code 1979, and the uniform citation and complaint procedures provided in sections 805.6 through 805.15, The Code 1979. Specifically you raise the following questions:

1. Is an arrest warrant issued under the provisions of Section 805.5 valid when the original charge was made on the Uniform Citation and Complaint provided for by Section 805.6?

2. If you rule that an arrest warrant cannot properly be issued under the provisions of Section 805.5 for an original charge made on the Uniform Citation and Complaint, can an arrest warrant be issued under another provision of the Code?

Chapter 805 establishes the authorization and mechanism for police citations as a substitute for arrest. The first five sections of the chapter (§§805.1 - 805.5) deal with police citations in general. The remaining provisions (§§805.6 - 805.15) deal with traffic and scheduled violation citations in particular.

In general, a peace officer may issue a police citation instead of making a formal arrest "(w)henever it would be lawful . . . to arrest a person without a warrant." Section 805.1, The Code 1979. *See* §804.7, The Code 1979 (specifying those situations in which a peace officer may make warrantless arrests); *compare*, §804.1, The Code 1979 (authorizing the issuance of a citation by a magistrate for a complaint alleging the commission of a simple misdemeanor). The contents of a police citation are contained in section 805.2 and, with the signature of the cited person, the form is "a written promise to appear in court at the time and place specified." Section 805.3, The Code 1979. Breach of this promise is penalized in section 805.5:

> Any person who willfully fails to appear in court as specified by the citation shall be guilty of a simple misdemeanor. Where a defendant fails to make a required court appearance, the court shall issue an arrest warrant for the offense of failure to appear, and shall forward the warrant and the original citation to the clerk. The clerk shall enter a transfer to the issuing agency on the docket, and shall return the warrant with the original citation attached to the law enforcement agency which issued the original citation for enforcement of the warrant. Upon arrest of the defendant, the warrant and the original citation shall be returned to the court, and the offenses shall be heard and disposed of simultaneously.

The elements of this simple misdemeanor offense may be schematized as follows:

(1) any person,

(2) who willfully,

(3) fails to appear in court as specified by the citation.

" 'Willfully' ordinarily means intentionally, deliberately or knowingly, as distinguished from accidentally, inadvertently or carelessly." *State v. Wallace*, 259 Iowa 765, 773, 145 N.W.2d 615, 620 (1966). The section requires the court to issue a bench warrant for the arrest of the reclacitrant on the charge of failure to appear, which charge is heard simultaneously with the original citation offense. *See generally United States v. Evans*, 574 F.2d 352 (6th Cir. 1978); *compare*, §811.2(7), The Code 1979 (establishing criminal penalties for bail jumping—"willfully fails to appear before any court or magistrate as required").

The purpose of these general provisions is clear. A person who could otherwise be arrested and taken before a magistrate for committing *any* public offense may instead be issued a citation to appear where it is reasonable to believe the defendant would respond to it. *See State v. Rose*, 121 Ariz. 131, 589 P.2d 5 (1978). In effect, the issuance of a citation in lieu of arrest is a release of the defendant on his personal recognizance with the stipulation that the person appear in court as directed. *See State v. Doolittle*, 69 Wash. 2d 744, 419 P.2d 1012 (1966). And in order to insure the efficacy of these prinicples and procedures, the Iowa Legislature has created and defined the offense of willful failure to appear. *State v. Wallace*, 259 Iowa 765, 772, 145 N.W.2d 615, 620 (1966) ("All crimes in this state are statutory and the legislature may define an offense by a particular description of the act or acts constituting it.").

In particular, a peace officer may issue a uniform citation and complaint "for charging all traffic violations . . . and . . . all other violations

which are designated by section 805.8 to be scheduled violations." Section 805.6(1)(a), The Code 1979. The scheduled violations of section 805.8 other than traffic [§805.8(2)] include violations of navigation laws [§805.8(3)], snowmobile violations [§805.8(4)], fish and game law violations [§805.8(5)], and violations relating to the use and misuse of parks and preserves [§805.8(6)]. The contents of the uniform citation and complaint are the same as the general police citation (including, under §805.2, a statement of "the penalty for nonappearance") but with certain notable additions.

The uniform citation and complaint form also reflects the following statutory options for the immediate release of a cited person, which options may be exercised in lieu of formal arrest and process under chapter 804, The Code 1979: (1) According to section 805.9(1), a cited person, "before the time specified . . . for appearance," may admit a scheduled violation by signing "the admission of violation on the citation and complaint" and delivering or mailing the form, together with the scheduled fine and five dollars ($5) cost, to an office designated in section 805.7. "*Thereupon the defendant shall not be required to appear before the court.* The admission shall constitute a conviction." Section 805.9(1), The Code 1979 (emphasis added). When examined with the enabling language of the other statutory options below [*see* §805.9(3) and 805.6(1)(c), The Code 1979], this section seems to allow the peace officer to release the cited person on his or her own recognizance. (2) Similarly, if "the officer does not deem it advisable to release the defendant" according to option one but "the defendant wishes to admit the violation, the officer may release the defendant upon observing the person mail the citation and complaint, admission, and minimum fine, together with five dollars costs," to the designated office. "The admission shall constitute a conviction and judgment in the amount of the scheduled fine plus five dollars costs." Section 805.9(3)(a), The Code 1979. (3) If "the officer does not deem it advisable to release the defendant" according to option one and the defendant does *not* wish to admit the violation, the officer may release the defendant upon observing the person mail the citation and complaint and the specified amount of money "*as bail* together with the following statement signed by the defendant:

I agree that either (1) I will appear pursuant to this citation or (2) if I do not appear in person or by counsel to defend against the offense charged in this citation the court is authorized to enter a conviction and render judgment against me for the amount of one and one-half times the scheduled fine plus five dollars costs."

Section 805.4(3)(b), The Code 1979 (emphasis added). (4) Similarly, if the officer does not elect any of the foregoing options and the offense is a simple misdemeanor, the defendant may be released upon signing the following statement:

I hereby give my *unsecured appearance bond* in the amount of . . . . dollars and *enter my written appearance.* I agree that if I fail to appear in person or by counsel to defend against the offense charged in this citation the court is authorized to enter a conviction and render judgment against me for the amount of my appearance bond in satisfaction of the penalty plus court costs.

Section 805.6(1)(b)-(d), The Code 1979 (emphasis added). This unsecured appearance bond is a written promise by the defendant to pay a sum certain [either (1) "an amount equal to one and one-half (1½)

times the scheduled fine plus five dollars costs; or (2) If the offense is one for which a court appearance is mandatory (*see* option five below) the amount of one hundred dollars plus five dollars costs" — §805.6(1)(c)] in the future if he or she defaults on the obligation to appear. By this agreement, then, nonappearance results in conviction and judgment in the amount of the unsecured appearance bond. If the convicted defendant does not voluntarily pay the specified amount, the judgment may be enforced according to section 909.6, The Code 1979 ("the law relating to judgment liens, executions, and other process available to creditors for the collection of debts shall be applicable to such judgments"). Further, nonpayment may lead to a holding of contempt of court under section 909.5 and chapter 665, The Code 1979. (5) Finally, if a scheduled violation involves aggravating circumstances as specified by section 805.10 ["accident or injury to person or property," use of a motor vehicle when defendant had no valid driver's license or permit, or creation of "an immediate threat to the safety of other persons or property"], a peace officer may release a cited person only upon execution of the unsecured appearance bond of option four above. The issued citation must be inscribed with the statement "Court appearance required" and the space in which the defendant may admit the violation must be stricken.

The purpose of these particular provisions is equally clear. The uniform citation and complaint procedures are simply designed to implement a more uniform and expeditious system for the disposition of these relatively minor offenses. *See Levitz v. State*, 339 So.2d 655 (Fla. 1976); *State v. Martin*, 387 A.2d 592 (Me. 1978); *State v. Atkinson*, 565 P.2d 978 (Or. App. 1977); *Swisse v. City of Sheridan*, 561 P.2d 712 (Wyo. 1977). **A person cited rather than arrested for committing a scheduled violation offense need never appear in court under these expedited procedures. A defendant who admits the offense and pays the fine and costs (options one or two) has submitted to the court's jurisdiction, has waived the right to be heard and other attendant rights, and has obviously satisfied the penalty for the scheduled violation. Likewise, a defendant who forfeits bail upon nonappearance (options three or four) has admitted the offense, has waived his or her rights, and has also satisfied the penalty for the scheduled violation. The bail is, in effect, the fine which is used more for punishment than insuring the trial process will occur.** ***See McDermott v. Superior Court of the City and County of San Francisco*****, 493 P.2d 1161 (Cal. 1972).**

The foregoing discussion should make evident the relationship between section 805.5 and the uniform citation and complaint. If a cited person admits the scheduled offense and pays the fine plus costs (options one or two) ***or*** **forfeits bail upon nonappearance per the signed agreement (options three or four), the person has constructively appeared and has satisfied the penalty for the scheduled violation. Under any of these circumstances, the offense of willful failure to appear simply does** ***not*** **lie. Section 805.5 would only be applicable in the instance where a defendant is released on personal recognizance (option one) but does not timely admit the offense by mail and willfully fails to appear at the time and place designated in the citation.**

April 21, 1980

STATE OFFICERS AND DEPARTMENTS: State Conservation Commission — Migratory birds. §§109.38, 109.39 and 109.48, The Code 1979. The State Conservation Commission is authorized to regulate by rule the manner of taking ducks and other species of migratory birds listed in §109.48, The Code 1979. Commission rules may be more, but not less, restrictive than federal regulations. (Peterson to Schroeder, State Representative, 4-21-80) #80-4-12(L)

April 25, 1980

MUNICIPALITIES: Creation of a self-insurance fund—§§384.4(1), 384.5, 384.9, 384.12(19), 613A.7, 613A.9 and 613A.10, The Code (1979). The tax authorized by §§613A.7, .9, .10 may not be levied for the purpose of creating a self-insurance fund, although general tax revenues may be utilized for self-insuring the municipality. (Evans to Johnson, State Representative, 4-25-80) #80-4-13

Honorable Robert Johnson, State Representative: You have requested an opinion of the Attorney General on the following question: "May a city self-insure against liability claims by applying a general levy for self-insurance?" Your opinion request can be read to encompass two distinct questions, to-wit:

(1) May a city apply general tax revenues to create a self-insurance fund, without reference to the excess levies permitted by Sections 613A.7 and 613A.10, The Code, 1979?

(2) May the excess levies provided for in sections 613A.7, 613A.10, and 384.12(19), The Code, 1979, be applied to create a self-insurance fund?

It is our opinion that a city may levy taxes, within the general maximum limitation, for any legitimate municipal purpose, including the establishment of a self-insurance fund. Such use of general tax levies appear to be contemplated by the general language of section 384.9 pertaining to "additional funds" and is clearly allowable as an application of excess debt service tax revenues, pursuant to section 384.5, The Code, 1979. It is important to note, however, that such tax revenues are not generated from and additional levy, but merely are available for use as a self-insurance fund. As will be demonstrated in answer to the second question posed herein, it does not appear that any excess levy of any sort is available for a self-insurance fund under Chapters 613A or 384, The Code, 1979.

Chapter 613A removes all common law tort immunity previously accorded municipalities except as limited by §613A.4, and requires that such municipalities defend, save harmless and indemnify officers and employees against tort claims and demands.

Sectsion 613A.7, of the Code permits a municipality to purchase liability insurance to provide for the defense and indemnification of the municipality, its officers, employees and agents from any such claim, and levy a special tax to pay for the premiums. *See also* §384.12(19), The Code (1979). In pertinent part it provides:

"The governing body of any municipality may purchase a policy of liability insurance insuring against all or any part of liability which might be incurred by such municipality or its officers, employees and agents under the provisions of sections 613A.2 and section 613A.5 and may similarly purchase insurance covering torts specified in section 613A.4. The premium costs of such insurance may be paid out of the general fund

or any available funds or may be levied in excess of any tax limitations imposed by statute . . . ."

Section 384.12(19) provides in pertinent part:

"A city may certify, for the general fund levy, taxes which are not subject to the limit provided in section 384.1 and which are in addition to any other moneys the city may wish to spend for such purposes as follows:

(19) A tax to pay the premium costs on tort liability insurance as provided in section 613A.7."

A municipality therefore may purchase tort liability insurance and levy an additional tax to pay the premium cost on such insurance. §613A.7, The Code (1979); §384.12(19) The Code (1979).

Section 613A.9 provides municipalities with an alternative method of handling tort claims. It permits a municipality to compromise, adjust and settle tort claims, and appropriate money, in lieu of insurance coverage. Section 613A.10 also provides a municipality with an alternative method of paying such tort liabilities. It permits a municipality to levy a tax to pay for final judgments and settlements made.

Section 613A.9 provides:

"The governing body of any municipality may compromise, adjust and settle tort claims against the municipality, its officers, employees and agents, for damages under sections 613A.2 or 613A.8 and may appropriate money for the payment of amounts agreed upon."

Section 613A.10 provides:

"When a final judgment is entered or a settlement is made by a municipality for a claim within the scope of sections 613A.2 or 613A.8, payment shall be made and the same remedies shall apply in the case of nonpayment as in the case of other judgments against the municipality. If said judgment or settlement is unpaid at the time of the adoption of the annual budget, it shall budget an amount sufficient to pay the judgment or settlement together with interest accruing thereon to the expected date of payment. Such tax may be levied in excess of any limitation imposed by statute."

Under sections 613A.9 and 613A.10 a municipality may therefore compromise, adjust, settle and pay its tort claims, and levy a tax to pay for final judgments and settlements made which are unpaid, in lieu of obtaining tort liability insurance coverage.

It is thus, clear that a municipality has authority to levy a tax under chapter 613 for two purposes: 1) to pay premiums for tort liability insurance and 2) to pay for final judgments and settlements made which are unpaid.

It is equally clear, however, that a municipality cannot tax except as authorized by the Legislature, since the power to tax arises by legislative act. *Clark v. City of Des Moines*, 222 Iowa 317, 267 N.W. 97 (1936). Accordingly, a municipality may levy a tax to establish a self-insurance fund for future liability claims only if the Legislature has authorized such a tax.

It is the opinion of this office that the Legislature has not authorized such a tax.

The language utilized by the legislature in enacting sections 613A.7, 613A.9 and 613A.10 indicates that it did not intend municipalities to

levy a tax to establish a self-insurance fund for payment of future liability claims. The Legislature clearly specified that the tax to be levied under §613A.7 be for the payment of tort liability insurance premiums. The Legislature also clearly specified that the tax to be levied under §613A.10 be used solely for the payment of final judgments and settlements. *See also* §384.4(1), The Code (1979). It did not, however, specify that the tax to be levied be for future judgments or settlements, as would be the case if a tax were levied for a self-insurance fund. The Legislature has therefore not given municipalities the authority to levy a tax for a self-insurance fund.

Accordingly, it is the opinion of this office that a city cannot self insure against liability claims by applying a general levy for self-insurance. The foregoing result is dictated by examining the unequivocal language employed by the legislature in Chapter 613A, sections .7, .9 and .10. Not only is the language of the statute clear on this point, it is suggested that there is an underlying economic rationale for restricting the use of the "excess" levy to the two enumerated purposes. In the case of an annual insurance premium or the existence of a debt in the form of a judgment or negotiated settlement, the amount of tax monies required can be calculated with exactitude, and the taxpaying public is not subjected to an excess levy for a future, unliquidated amount, which sum, once collected, may not actually be needed within the budget period. Similarly, the self-insurance fund might be too small to cover a catastrophic judgment, thereby necessitating yet another levy in a future year. In the latter event, a city or county could find itself levying for both a fixed sum judgment and to replenish its self-insurance fund. It is submitted, therefore, that use of a general levy for a self-insurance fund is an issue either not considered or rejected by the legislature, and such a tax can only be authorized by further legislative action.

April 25, 1980

GOVERNOR/STATE OFFICERS/ENERGY POLICY COUNCIL: Energy Emergency Powers; Federal Emergency Energy Conservation Act of 1979, Pub. L. No. 96-102; Art. IV, §14, Constitution of Iowa; §§93.7, 93.8, The Code 1979. Governor of Iowa may not order emergency energy conservation measures under power delegated by the federal government absent authority in state law. The primary source of authority for the Governor and the Energy Policy Council to curtail energy use in case of acute shortage is contained in §93.8, The Code 1979. (Ovrom to Stanek, Iowa Energy Policy Council, 4-25-80) #80-4-14 (L)

May 1, 1980

STATE OFFICERS AND DEPARTMENTS: GENERAL ASSEMBLY; SPEAKER OF THE HOUSE. Iowa Const., art. III, §7, art. IV, §§17, 19; ch. 69, §§2.6-7, 2.11, 69.8, The Code 1979. If a vacancy occurs in the office of Speaker of the House because the incumbent does not complete the entire term, the House has the constitutional authority to select a successor in any manner that the membership chooses. House Rule 8 of the Sixty-eighth General Assembly does not authorize the Speaker Pro Tempore to succeed to the office of Speaker if a vacancy occurs in that office. (Fortney to Harbor, Speaker of the House of Representatives, 5-1-80) #80-5-1

Honorable William H. Harbor, Speaker of the House of Representatives: You have requested an opinion of the Attorney General regarding the process that should be followed to fill the office of Speaker of the House when the incumbent does not complete the entire term.

Vacancies in public offices and the manner of filling such vacancies is addressed by ch. 69, The Code 1979. Section 69.8 (2) deals with the manner of filling vacancies in state offices. It provides:

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

* * *

2. State offices. In all state offices, judges of courts of record, officers, trustees, inspectors, and members of all boards or commissions, and all persons filling any position of trust or profit in the state, by the governor, *except when some other method is specially provided* . . . [Emphasis supplied.]

In the case of a vacancy in the office of Speaker of the House, another method is "specially provided", such that appointment by the Governor pursuant to §69.8(2) is inapplicable.

Iowa Const., art. III, §7, provides:

Each house shall choose its own officers, and judge of the qualification, election, and return of its own members. A contested election shall be determined in such manner as shall be directed by law. [Emphasis supplied.]

Iowa Const., art. III, §7, has been interpreted by the Iowa Supreme Court as providing "undoubted authority" for either house to "choose, in such way as it pleases, its own officers." *Cliff v. Parsons*, 57 N.W. 599, 600, 90 Iowa 665 (1894). *Cliff* also established the principle that *each* house of *each* General Assembly has the power to select its officers unhampered by any restrictions imposed by statute. In the Court's words:

Neither house has power to control the other in choosing its officers, nor in fixing their tenure of office, nor has any general assembly power to control the right of either house or any subsequent general assembly in this respect.

57 N.W. 599, 601.

Cliff has been interpreted as establishing the principle that the constitutional authority conferred on each house by Iowa Const., art. III, §7, is so basic that any statute or rule which infringes on the discretion of the House with regard to employment of officers can be disregarded by the membership, if the body so chooses. Op. Atty. Gen. #80-4-10; 1970 Op. Atty. Gen. 66.[1]

Having concluded that the House has the constitutional authority to select a Speaker in any manner the House chooses, we turn our attention to the House Rules to determine whether the Sixty-eighth General Assembly has devised a method for selection of a Speaker in the event a vacancy is created in that office.[2]

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[1] Because of the interpretation which has been given to Iowa Const., art. III, §7, it is unnecessary for this opinion to rely on various statutory provisions which also can be interpreted as conferring on each house the authority to select its own officers in the manner it deems appropriate. *See* §§2.6-7 (permanent organization and officers—tenure) and §2.11 (officers and employees—compensation).

[2] It should be noted that, pursuant to *Cliff*, each general assembly determines for itself the method for selecting officers. The means selected by the Sixty-eighth General Assembly provide guidance only for that

An examination of the House Rules reveals that the only rule which arguably has a bearing on the issue you raise is Rule 8 dealing with the office of Speaker Pro Tempore. Rule 8 reads as follows:

The house shall, at its pleasure, elect a speaker pro tempore. When the speaker shall for any cause be absent, the speaker pro tempore shall preside, except when the chair is filled by appointment by either the speaker or the speaker pro tempore. The speaker or the speaker pro tempore shall have the right to name any member to perform the duties of speaker, but such substitution shall not extend beyond the adjournment. The acts of the speaker pro tempore shall have the same validity as those of the speaker. In the absence of both the speaker and the speaker pro tempore, the house shall name a speaker who shall preside over it and perform all the duties of the speaker with the exception of signing bills, until such time as the speaker or speaker pro tempore shall be present, and the person's acts shall have the same force and validity as those of the regularly elected speaker.

A critical examination of Rule 8 and a comparison of its terms with other Iowa provisions for succession to office establishes that Rule 8 does not authorize the Speaker Pro Tempore to assume the office of Speaker when a vacancy occurs in that office.

First, Rule 8 does not require the House to select a Speaker Pro Tempore. The Rule merely authorizes the selection of such officer *if the House so chooses.*

Second, if the Speaker is absent from his chair, the Speaker Pro Tempore does not automatically assume the chair. If the Speaker chooses, he or she may designate a member of the House, other than the Speaker Pro Tempore, to assume the chair. Only when the Speaker fails to designate another, does the Speaker Pro Tempore assume the chair.

The preceding factors demonstrate that the powers of the Speaker Pro Tempore are of a temporary or transitory nature. The Speaker Pro Tempore serves in a substitute capacity and only on a daily basis. The Speaker Pro Tempore does not succeed to the office of Speaker, but rather exercises the Speaker's authority until the Speaker resumes the chair.

In contrast to the framework established by Rule 8, the reader is directed to a comparison of Iowa Const., art. IV, §§17 and 19, relating to the method of succession to the office of governor.

Iowa Const., art. IV, §17, provides:

In case of the death, impeachment, resignation, removal from office, or other disability of the Governor, the powers and duties of the office for the residue of the term, or until he shall be acquitted, or the disability removed, shall devolve upon the Lieutenant Governor.

Iowa Const., art. IV, §19, provides:

Gubernatorial succession, Sec. 19. If there be a vacancy in the office of Governor and the Lieutenant Governor shall by reason of death, impeachment, resignation, removal from office, or other disability become

(Footnote Cont'd)

General Assembly. Succeeding assemblies are free to devise their own methods. In addition, a particular General Assembly could, if it so chose, disregard the method contained in its rules and instead elect an alternative method for filling a vacancy. *See* 1970 Op. Atty. Gen. 66.

incapable of performing the duties pertaining to the office of Governor, the President pro tempore of the Senate shall act as Governor until the vacancy is filled or the disability removed; and if the President pro tempore of the Senate, for any of the above causes, shall be incapable of performing the duties pertaining to the office of Governor the same shall devolve upon the Speaker of the House of Representatives; and if the Speaker of the House of Representatives, for any of the above causes, shall be incapable of performing the duties of the office of Governor, the Justices of the Supreme Court shall convene the General Assembly by proclamation and the General Assembly shall organize by the election of a President pro tempore by the Senate and a Speaker by the House of Representatives. The General Assembly shall thereupon immediately proceed to the election of a Governor and Lieutenant Governor in joint convention.

In examining Iowa Const., art. IV, §§17 and 19, two points are of relevance to the issue you raise. First, these constitutional provisions establish the method by which the office of governor "devolves" from one person to another. The legal meaning of the term "devolve" is "to pass or be transferred from one person to another; to fall on, or accrue to, one person as the successor of another; as a title, right, office, liability." *Black's Law Dictionary* (Rev. 4th Ed. 1968, p. 540). Similarly, "devolution" is defined as "the transfer or transition from one person to another of a right, liability, title, estate, or office." *Black's Law Dictionary* (Rev. 4th Ed. 1968, p. 539). In contrast, Rule 8 does not provide for the office of Speaker of the House to devolve upon the Speaker Pro Tempore. Under Iowa Const., art. IV, §§17 and 19, specified individuals actually succeed to the office of governor. No comparable succession occurs under Rule 8. The second point of interest in Iowa Const., art. IV, §§17 and 19 is that the line of succession to the office of governor ends with the Speaker of the House. The constitutional framework does not include succession by the Speaker Pro Tempore if the Speaker cannot perform the duties of governor.

Due to the preceding considerations, it is our opinion that House Rule 8 of the Sixty-eighth General Assembly does not authorize the Speaker Pro Tempore to succeed to the office of Speaker if a vacancy occurs in that office due to the failure of the incumbent to complete the term. The Sixty-eighth General Assembly would therefore rely on its constitutional authority to select a successor Speaker in any manner the body deemed appropriate.

May 1, 1980

MOTOR VEHICLES; INDIANS: Iowa Code §§1.12-1.15; 321.18, .19, .20, .48, .228(2); Laws of the 26th G.A., ch. 110, sec. 3 (1896). The Mesquakie Tribe must register its motor vehicles and otherwise comply with the provisions of chapter 321 when tribal vehicles are operated on "highways". Roads owned and maintained by the Tribe are not "highways" as defined in §321.48, The Code. We construe §321.19, The Code, as exempting tribal vehicles used for governmental purposes from payment of registration fees; this construction is necessary to avoid unconstitutional dispartiy of treatment and infringement on tribal government. (Osenbaugh to Corzatt, Tama County Attorney, 5-1-80) #80-5-2

Mr. Jeffrey C. Corzatt, Tama County Attorney: You have sought the opinion of this Office concerning a number of questions, all of which relate to the applicability of the State motor vehicle laws, chapter 321, Iowa Code, to the use of vehicles owned by the Mesquakie Tribe and

operated on the settlement. We are responding to each question separately as follows:

1. You first ask whether the Tribe must register a vehicle used exclusively upon settlement property. In our opinion, the duty to register applies to the Tribe's ownership of a vehicle, even though such vehicle is used solely within the settlement—so long as such vehicle is driven or moved upon a "highway". Sections 321.18, 321.20, Iowa Code 1979. Section 321.1(48) defines "highway" as follows:

"*Street*" or "*highway*" means 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 purposes of vehicular traffic.

A "highway" is distinguished from a "private road" as defined in §321.1(49):

"*Private road*" or "*driveway*" means every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons.

It is our understanding that there are small portions of county road within the settlement. Such would be a "highway" to which the registration requirement applies unless the vehicle fits within an exception in chapter 321. Section 321.20, Iowa Code.

Whether roads owned and maintained by the Tribe are "highways" or "private roads" requires the determination whether these roads are "open to the use of the public, as a matter of right." We are advised that the Tribal Council has the power to exclude non-Mesquakies from the reservation as a matter of right under its Constitution and bylaws. *See also Quechan Tribe v. Rowe*, 531 F.2d 145, 152 (9 Cir. 1976). The Tribe could not, however, exclude the public from highways owned by the State or county, according to the limitations in the State's tender of jurisdiction over the settlement. Laws of the 26th G.A., ch. 110, section 3 (1896). These limitations were accepted by Congress. *Sac and Fox Tribe v. Licklider*, 576 F.2d 145, 152 (8 Cir. 1978). Although there may be de facto use of the Tribe's roads by the general public, implied permission for public use is not sufficient to establish that the roads are "highways"; to be a "highway", public use must be as a matter of right. *See State v. Sims*, 173 N.W.2d 127 (Iowa 1969) (privately owned business parking lot not a "public highway", citing section 321.48, Iowa Code). We therefore conclude that the Tribe's roads are not "highways" within §321.48, Iowa Code unless some portions of such road is open to the public as a matter of right.

The statutory definition leaves motor vehicle use on tribal roads largely unregulated although certain provisions of chapter 321 apply not only to "highways" but also "elsewhere throughout the state." §321.228(2), Iowa Code. These include the requirements for rendering aid and reporting accidents, §§321.261 to 321.274, the prohibition against reckless driving, §321.277, and the prohibition against driving while intoxicated, §§321.281 to 321.282, Iowa Code. *State v. Miller*, 204 N.W.2d 834, 837 (Iowa 1973); 1976 Op. Att'y Gen. 746. This situation can be rectified by legislative amendment. As discussed below, we believe the State may lawfully enact legislation to govern motor vehicle use on Tribal roads so long as such is neither discriminatory nor interferes with Tribal

self-government. Thus the legislature may amend the definition of "highway" to encompass these roads.

We will proceed to respond to your query as to vehicles operated on state, county, or federal highways within the settlement. None of the exceptions to registration within §321.18, The Code, are applicable. The special governmental exemptions of §321.19 exempt certain entities from license fee requirements but not from the duty to register vehicles. *See also*, §321.125, The Code.

The Sac and Fox settlement has been determined to be an Indian reservation, *Sac and Fox Tribe of the Mississippi in Iowa v. Licklider*, 576 F.2d 145, 149-150 (8 Cir. 1978), or "Indian country", *Youngbear v. Brewer*, 415 F.Supp. 807, 809 (8 Cir. 1976), aff'd, 549 F.2d 74 (8 Cir. 1977, for the purpose of applying certain federal states. Congress has granted to the State of Iowa jurisdiction to enforce its criminal laws on the settlement, except for those enumerated in the Federal Major Crimes Act. Act of June 30, 1948, ch. 759, 62 Stat. 1161. This statute was construed to authorize the State to enforce its fish and game laws on the settlement in *Sac and Fox Tribe, supra*. Chapter 321 is similar to the fish and game laws involved in that case in that its provisions are largely regulatory but are enforced by criminal provisions. Sections 321.98 (operation without registration a simple misdemeanor), 321.104 (penal offenses against title law), Iowa Code, 1979.

The Iowa act which tendered to the United States exclusive jurisdiction over the Sac and Fox Indians and Settlement expressly reserved the power to punish crimes against the laws of Iowa. Laws of the 26th G.A., ch. 110 (1896). Congress accepted jurisdiction subject to the limitations contained in that act. Act of June 10, 1896, ch. 398, 29 Stat. 321, 331 (1897). In *Peters v. Malin*, 111 F. 244, 255 (C.C.N.D. Iowa 1901), quoted in *Sac and Fox Tribe of Mississippi in Iowa, supra*, 576 F.2d at 152, the Court construed these statutes and said:

> The state of Iowa has the right to exercise its police powers for the protection of its own citizens, but it cannot regulate the affairs of the tribal Indians in their relations to each other, for in these relations the Indians are under the control and protection of the national government.

In 1967 Iowa assumed jurisdiction over civil causes of action arising in the settlement under the federal Act of August 15, 1953, ch. 505, 67 Stat. 588, 589, by enacting sections 1.12 to 1.15, Iowa Code. *See, Sac and Fox Tribe, supra*, 576 F.2d at 149. By so doing, Congress provided that Iowa's civil laws "of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . ." 28 U.S.C. §1360(a). *See also*, section 1.12, Iowa Code. The Supreme Court has indicated that this language does not subject Indian reservations to "the full panoply of civil regulatory powers." *Bryan v. Itaska County*, 426 U.S. 373, 388, 48 L.Ed. 710, 721, 96 S.Ct. 2102 (1976). However, reservation Indians are not automatically exempt from state laws of general applicability but only those laws which infringe on tribal self-government, *Williams v. Lee*, 358 U.S. 217, 220, 3 L.Ed.2d 251, 254, 79 S.Ct. 269 (1959), or which are inconsistent with federal law or agreement, *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 483, 48 L.Ed.2d 96, 112, 96 S.Ct. 1634 (1976), or which provide a tax not expressly authorized by Congress, *Bryan, supra*.

We would conclude that a tribal vehicle used on "highways" within the Settlement is subject to motor vehicle registration unless such is inconsistent with any federal law or agreement or interferes with tribal self-government. We know of no federal law to the contrary and do not believe that registration of tribal vehicles is preempted by federal law. Nor do we believe that the mere registration of tribal motor vehicles infringes on tribal self-government, given the significant interests in protecting the State's certificate of title laws, providing a means to indentify automobiles using the highways of the State, and facilitating investigation of violations of law. Since enactment of the Uniform Commercial Code in 49 states, national as well as State interests require that States maintain a complete registry of motor vehicles to insure protection of ownership interests. (The duty to register and the duty to obtain a certificate of title are apparently based on the same statutory criteria. *See*, §321.20, Iowa Code.) The annual registration of vehicles helps prevent thefts and other abuses which may frustrate title laws.

This is a non-discriminatory duty applicable to all owners of vehicles, with exceptions only for certain limited-use vehicles. Section 321.18, Iowa Code. Entities of state and foreign governments are required to register vehicles even though exempt from the payment of fees. §321.19, Iowa Code. (The federal government maintains its own registration system for federal vehicles.) We believe it very unlikely that the Tribe could establish as a matter of fact that vehicle registration and title requirements frustrate tribal self-government.

We therefore conclude that the Tribe must register its vehicles even though used solely on the settlement if such vehicles are operated on "highways".

2. If vehicles are used only on Tribal roads and the Tribe elects not to register such vehicles, you ask what procedures would be necessary to transfer title. If no certificate of title exists, the last paragraph of §321.24, Iowa Code, would require a person registering the vehicle to post a cash bond to register the vehicle. Since we determine that the Tribe is exempt from the payment of registration fees and since the necessity of posting a cash bond before the vehicle could be used on highways would no doubt reduce the resale value of such vehicles, we would recommend that the Tribe register its vehicles and obtain certificates of title. The Tribe might also petition the Department of Transportation to establish a rule to resolve the problem. *See* 820 I.A.C. [07, D] 11.38 (321) (registration of motorcycles converted from off-road use to road use).

3. Your third question concerns the State's power to charge registration fees on tribal vehicles. "Must the tribe pay the registration fees, penalties and costs if they do not register vehicles owned by the tribe and operated exclusively on the settlement?"

We would construe §321.19(1) as exempting tribal vehicles used in the transaction of official business as "other subdivisions of government" exempt from the payment of motor vehicle registration fees to avoid an unconstitutional application of the statute. That section exempts State, federal, and foreign governmental vehicles from the payment of fees as follows:

All vehicles owned by the government and used in the transaction of official business by the representatives of foreign powers or by officers, boards, or departments of the government of the United States, and by the state of Iowa, counties, municipalities and other subdivisions of government including vehicles used by an urban transit company operated by a municipality and such self-propelling vehicles are used neither for the conveyance of persons for hire, pleasure, or business nor for the transportation of freight other than those used by an urban transit company operated by a municipality, and all fire trucks, providing they are not owned and operated for a pecuniary profit, are hereby exempted from the payment of fees in this chapter prescribed, except as provided for urban transit companies in subsection 2, but shall not be exempt from the penalties herein provided.

In our opinion the disparity of treatment given tribal vehicles used for governmental purposes, such as road maintenance and refuse collection, could well violate both the equal protection clause of the State and federal constitutions and the federal prohibition of laws which infringe on tribal self-government. In *Red Lake Band of Chippewa Indians v. State of Minnesota*, 248 N.W.2d 722 (Minn. 1976), the Minnesota Supreme Court held that the Red Lake Indian Reservation must be accorded the same reciprocity for its motor vehicle registration plates as those accorded states, territories and possessions of the United States, and foreign countries. While there are distinctions between Iowa's jurisdiction over the Sac and Fox reservations and Minnesota's lack of regulatory authority over the Red Lake Band, nonetheless, we believe the rationale of that decision is applicable to the disparity of treatment given the Sac and Fox Tribe governmental vehicles if the statute were construed not to exempt them from the payment of fees. By passage of §321.19(1), Iowa Code, the legislature has recognized that payment of motor vehicle fees may impair governmental operations. Given the prohibition against impairment of tribal self-government, we know of no strong interest in requiring the Tribe to pay such fees. We would note too that many of the vehicles in question are road maintenance vehicles used by the Tribe to maintain its own roads in the settlement. Since many of the Tribe's vehicles are used primarily on tribal roads, payment of such fees is not supported by the rationale that such fees will support the roads used by such vehicles. We would construe §321.19(1), Iowa Code, as exempting vehicles owned by the Tribe and used solely for its governmental functions from payment of license fees as a "subdivision of government". This construction we feel is consistent with the underlying legislative purpose of §321.19(1) and is a necessary construction to avoid a constitutional attack upon the statute. *See also, Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 48 L.Ed.2d 96, 96 S.Ct. 1634 (1976); *Confederated Tribes of Colville v. State of Washington*, 446 F.Supp. 1339, 1365-1366 (E.D. Wash. 1978) (appeal pending, U.S. Supreme Court), invalidating motor vehicle taxes on motor vehicles owned by Indians and used in whole or in part on reservations.

We do not decide whether Tribal sovereignty precludes the imposition of motor vehicle license fees (other than the property tax portion) upon the Tribe but only that exemption from such fees is constitutionally required in the application of this statute to the facts here presented. The Tribe would not therefore necessarily be a "subdivision of government" under other statutes.

4. Your fourth question concerns enforcement of offenses against registration laws should the Tribe fail to register a vehicle. "Do they

violate §§321.97 through 321.104 of the Code of Iowa when they do not have a registration or certificate of title for vehicles owned by the tribe and operated exclusively on the settlement?"

Section 321.125, Iowa Code, states:

The exemption of a motor vehicle from a registration fee shall not exempt the operator of such vehicle from the performance of any other duty imposed on him by this chapter.

Iowa law would thus impose duties upon the Tribe in the operation of its vehicles upon "highways" despite the exemption we find to be required above.

Since Iowa has jurisdiction over criminal offenses on the settlement, except certain major crimes, we believe the State may enforce these penal provisions on the settlement. *See, Sac and Fox Tribe, supra* (enforcement of fish and game laws).

Although the Tribe itself may not be subject to suit because of sovereign immunity, individual Indians operating an unregistered vehicle would be subject to prosecution. *Puyallup Tribe v. Washington Game Dep't.*, 433 U.S. 165, 171-172, 53 L.Ed.2d 667, 673, 97 S.Ct. 2616 (1977) (Puyallup III).

5. This question is framed as follows: "Must a native American employee of the Mesquakie tribe operating a vehicle owned by the Mesquakie tribe on the settlement exclusively have a valid Iowa Driver's License?"

Section 321.174, Iowa Code, prohibits persons from driving any motor vehicle upon a "highway" without a valid license. The exemptions contained in section 321.176, Iowa Code, are not applicable here. Section 321.216, Iowa Code, makes a violation of this requirement a simple misdemeanor.

On the authority of *Sac and Fox Tribe, supra*, we are of the opinion that the State may punish a member of the Tribe operating a Tribal vehicle on a "highway" even though located in the settlement if such driver does not have a valid Iowa driver's license. This is consistent with the State's exercise of criminal jurisdiction. We find no federal preemption of state driver's license requirements. Nor do we believe such requirements impair Tribal self-government or relations within the Tribe. The State has a valid police power purpose to protect all members of the public using highways open to them. It would be incumbent upon the Tribe to establish that the driver's license requirement frustrated the functions of tribal self-government in order to avoid application of this statute.

6. Your sixth question raises similar issues regarding enforcement of chapter 321. "Do the provisions of Chapter 321 which deal with traffic signals, motor vehicle operation, motor vehicle equipment, and criminal violations apply to vehicles driven by native American employees of the Mesquakie tribe, operated exclusively on the Mesquakie settlement?" Again, we would conclude that these provisions apply to Indians operating motor vehicles on "highways" within the settlement even though such persons are employees of the Tribe. As noted on page two above, certain provisions of the motor vehicle code would apply anywhere on the settlement.

In conclusion, it is our opinion that chapter 321, Iowa Code, applies to the use of tribal vehicles on highways within the settlement, save only that the Tribe is exempt from payment of the motor vehicle registration fee. However, tribal roads are not "highways" as defined in §321.48, Iowa Code. Many provisions of the motor vehicle code are therefore not applicable on tribal roads.

May 6, 1980

PUBLIC EMPLOYEES: COLLECTIVE BARGAINING: Chapter 20, §§4.1(2), 20.9, 20.28, 79.23, as amended by 1979 Iowa Acts, Chapter 2, §42, The Code 1979; 1979 Iowa Acts, Chapter 2, §43; 1977 Iowa Acts (Ex. Sess.), Chapter 1, §35. Section 79.23, The Code 1979, as amended by 1979 Iowa Acts, Chapter 2, §42, provides that both organized and unorganized public employees are eligible to receive a cash payment for unused sick leave upon retirement. However, organized employees covered by a collective bargaining agreement negotiated under Chapter 20, The Code 1979, can "bargain away" this benefit if their contract contains an express waiver of the benefit. In the absence of such a waiver, the organized employees retain entitlement to the benefit. Organized employees retiring on or after July 1, 1977 and before July 1, 1979 are expressly excluded from this benefit by 1979 Iowa Acts, Chapter 2, §43. (Fortney to Brandt, State Representative, 5-6-80) #80-5-3 (L)

May 6, 1980

MUNICIPALITIES: Volunteer Fire Fighters — §§362.5 and 372.13(8), The Code 1979. City employees and officers can be volunteer fire fighters and receive payment for same. Membership in a city volunteer fire department is not city employment. (Blumberg to Johnson, State Auditor, 5-6-80) #80-5-4 (L)

May 9, 1980

TAXATION: SALES, USE, AND MOTOR FUEL TAX STATUS OF COMMUNITY ACTION AGENCIES: Sections 324.3 and 422.45(5), The Code 1979. Each Iowa community action agency must be judged on its own particular set of facts to determine whether or not it is a political subdivision, governmental instrumentality or governmental agency, and, as a consequence, within the provisions of §422.45(5) providing for a sales and use tax exemption or within §324.3 providing for a motor fuel tax exemption or refund. (Donahue to Calhoun, State Senator, 5-9-80) #80-5-5 (L)

May 9, 1980

COUNTIES AND COUNTY OFFICERS: Dismissal of deputy county officers. Section 341.3, The Code 1979. Deputy county officers performing satisfactorily in their job may not be dismissed solely on the basis of differing political beliefs or party affiliation, unless it can be demonstrated that party affiliation is an appropriate requirement for effective work performance. (Hyde to Van Gilst, State Senator 5-9-80) #80-5-6

Honorable Bass Van Gilst, State Senator: We have received your request for an opinion from this office concerning the validity of dismissal of deputy county officers because a deputy has an affiliation with a political party different than that of the appointing officer. We have delayed our response until we had available to us the opinion in a United States Supreme Court decision dealing with this issue.

Section 341.3, The Code 1979, provides that: "[a]ny certificate of appointment may be revoked in writing at any time by the officer making the appointment, which revocation shall be filed and kept in the office

of the auditor." Under this authority, the practice has been that deputies or employees not covered by civil service serve at the pleasure of the appointing officer. *See* 1976 Op. Atty. Gen. 842. As your request noted, *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), cast doubt on the validity of this "patronage system" when the Court determined in a plurality decision, that, on the basis of First Amendment considerations, a nonpolicymaking, nonconfidential government employee could not be discharged from a job that he or she was satisfactorily performing solely because of different political party affiliation.

On March 31, 1980, the United States Supreme Court handed down its decision in *Branti v. Finkel*, No. 78-1654, 48 U.S.L.W. 4331. Mr. Justice Stevens, writing for the six-member majority, concluded that political affiliation or beliefs would not alone be a valid reason for discharge, unless it can be demonstrated that certain political belief or party membership was essential to the employee's duties.

. . . [I]t is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered.

* * *

It is equally clear that party affiliation is not necessarily relevant to every policy-making or confidential position. The coach of a state university's football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats, or vice versa, no matter which party is in control of state government. On the other hand, it is equally clear that the governor of a state may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments. In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affilitaion is an appropriate requirement for the effective performance of the public office involved.

48 U.S.L.W. at 4334. The deputies in question in *Branti* were assistant public defenders.

Relying on the mandate of §341.6, The Code 1979, that a deputy perform the duties of the principal during his or her absence or disability, 1976 Op. Atty. Gen. 842 distinguished *Elrod* factually and concluded that its holding would have no application to deputies in a county clerk's office. Unless it can be demonstrated that party affiliation is an appropriate requirement for the effective performance of a deputy clerk of court, however, discharge based solely on party affiliation is impermissible. *Branti* places the burden of proving that a position is politically sensitive on the hiring authority.

Branti addressed itself only to the question of discharge of an employee *solely* on the basis of differing political beliefs or party affiliation. It is important to note that neither *Elrod* nor *Branti* prohibit discharge of a non-civil service employee who is not satisfactorily performing his or her job. Considerations, including but not limited to lack of qualification, statutory requirements, or poor job performance, may provide a basis for discharge. *Elrod*, 427 U.S. at 366, specifically provided: "Employees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist." Our opinion does not consider the validity of discharge under these circumstances.

When county deputy officers meet all other work performance requirements, however, they may not be dismissed *solely* on the basis of differing political beliefs or party affiliation from the hiring officer, unless it can be demonstrated that party affiliation is an appropriate requirement for effective work performance.

A copy of the United States Supreme Court opinion in *Branti* is enclosed.

May 9, 1980

COUNTIES: Aid to nonprofit historical societies. Iowa Const., art. III, §31; 1979 Session, 68th G.A., ch. 39. A tax levied by a county for support of nonprofit historical societies may not be used for construction or maintenance of a building. A county may not make an appropriation for construction of a building to be owned by a nonprofit historical society without the approval of two-thirds of the General Assembly. (Norby to Anderson, Dickinson County Attorney, 5-9-80) #80-5-7(L)

May 12, 1980

COUNTIES AND COUNTY OFFICERS: Compensation of supervisors. Sections 331.22, 332.3(10), 340A.6, The Code 1979. County board of supervisors has no authority to totally reject the recommended compensation schedule prepared by the county compensation board. The county board of supervisors determines by resolution whether its members should be compensated on an annual salary or per diem basis. When a change in the method of compensation is authorized, the county compensation board recommends the amount of compensation under the new method. (Hyde to Barry, Assistant Muscatine County Attorney, Civil Division, 5-12-80) #80-5-8

Edmund D. Barry, Assistant County Attorney, Muscatine County: We have received your request for an opinion from this office concerning the relationship between the county board of supervisors and the county compensation board with respect to determining salaries for county officers and members of the board of supervisors. Specifically, you have asked:

1. Does the board of supervisors have the power to totally reject the county compensation board's recommended compensation schedule and request that the county compensation board prepare a revised schedule, or is the board's review limited in the manner set out in §340A.6, The Code 1979, *i.e.*, any reductions must be on an equal percentage basis for all elected county officers?

2. In what manner may the board of supervisors' compensation be changed from a per diem basis to annual salary? May said charge be made by county compensation board determination, board of supervisors resolution, or by public vote?

3. How is the initial salary of the board of supervisors determined when it switches from a per diem basis to annual salary?

Your first question has been answered by an opinion issued by this office April 5, 1977, which concluded that, under §340A.6, The Code 1977, the county board of supervisors has only two options available to it upon transmittal of the recommended compensation schedule prepared by the county compensation board: acceptance of the recommended schedule or reduction of recommended salaries of each elected officer by an equal percentage. *See* Op. Atty. Gen. #77-4-4. While that opinion was written prior to the adoption of county home rule, Iowa Const., art. III, §39A, the liberal interpretation of implied county powers man-

dated by that amendment would not apply where the Code specifically limits or preempts the authority of the board of supervisors. *See* Op. Atty. Gen. #79-4-7.

The county compensation board system was established by the General Assembly in the 1975 Session, 66th G.A. The compensation board is composed of a representative group of county residents and officers, who are directed to annually follow a certain procedure to determine a compensation schedule, including a review of compensation for comparable offices in other jurisdictions and a public hearing to receive citizen input. The board of supervisors is specifically empowered to accept the schedule, or to reduce the amount of compensation by an equal percentage. *See* §340A.6, The Code 1979. It is unlikely that the Legislature intended that the carefully delineated procedure producing the recommended compensation schedule could be negated by action of the board of supervisors, when it provided specific actions that could be taken. Under §340A.6, The Code 1979, the county board of supervisors has no authority to totally reject the recommended schedule of the county compensation board.

Your other questions require an interpretation of §331.22, The Code 1979, which provides for the compensation of county supervisors:

The board of supervisors shall receive an annual salary or per diem compensation as provided in section 340A.6. The annual salary or per diem shall be in full payment for all services rendered to the county except that each member of the board is entitled to reimbursement for mileage expense incurred while engaged in the performance of official duties at the same rate as provided by law for state employees. The total mileage expense for a member of the board of supervisors shall not exceed one thousand five hundred dollars per year unless the board of supervisors by resolution adjusts the maximum amounts payable to each of the members, but in any event the aggregate amount of mileage expense for all members.

The board of supervisors is authorized to "fix the compensation for all services of county and township officers not otherwise provided by law, and to provide for the payment of the same." Section 332.3(10), The Code 1979. Since neither §331.22 nor §340A.6 clearly delineate whether the board of supervisors or the county compensation board are empowered to determine the method by which county supervisors are compencated, that authority must rest with the board of supervisors, as one of its general powers to manage the affairs of the county and to determine compensation. *See* §§332.3(2) and 332.3(6), The Code 1979. Once the supervisors have determined by resolution the *method* by which they are to be compensated, *i.e.*, annual salary or per diem compensation, as provided in §331.22, The Code 1979, the county compensation board shall recommend the *amount* of such compensation. Pursuant to §340A.6, The Code 1979, the compensation board prepares a recommended compensation schedule after comparison study, publication, and public hearing, which it transmits to the board of supervisors for approval. The determination by the compensation board of the amount to be paid supervisors would continue to follow this §340A.6 procedure in any year where the board of supervisors voted to switch from per diem compensation to annual salary. The expertise developed by the county compensation board, and its mandated responsibility to review comparable compensation schedules, make it the best entity to recommend appropriate compensation for supervisors under a new method.

In conclusion, the county board of supervisors has no authority to totally reject the recommended compensation schedule prepared by the county compensation board. The board of supervisors determines by resolution whether compensation to supervisors is paid on an annual salary or per diem basis. When a change has been authorized, the county compensation board recommends the amount of compensation for supervisors.

May 12, 1980

STATE GOVERNMENT; DEPARTMENT OF PUBLIC HEALTH. Nonpublic water wells. Chapter 135.11, Chapter 455B, The Code 1979. The Department of Health under Section 135.11(1) and 135.11(15) The Code 1979, has the authority to establish and enforce rules establishing minimum standards for construction of nonpublic water wells which will be used as sources of drinking water. (Lindebak to Pawlewski, Commissioner of Public Health, 5-12-80) #80-5-9(L)

May 15, 1980

SOCIAL SERVICES: ADC BENEFITS: §239.5, The Code 1979. The treatment by the Iowa Department of Social Services of OASDI benefits of some minor parents as income is inconsistent with the court's decision in **Griffith v. Burns.** (Morgan to Reagen, Commissioner, Dept. of Social Services, 5-15-80) #80-5-10 (L)

May 15, 1980

OPEN MEETINGS: Electronic Meetings. Sections 28A.2(2), 28A.8, 372.13(5), The Code 1979. The special requirements of §28A.8 for electronic meetings are applicable only when a majority of the governmental body are separately participating by electronic means. Whether a physically absent member may insist upon participating by electronic means is to be determined by reference to local city council rules. (Schantz to O'Kane, State Representative, 5-15-80) #80-5-11 (L)

May 15, 1980

COUNTIES: County Zoning Ordinances. Iowa Const., art. III, §§38A, 39A; Ch. 358A, §§349.16, 362.2(1), 362.3, 380.6, 380.7, The Code 1979. County zoning ordinances must be published in full as part of the proceedings of the county board of supervisors. (Hyde to Jesse, State Representative, 5-15-80) #80-5-12 (L)

May 15, 1980

TAXATION: SALES TAX: Taxable Status of Gross Receipts Involving Exchange of Coins at Enhanced Value. §§422.42(2) and 422.42(6), The Code 1979, and §422.43, The Code 1979, as amended by 1979 Session, 68th G.A., ch. 96, §1. 1980 Iowa Adm. Bull. 1083, containing Department of Revenue proposed rule 15.18, which includes in taxable gross receipts subject to Iowa retail sales tax the amount of coins exchanged at greater than face value for merchandise in value equivalent to the enhanced value of the coins would, if adopted and made effective, be valid. (Griger to Bair, Director of Revenue, 5-15-80) #80-5-13(L)

May 20, 1980

JOINT EXERCISE OF GOVERNMENTAL POWERS: REGIONAL PLANNING COMMISSIONS—Chapter 473A, The Code 1979. The political subdivisions creating the regional planning commission, an independent political instrumentality, are not obligated to assume the commission's liabilities and debts. (Mueller to Van Gilst, State Senator, 5-20-80) #80-5-14 (L)

May 20, 1980

COUNTIES; REAL PROPERTY/SUBDIVISION PLATTING. §§409.1, 441.65, The Code 1979. A rural landowner who subdivides land for sale as garden plots is required to file a plat in accordance with Chapter 409, The Code 1979; if the landowner fails to do so the county auditor may order the plat under §441.65. (Ovrom to Mahaffey, Poweshiek County Attorney, 5-20-80) #80-5-15 (L)

May 22, 1980

UNEMPLOYMENT COMPENSATION: A new construction employer must have twelve consecutive quarters during which his account has been chargeable with benefit payments in order to receive a computed rate. §96.3(a)(2); 96.3(4); 96.7; 96.7(2)(d); 96.7(3)(a)(2); 96.7(3)(d)(2); 96.19(5); 96.19(16); 96.19(17); 96.19(21); 1979 Iowa Acts Ch. 33 §5; IAC §370-3.40(1). (Powers to Hutchins, State Senator, 5-22-80) #80-5-16

Senator C. W. "Bill" Hutchins: In your opinion request you asked the question whether an employer in the construction business would qualify for a computed rate if the employer has made contributions to the unemployment fund for twelve (12) consecutive quarters prior to the last computation date.

Employer contributions to the unemployment compensation fund are mandated by §96.7, The Code 1979. Initial employer contributions are set at an arbitrary percentage of wages paid, §96.7(2d), The Code 1979. After a preliminary period an employer is entitled to have a "computed rate," that is, a rate which is more reflective of the benefit experience of the employer's contribution account.

The conditions under which a construction employer is entitled to a computed rate are enunciated in §96.7(3)(d)(2), The Code 1979, which states in part:

. . . such (construction) employer shall not qualify for an experience rating until there shall have been twelve consecutive calendar quarters immediately preceding the rate computation date throughout which his account has been chargeable with benefit payments.

The statute creates in essence a waiting period and your question is what is the length of that period.

In order to determine that period, we must understand the meaning of the phrase "throughout which his account has been chargeable with benefit payments," which modifies quarters.

The initial criteria to be satisfied in order to count a quarter of employer liability toward the twelve quarter preliminary period is that the account of the employer must be chargeable with benefit payments throughout the quarter. Webster's defines throughout as: "All the way through; in or during every part of." Thus, the employer must be chargeable with benefit payments every day of the quarter in order for it to count against the requirement.

A new employer must be a covered employer within the meaning of §96.19(5), The Code 1979, to become chargeable with benefits. An employer can generally only be charged with benefits for wages paid by that employer, §96.7(3)(a)(2), The Code 1979, amended by 1979 Iowa Acts Ch. 33 §5.

In order to determine when an employer becomes chargeable we must examine how benefits are figured. Benefits are calculated by quarterly increments, §96.19(16) and (17), The Code 1979. Wage credits paid by an employer during an individual claimants base period are used to ascertain the benefit amount, §96.3(4), The Code 1979, amended by 1979 Iowa Acts Ch. 33 §2. Benefits paid to an individual are generally charged against the individual's base period employers, §96.7(3)(a)(2) amended by 1979 Iowa Acts Ch. 33 §5.

A new employer cannot be chargeable with benefit payments until the third quarter of liability because of the definition of base period which states:

"Base period" means the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which he or she filed a valid claim. §96.19(16), The Code 1979.

In other words, the current quarter and the most recent previous quarter are dropped in determining a claimant's base period.

Thus, while the statute requires a new construction employer to have twelve consecutive calendar quarters of chargeability, this computation is actually at least fourteen quarters. An additional lag may occur if an employer satisfies this requirement at the end of any quarter other than the quarter ending on June 30 since the rate is only calculated annually on July 1, §96.19(21), The Code 1979.

In answer to your question, a new employer in the construction business becomes eligible for a computed rate when there "shall have been twelve consecutive quarters immediately preceding the rate computation date through which his account has been chargeable with benefit payments," §96.7(3)(d)(2), The Code 1979. The administrative rule which states that the employer's third month of liability shall be the first quarter an employer's account is chargeable with benefits [IAC §370-3.40(1)] is not in conflict with the statute.

May 23, 1980

CRIMINAL LAW: BRIBERY; PUBLIC OFFICIALS; GIFTS AND GRATUITIES. Chapter 68B, 722, §§68B.5, 722.1-2, The Code 1979; 1980 Session, 68th G.A., House File 687, §§6, 8, 63, 64. The acceptance of a trip to a foreign country with expenses paid by the foreign government could likely result in a member of the General Assembly being found to have accepted a gift in violation of §68B.5, The Code 1979. Such acceptance would, in the usual circumstances, not likely be found to constitute a bribe pursuant to §§722.1-2, The Code 1979. After July 1, 1980, the receipt of such a trip would not likely be found to constitute a violation of ch. 68B, as amended, in that such trip would not be a "gift". Likewise, in the absence of an agreement or understanding that such trip is given to influence the actions of the legislator, a violation of §§722.1-2, as amended effective July 1, 1980, would not likely be found to have occurred. (Fortney to Bisenius, State Senator, 5-23-80) #80-5-17(L)

June 3, 1980

TAXATION: Tax Redemption of Separately Owned Mineral Rights by the Landowner. §§84.20, 447.1 as amended by 1979 Session, 68th G.A., Ch. 109, 447.5, 448.1, The Code 1979. When the landowner properly redeems from a tax sale of separately owned underlying mineral rights, the title to the mineral rights is vested in the landowner. No tax deed is issued to such redeeming landowner, but the county auditor and county treasurer must comply with the provisions of §447.5. (Price to Wilson, Marion County Attorney, 6-3-80) #80-6-1

Mr. Terry Wilson, Marion County Attorney: You have requested an opinion of the Attorney General concerning the rights of a landowner who wants to acquire title to separately owned underlying mineral rights which have been sold at tax sale for non-payment of taxes. Specifically, the following questions were presented in your request:

1. What rights does the owner of the land acquire by exercising his right to redemption under Section 84.20 of the Code of Iowa?

2. Does the County give a tax deed to the owner of the land to the mineral rights or is there anything further necessary to be done by the County?

3. How does the owner of the land acquire ownership of the mineral rights?

Section 84.20, The Code 1979 provides:

Tax sale--redemption by owner. When any such rights or interests [mineral rights] not owned by the owner of the land are sold at tax sale, and when the owner of such rights or interests does not redeem under the provisions of chapter 447 within ninety days after such tax sale, the owner of the land shall thereafter have the same right of redemption as the owner of such rights or interests has, and redemption by the owner of the land shall terminate all right of redemption of the owner of such rights or interests.

Pursuant to Chapter 447, before the tax sale certificate holder is entitled to receive a tax deed from the treasurer. Iowa law provides for a period of time whereby the person having an interest in the mineral rights sold may redeem from the tax sale by payment of specified sums to the county auditor who then reimburses the tax sale certificate holder. Such redemption may be made at any time before the right of redemption is cut off by payment to the county auditor of the tax sale price and four percent thereof added as a penalty plus three-quarters percent interest per month on the sale price plus the penalty from the date of sale, and the amount of all taxes, interests and costs paid by the purchaser or assignee for any subsequent year together with a similar four percent penalty added thereto and three-quarters percent interest per month on the whole of such amount from the date of payment of such subsequent taxes. *See* 1979 Session, 68th G.A., Ch. 109, which amended §447.1, The Code 1979 and *Clarkson v. McCoy*, 215 Iowa 1008, 247 N.W. 270 (1933).

Consequently, the landowner could pay the specified amounts where the owner of the mineral rights has not exercised his option to redeem pursuant to Chapter 447. Additionally, it should be noted that §84.20 also provides that "redemption by the owner of the land shall terminate all right of redemption of the owner of such rights or interests [mineral rights]." Therefore, once the landowner exercises his option to redeem

pursuant to §84.20, the owner of the mineral rights is precluded from redeeming.

Section 447.5, The Code 1979 provides:

Certificate of redemption—countersigned by treasurer. 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.

In the event redemption is properly made by the landowner by payment of the correct amount to the county auditor, then pursuant to §447.5 the county auditor should issue a certificate of redemption, countersigned by the treasurer, to the landowner after he exercises his right to redeem. *Clarkson v. McCoy*, supra.

Upon redemption by the landowner, no special notice thereof apart from payment of the correct amount is required to be given by the auditor to the tax sale certificate holder. *See* Op. Att'y Gen. #77-9-14.

The effect of payment of the amount necessary to redeem by the owner or other persons entitled to redeem land from a tax sale, when made before the right of redemption is cut off, is to defeat the estate of the purchaser at the tax sale. *See* 72 Am.Jur.2d, *State and Local Taxation*, §997.

From the above discussion, it is clear, with reference to your first and third questions, that when the landowner properly exercises his redemption rights, the effect is to vest the title to the mineral rights in such landowner.

With reference to your second question, tax deeds are only authorized by statute to be issued to holders of tax sale certificates for unredeemed property sold at tax sale. *See* §448.1, The Code 1979. In the situation you posed, the landowner is not the holder of a tax sale certificate. Consequently, upon the proper exercise of the right of redemption by the landowner, the county auditor and treasurer need only comply with the provisions of §447.5.

June 3, 1980

COUNTIES: Drainage Districts. Sections 4.1(36)(a), 455.10, 455.164, 455.166, 455.169, 462.1, 462.2, 462.3, 462.27, The Code 1979. When private individuals enter an unauthorized contract to perform those legal services attendent upon the transfer of control of a drainage district from the Board of Supervisors to a panel of trustees, the Board of Supervisors may, in its discretion choose to ratify the contract and pay those expenses incurred before the transfer of control of the district from the Board to the trustees from the drainage district funds. Absent such ratification, an attorney is not entitled to collect from drainage district funds for changes for his employment pursuant to that contract and prior to the transfer. If the Board chooses not to ratify the agreement, the County Auditor may refuse to certify those charges incurred prior to the election of the panel of trustees, even if those charges have been approved by the trustees. (Benton to Martens, Emmet County Attorney, 6-3-80) #80-6-2 (L)

June 5, 1980

STATE OFFICERS AND DEPARTMENTS: County Board of Supervisors — City Airport Commission: Chapters 329, 330, and 332, The Code 1979. The positions of airport commissioner and county supervisor are not incompatible. (Mueller to Martens, Emmet County Supervisor, 6-5-80) #80-6-3(L)

June 11, 1980

INTEREST: Chapters 535, 537, 536, 536A. H.F. 2492 changes existing Iowa usury laws so that creditors may charge interest on accounts receivable, without a prior written agreement, if the creditors meet certain notice requirements. Truth-in-lending disclosure requirements are not affected by H.F. 2492.

Section 2 of H.F. 2492 also creates new classes of borrowers who may agree in writing to pay any rate of interest. If a person belonging to a class listed in §2 enters a transaction without executing a written agreement for the payment of interest, a creditor in that transaction will be limited to charging interest at the rate specified in §7 of H.F. 2492, assuming the creditor follows the §7 notice requirements. If the seller does not meet the §7 notice requirements, the seller is limited by §535.2 to charging interest at the rate of 5% per year.

The charging of interest after judgment, is controlled by §535.3. Judgment may be entered for the amount of the principal of an obligation, plus interest, even though the effect may be that post-judgment interest is added to pre-judgment interest. Post-judgment interest may not be compounded. (McFarland to Long, Judicial Magistrate, 6-11-80) #80-6-4

Honorable William A. Long, Judicial Magistrate: The Office of the Attorney General has received your letter dated March 5, 1980, where you requested an opinion on a series of questions relating to the rates of interest that may be charged under various fact situations. You supplemented that request by posing an additional question in a letter dated April 14, 1980.

For each of the first six situations that you presented, you requested our opinion as to the following questions:

a. May interest be charged?

b. If yes, from what date?

c. If yes, how much interest?

d. If yes, what, if any, procedure must be followed to notify the debtor of the interest?

e. If yes, does the same rate continue after judgment?

Because of the complexity of the various statutes dealing with interest rates, this opinion will provide very generalized answers to questions "a" through "d" as they are applied to each of the six fact situations that you presented. Question "e" will be addressed separately since it presents an entirely different legal issue involving post-judgment interest. The six fact situations you presented are as follows:

1. A transaction that was intended to be a cash transaction, where payment is not received when the goods or services are delivered.

2. A 30-day payment transaction where payment is not made in that time.

3. Debtor borrows $450 from a bank:

(1) to purchase a t.v., or

(2) personal loan — the loan is to be paid back in six equal monthly installments.

4. Same as problem number three except the loan is from a finance company.

5. Debtor borrows $6,000 from bank:

(1) to purchase a car, or

(2) personal loan — the loan is to be paid in 24 equal monthly installments.

6. Same as problem number five except the loan is from a finance company.

SITUATION #1. Generally, in a transaction that the parties intend to be a cash transaction but the debtor fails to pay at the time he or she receives the goods or services, the creditor may charge interest at the rate of 5% per year in the absence of a written agreement setting the interest at a higher rate:

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:

* * *

b. Money after the same becomes due.

§535.2(1), The Code

Generally, a seller or lender may charge interest from the time money becomes due and payable. *Thomas Truck & Caster Co. v. Buffalo Caster & Wheel Corp.*, 210 N.W.2d 532 (Iowa, 1973). Chapter 535 prescribes no procedure for notifying the debtor of interest charges less than 5% per year. (Under §535.2, creditors may charge interest in excess of 5% per year only if the interest is set out in a bilateral written agreement between the parties to the transaction. *See* Op. Att'y Gen. #79-8-30)

House File 2492, which was signed by the Governor on May 1, 1980, and will go into effect upon publication, contains a section allowing creditors to charge interest on accounts receivable without a prior written agreement:

1. Except where the parties have agreed in writing for the payment of a different finance charge or rate of interest, a creditor may charge a finance charge on the unpaid balances of an account receivable at a rate not exceeding that permitted by subsection three (3) or four (4) of this section if the creditor gives notice as required by subsection two (2) of this section.

H.F. 2492, §7.1

Subsection three (3), section 7, of H.F. 2492 provides as follows:

With respect to an account other than an open account, the creditor may impose a finance charge not exceeding that permitted by section five hundred thirty-seven point two thousand two hundred one (537.2201), subsections two (2) through five (5) of the Code.

Section 537.2201 permits creditors in consumer credit transactions, other than open-end transactions, to charge interest at the rate of 15% per year. Section 13 of H.F. 2492 amends §537.2201 to read as follows:

2. The finance charge, calculated according to the actuarial method, may not exceed *twenty-one* percent per year on the unpaid balances of the amount financed.

As a condition to charging interest without a prior written agreement between the parties, a creditor must follow specific notice requirements as set out in Section 7(2) of H.F. 2492:

2. As a condition of imposing a finance charge under this section, the creditor shall give notice to the debtor as follows:

a. In a transaction that is subject to the truth in lending Act, the creditor shall give all disclosures as required by that Act and at the time or times required by that Act.

b. In a transaction that is not subject to the truth in lending Act, the creditor shall give written notice to the debtor at the time the debt arises. The noice shall be contained on the invoice or bill of sale evidencing the credit transaction, and shall disclose the rate of the finance charge and the date or day of the month before which payment must be received if the finance charge is to be avoided. With respect to open accounts, this notice shall be given at the time credit is initially extended; provided that additional advance notice in writing shall be given to the debtor not less than ninety days prior to any change in the terms of the agreement or of rate of the finance charge or date payment is due. For purposes of this paragraph, notice is given if the invoice or bill of sale is delivered with the goods, whether or not the debtor is present at the time of delivery.

c. As used in this subsection, "truth in lending Act" means as defined in section five hundred thirty-seven point one thousand three hundred two (537.1302) of the Code.

In the example you presented in problem #1, the H.F. 2492 authorization to charge interest up to 21% per year on accounts receivable, without a prior written agreement, applies only if the seller can be deemed to have extended credit to the buyer. "Account receivable" is defined in H.F. 2492.7(5) to mean: "a debt arising from the retail sale of goods or services or both on credit." "Credit" is not defined in H.F. 2492 but is defined in the *Iowa Consumer Credit Code* as: "*the right* granted by a person to defer payments of debt, to incur debt and defer its payment, or to purchase property or services and defer payment therefor." [Emphasis added] §537.1301(16). In determining whether a seller has granted the buyer the right to defer payment, the facts in each individual case must be considered. Presumably, if a creditor voluntarily acquiesces to the buyer deferring payment for goods or services, the creditor is granting the debtor the right to defer payment. On the other hand, if a buyer pays by check and the check fails to clear for insufficient funds, the seller cannot be said to have extended credit by granting the buyer the right to defer payment.

SITUATION #2. If parties to a sales transaction set up a 30-day account which remains unpaid at the end of the 30-day period, the seller or lender may charge interest from the end of the 30-day period, according to §535.2(1)b, since that is when the money becomes due. With a written agreement, the parties may agree on the payment of interest at a rate permitted by subsection three of §535.2 as amended by 1979

Session, 68th G.A., Chapter 130, and in the case of consumer credit transactions, as permitted by section 537.2201 of the *Iowa Consumer Credit Code* (ICCC), Chapter 537, The Code.

Beyond the requirement for a written agreement before a creditor may assess interest in excess of 5% per year, Chapter 535 prescribes no steps to notify the debtor of interest charges on unpaid accounts receivable. However, in consumer credit transactions, the disclosures required by the *Federal Truth-In-Lending Act*, 15 U.S.C. 1601, must be made before the creditor charges interest.

Section 7 of H.F. 2492, which allows creditors to charge interest on accounts receivable at the rate of 21%, with the proper notification to the buyer, was explained previously in the discussion of the first fact situation and applies to the instant situation where payment is due on a 30-day account.

You should also be aware that H.F. 2492, Sec. 2, creates new classes of borrowers that may agree in writing to pay *any* rate of interest:

1. The following persons may agree in writing to pay any rate of interest, and a person so agreeing in writing shall not plead or interpose the claim or defense of usury in any action or proceeding, and the person agreeing to receive such rate of interest shall not be subject to any penalty or forfeiture for agreeing to receive or receiving such interest:

a. A person borrowing money to finance the acquisition of real property, including the refinancing of a contract for deed, and including the refinancing or assumption of a prior loan by a new borrower if the lender releases the original borrower from all personal liability with respect to the loan;

b. A person borrowing money or obtaining credit in an amount which exceeds thirty-five thousand dollars, exclusive of interest, for the purpose of constructing improvements on real property, whether or not the real property is owned by that person;

c. A vendee under a contract for deed to real property; or

d. A person described in section five hundred thirty-five point two (535.2), subsection two (2), of the Code.

e. A person borrowing money or obtaining credit for business or agricultural purposes, or a person borrowing money or obtaining credit in an amount which exceeds thirty-five thousand dollars for personal, family or household purposes. As used in this paragraph, "agricultural purpose" means and includes any of the purposes referred to in section five hundred thirty-seven point one thousand three hundred one (537.1301), subsection four (4) of the Code, but regardless of whether or not the activities described in that subsection are undertaken by a natural person or other entity.

SITUATIONS #3 and #5. In problems three and five you state situations in which an individual borrows money from a bank to purchase items for personal use. Loans to an individual for a car or television or any other item for personal, family or household use are considered consumer credit loans, provided the loans are under $35,000. §537.1301(16), The Code.

Section 537.2401(1) sets the maximum rate that banks may charge on consumer credit loans not pursuant to open-end credit at 15% per year from the date the debt is incurred. Section 14 of H.F. 2492 amends §537.2401(1) by raising the maximum rate on consumer credit loans

not for open-end credit to 21%. As stated above, H.F. 2492 will be effective upon publication.

The Truth-In-Lending Act requires that, in any consumer credit transaction, the annual percentage rate disclosure and other truth-in-lending disclosures be made at the time credit is extended. The requirements of the Truth-In-Lending Act are not affected by H.F. 2492:

In a transaction that is subject to the truth-in-lending Act, the creditor shall give all disclosures as required by that Act and at the time or times required by that Act.

H.F. 2492, §7(2)(a)

SITUATIONS #4 and #6. In situations four and six you inquire as to the interest rate chargeable when a consumer loan is extended by a finance company. The general term, "finance company," is often used to refer to lenders that are licensed under Chapter 536 (*Chattel Loan Statute*) and/or Chapter 536A (*Industrial Loan Statute*).

Chapter 536 authorizes lenders which are licensed under Chapter 536 to charge interest on loans under $2,000 at rates determined by the Banking Board. On August 22, 1979, the Banking Board fixed the maximum interest chargeable by Chapter 536 licensees, beginning January 1, 1980, at:

. . . thirty six percent per annum on any part of the unpaid principal balance of the loan not exceeding two hundred fifty dollars and twenty-four percent per annum on any part of the loan in excess of two hundred fifty dollars, but not exceeding four hundred dollars, and eighteen percent per annum on any part of the unpaid balance in excess of four hundred dollars.

140 I.A.C. §21.8

The rates stated above will be effective until different rates are set by the Board.

Before Chapter 536 licensees may charge interest on consumer loans, they must make the disclosures that the *Truth-In-Lending Act* requires and at times required by the Act. The truth-in-lending disclosure requirements are specifically incorporated by the ICCC in §537.3201. Chapter 536 indirectly incorporates the truth-in-lending Act by specifying that the provisions of the ICCC apply to consumer loans in which Chapter 536 licensees participate. §536.13(6), The Code.

Section 536A.23 as amended by Chapter 130, 1979 Session Laws, 68th G.A., authorizes companies that are licensed under Chapter 536A, the *Iowa Industrial Loan Statute*, to charge interest at the rate of 9% per year. The 9% interest may be applied by using an add-on or discount method of computation, under which the effective annual interest increases indefinitely as the term of the loan increases. Section 6 of H.F. 2492 raises the interest rate which Chapter 536A licensees may charge to 10% per year. A 10% rate computed by using a discount method of computation would yield interest at an effective annual rate of 17.83% over a six month period and 25% over a 12 month period. Using an add-on method of computation, a 10% rate will yield 16.94% over a six month period and 18.16% over a 24 month period.

Like Chapter 536, Chapter 536A incorporates the provisions of the ICCC with regard to consumer loans extended by industrial loan licen-

sees. Again, one effect of incorporating the ICCC is incorporating the disclosure requirements of the *Truth-In-Lending Act.*

Post-Judgment Interest

As to each of the above fact situations, you asked what rate of interest would be applicable after judgment. The application of post-judgment interest is controlled by §535.3:

Interest shall be allowed on all money due on judgments and decrees of courts at the rate of seven* cents on the hundred by the year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding the maximum applicable rate permitted by the provisions of section 535.2, which rate must be expressed in the judgment or decree.

*Interest on judgments and decrees prior to July 1, 1973, see 65GA, ch 275, §2

The 7% rate specified in §535.3 was raised to 10% by H.F. 163 effective January 1, 1981.

Post-judgment interest at the rate of 7% per year may be charged in each of the fact situations you presented unless the underlying obligation was founded on a contract fixing a different rate of interest. If there was an underlying contract, the contract rate will apply post-judgment if that rate is expressed in the judgment and it does not exceed the maximum applicable rate permitted by §535.2.

New H.F. 2492 poses an exception to Chapter 535.3 by authorizing the accumulation of interest on judgments, in certain limited situations, at rates in excess of Chapter 535.2 rates and in the absence of an underlying written agreement.

The rate of a finance charge imposed pursuant to this section is applicable to a judgment in an action on the account, notwithstanding section five hundred thirty-five point three (535.3) of the Code.

H.F. 2492, §7(7)

Since judgments do not bear interest at common law, *Arnold v. Arnold,* 258 Iowa 850, 140 N.W.2d 874 (1966), authority to apply interest to judgments is purely statutory and cannot be extended beyond the statutory limitations. Under the provisions of Chapter 535.3, post-judgment interest may not exceed the maximum applicable rates permitted by §535.2; H.F. 2492 is the only statutory exception to that rule. Therefore, statutes such as Chapter 536, 536A and 537 which authorize the charging of interest, under special circumstances, at rates in excess of rates allowed by §535.2, cannot be read to provide independent authority for a judgment creditor to receive post-judgment interest in excess of rates allowed by §535.2. This is true even if the judgment is founded on a contract fixing the rate of interest in excess of rates allowed by §535.2.

Finally, in your letter of April 14, 1980, you presented a fact situation in which a legal action is founded upon an interest-bearing note. You asked whether judgment could be entered for the amount of the principal plus interest when the effect would be that post-judgment interest would be added to pre-judgment interest. You inquired, further, whether post-judgment interest may legally be compounded.

The right to post-judgment interest is purely statutory, *Arnold*, and must be distinguished from the right to pre-judgment interest which is founded on contract. In Iowa, post-judgment interest is mandatory; it will accumulate even if the judgment fails to expressly provide for the accretion of interest. Pre-judgment interest, on the other hand, is an element of damages and is left to the discretion of the court. *Militzer v. Kal-Die Casting*, 41 Mich.App. 492, 200 N.W.2d 323 (1972). Since the right ot pre-judgment interest is totally independent from the right to statutory post-judgment interest, the existence of the right to post-judgment interest should not be a factor in determining the amount of interest in the form of damages to which a judgment creditor is entitled.

In the example you presented, a court may exercise its discretion to enter a judgment for the principal amount plus interest, regardless of the fact that the effect would be that statutory post-judgment interest will accumulate on the pre-judgment interest.

. . . it has generally been held that a judgment bears interest on the whole amount thereof, although such amount is made up partly of interest on the original obligation . . .

47 C.J.S., *Interest*, §21

Although the Iowa Supreme Court has not spoken to the issue of whether post-judgment interest may be compounded, it is the general authority that "compound interest on a judgment generally is not recoverable, unless it is authorized by statute." Id. No Iowa statute allows post-judgment interest to be compounded. Therefore, although post-judgment interest may be added to pre-judgment interest, post-judgment interest, itself, may not be compounded.

SUMMARY

Section 7 of H.F. 2492 changes existing Iowa usury laws to allow sellers to charge interest on accounts receivable, without a prior written agreement, if the sellers meet certain notice requirements specified in subsection 2 of §7. Section 7 allows sellers to charge interest at rates up to 21% per year but applies only if a seller can be deemed to have extended credit to the buyer.

Section 2 of H.F. 2492 creates new classes of borrowers who may agree in writing to pay any rate of interest. If a person belonging to a class listed in §2 enters a transaction without executing a written agreement for the payment of interest, a creditor in that transaction will be limited to charging interest at the rate specified in §7 of H.F. 2492, assuming the creditor follows the §7 notice requirements. If the seller does not meet the §7 notice requirements, the seller is limited by §535.2 to charging interest at the rate of 5% per year.

H.F. 2492 raises the maximum interest rate which lenders in consumer credit loans may charge, to 21% per year. The truth-in-lending disclosure requirements are not affected by H.F. 2492.

Lenders licensed under Chapter 536 and 536A may charge interest on consumer loans at rates specified in Chapters 536 and 536A. Chapters 536 and 536A rates may exceed maximum rates allowed by the ICCC. Both Chapter 536 and 536A specify that the provisions of the ICCC apply to consumer loans in which licensees participate.

Section 535.3 sets post-judgment interest at 7% per year unless the underlying obligation is founded on a contract fixing a different rate of interest. In cases where there is an underlying contract, the contract rate will apply post-judgment, provided that rate is specified in the judgment and does not exceed the maximum applicable rate permitted by §535.2. Section 7(7) of H.F. 2492 is the only exception to §535.3, and authorizes the accumulation of interest on judgments, under certain limited circumstances, at rates in excess of §535.2 rates and in the absence of a written agreement.

A court may enter judgment for the total amount of the principal of an obligation plus interest, even though the effect may be that post-judgment interest will be added to pre-judgment interest. Post-judgment interest may not be compounded.

June 17, 1980

ADMINISTRATIVE AGENCIES: IOWA RURAL COMMUNITY DEVELOPMENT COMMITTEE. Chapters 17A, 387, §§17A.1(2), 17A.2(1), 17A.2(7), 17A.23, 135.62(2), 387.1-5, The Code 1979. The Iowa Rural Community Development Committee is an "agency" within the meaning of the Iowa Administrative Procedures Act. The "reassignment" of an administrative agency from one larger unit of state government to another does not effect the validity of the agency's administrative rules as long as the agency's underlying authority to administer the program in question remains unchanged as evidenced by its enabling statute. The eligibility criteria employed by the Iowa Rural Community Development Committee in allocating grant monies and in reviewing and passing upon competing grant applications are "rules" within the meaning of chapter 17A. Such criteria are void and unenforceable if not adopted pursuant to rulemaking procedures. (Fortney to Welsh, State Representative, 6-17-80) #80-6-5

The Honorable Joe Welsh, State Representative: You have requested an opinion of the Attorney General regarding the Iowa Rural Community Development Committee. This committee is established by §387.2, The Code 1979, and is charged with administration of the grant program established by chapter 387. The purpose of the program 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.

§387.1, The Code 1979.

As originally enacted, §387.2 established the committee within the community betterment division of the Iowa Development Commission. However, 1979 Acts, 68th G.A., chapter 3, §17 amended §387.2 to provide that "the Iowa rural community development committee is established within the office for planning and programming . . ." This amendment took effect July 1, 1979.

Prior to July 1, 1979, administrative rules for the committee were adopted pursuant to the rulemaking provisions of chapter 17A. These rules were promulgated under the auspices of the Iowa Development Commission. These rules were rescinded by the commission effective February 27, 1980. *See* Iowa Administrative Bulletin, vol. II, No. 19, p. 1091, March 19, 1980. Also on March 19, 1980, a notice of intended action was published in the Bulletin whereby the Office for Planning and Pro-

gramming proposed adoption of rules for the committee. *See* Iowa Administrative Bulletin, vol. II, No. 19, p. 1981, March 19, 1980.

In conjunction with the preceding facts, you have raised the following inquiries:

1. "When an administrative agency is transferred from one jurisdiction to another, are the administrative rules of that agency transferred as well?"

2. "If rules do not transfer automatically with the agency, what is the status of subsequent actions of that agency?"

3. "May the agency impose criteria for eligibility in addition to those published as 'guidelines' or as administrative rules?"

I.

The fact that the Iowa Rural Community Development Committee is jurisdictionally housed in another, larger unit of state government does not, in and of itself, present an anomalous situation.[1] Such an arrangement may be desired by the General Assembly for purposes of economy, to avoid duplication of staff and to avail the smaller unit of the expertise possessed by the personnel attached to the larger unit. However, simply because one unit of state government is attached to a second unit does not prevent the first from being considered a separate "agency" for purposes of chapter 17A. The questions you raise relate totally to the adoption of administrative rules. Consequently, primary attention must be directed to the Iowa Administrative Procedure Act (hereinafter IAPA).

At the outset, it should be noted that the IAPA is to be "construed broadly to effectuate its purposes". *See* §17A.23. In addition, the Act applies to "*all* state agencies". *See* §17A.1(2). [Emphasis supplied.] The Act defines an "agency" in §17A.2(1) as "each board, commission, department, officer, or other administrative office or unit of the state." At a minimum, the Iowa Rural Community Development Committee is an "administrative office or unit of the state". It is the body within state government which is charged with overseeing the operation of the Iowa Rural Community Development Act. The committee allocates the monies appropriated by the General Assembly for chapter 387 programs. *See* §387.4. It also is charged with providing an application mechanism for those seeking a chapter 387 grant. *See* §387.3(3). The chairperson of the committee is authorized to issue vouchers for grants upon which the state comptroller is authorized and directed to draw warrants. *See* §387.5.

That the Iowa Rural Community Development Committee is an agency within the meaning of §17A.2(1) seems clear. No statutory provisions appear which exempt the committee from the operation of IAPA. *See Frazee v. Iowa Board of Parole*, 248 N.W.2d 80 (Iowa 1976). This conclusion is supported by Professor Arthur Earl Bonfield. He writes:

Units within other state governmental units as well as 'super' units are clearly covered. The type of unit and its name are irrelevant. The juris-

[1] Other units of government have been established in similar circumstances. For example, the State Health Facilities' Council is within the Department of Health for administrative and budgetary purposes. *See* §135.62(2), The Code 1979. Like the Iowa Rural Community Development Committee, the council members are appointed by the governor and confirmed by the senate.

diction of the unit and its subject area and function are irrelevant. . . . The legislature clearly intended each and every unit of state government, of whatever nature, kind, or class, to be covered by the IAPA subject only to three exceptions . . . .[2]

Bonfield, *The Iowa Administrative Procedure Act*, 60 Iowa L. Rev. 731, 761 (1975).

Moreover, if we examine the question from a functional standpoint, we conclude that the committee is an "agency". Professor Kenneth Culp Davis has stated that:

an administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication, rulemaking, investigating, prosecuting, negotiation, settling, or informally acting. An administrative agency may be called a commission, board, authority, bureau, office, officer, administrator, department, corporation, administration, division or agency. Nothing of substance hinges on the choice of name, and usually the choices have been entirely haphazard.

K. Davis, *Administrative Law — Cases — Text — Problems* 1 (5th ed. 1973).

As established by chapter 387, the Iowa Rural Community Development Committee is unquestionably a governmental authority which directly affects the rights of those who seek chapter 387 grant monies. The criteria established by the committee for evaluating grant applications can have a substantial impact on the successful completion of development programs in Iowa's rural areas. As such, the Iowa Rural Community Development Committee is deemed to be an "agency" within the meaning of §17A.2(1).

Having concluded that the committee is itself an "agency", we must then address the question of whether the "reassignment" of the committee from the Iowa Development Commission to the Office for Planning and Programming results in a situation in which the administrative rules "transfer" with the committee or whether the "reassignment" results in the abrogation of the rules and the need to adopt new rules. To analyze this problem, we turn to the enabling statute of the committee, chapter 387, as amended by 1979 Acts, 68th G.A., chapter 3, §17. When the committee's enabling statute was amended in 1979, the sole change was the amendment to §387.2.[3] This amendment effected the "reassignment" in question. No other changes were enacted in chapter 387. Consequently, the underlying authority of the committee remains intact. No substantive changes were made in the committee's function, purpose or authority. Programmatically, the operation of the chapter 387 grant program re-

[2] The exceptions are the general assembly, the governor and the courts. *See* §17A.2(1).

[3] The section originally read, in part: "The Iowa rural community development committee is established within the community betterment division of the Iowa development commission . . ." *See* §387.2, The Code 1979. The words "community betterment division of the Iowa development commission" were struck and in lieu thereof the following was substituted: "Office for planning and programming". *See* 1979 Acts, 68th G.A., chapter 3, §17.

mained unchanged. As the purpose of the committee's administrative rules is to implement the program established by chapter 387, and as there have been no substantive changes in the program itself, the amendment of §387.2 by 1979 Acts, 68th G.A., chapter 3, §17 would not effect the validity of the agency's rules. As the agency and its program are substantively unaffected by the amendment, so too are the rules unaffected. Thus, it is our opinion that the rules of the Iowa Rural Community Development Committee which were in effect prior to July 1, 1979[1] would remain in effect following that date until otherwise modified in compliance with the procedures established by chapter 17A.

II.

Because of the response which we have made to your first question, it is unnecessary to respond to your second question. As the rules "transfer automatically with the agency", subsequent agency action may be taken in reliance on those rules.

III.

The third question you have submitted is whether an agency may "impose criteria for eligibility in addition to those published as 'guidelines' or as administrative rules"? Within the context of the Iowa Rural Community Development Program, your question can properly be viewed in terms of whether the committee can utilize eligibility criteria which have not been adopted as rules pursuant to chapter 17A. It is our opinion that such criteria cannot be used in reaching a decision regarding approval of a grant application.

The IAPA defines a "rule " as "each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure or practice requirements of any agency". *See* §17A.2(7), The Code 1979. The Code then provides a list of eleven types of agency statements which, by definition, are not rules. *See* §17A.2(7)(a)-(k).[2]

To determine whether eligibility criteria employed by an agency are rules, one should first note the breadth of the definition of "rule". Section 17A.7 defines rules as "statements". This is critical when viewed in perspective with the prior definition of "rule" as a "rule, regulation, order or standard of general application". *See* §17A.1(3), The Code 1973. The newer, and more expansive, definition of "rule" can be seen as a legislative attempt to prevent executive agencies from circumventing rulemaking procedures by denomination standards or policies as some-

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[1] 1979 Acts, 68th G.A., chapter 3, §17 was effective July 1, 1979.

[2] None of the enumerated exceptions is applicable to the eligibility criteria employed by an agency to determine whether a grant applicant receives or is denied the grant monies available. The criteria are not analogous to internal operating procedures and policies which do not substantially effect the public. Indeed, such criteria can be the controlling element in determining whether a community participates in the grant program.

thing other than a rule." Articulated eligibility criteria are assuredly agency statements of policy. Likewise, they are of "general applicability" in that they are directed to all segments of the public who might seek to participate in the grant program. The criteria are not directed to particular individuals, but instead are intended to impact equally on all applicants who are in similar circumstances. Therefore, the eligibility criteria employed by an agency in allocating grant monies and in reviewing and passing upon competing grant applications are rules within the meaning of Chapter 17A.

It is well-recognized that adequate sanctions are needed to ensure that agencies comply with statutory rule-making procedures. One commentator has noted that:

experience has indicated that some agencies exhibit a tendency to slight the procedural niceties prescribed by statute. Some administrators seem to believe that it is more important to get things done than to follow with meticulous care the time-consuming procedures set forth in the statutes. Because of this circumstance, and because there is some doubt whether the courts would construe the statutes as being mandatory or only directory, it is helpful to provide specific sanctions designed to assure reasonably strict compliance with the rule-making procedures provided by law.

1 F. Cooper, *State Administrative Law* 206 (1965).

Iowa has chosen to provide "specific sanctions". Section 17A.4(3) provides that a rule is void if it is not adopted in substantial compliance with the rulemaking provisions of chapter 17A. If an "agency statement" is determined to be a rule and it was not adopted in the normal process, it is void. Consequently, eligibility criteria employed by an agency in reviewing and approving grant applications are void and unenforceable if not adopted pursuant to chapter 17A.

CONCLUSION

The Iowa Rural Community Development Committee is an "agency" within the meaning of the Iowa Administrative Procedures Act. The "reassignment" of an administrative agency from one larger unit of state government to another does not effect the validity of the agency's administrative rules as long as the agency's underlying authority to administer the program in question remains unchanged as evidenced by its enabling statute. The eligibility criteria employed by the Iowa Rural Community Development Committee in allocating grant monies and in reviewing and passing upon competing grant applications are "rules" within the meaning of chapter 17A. Such criteria are void and unenforceable if not adopted pursuant to rulemaking procedures.

" For example, prior to the adoption of Acts 1974, 65th G.A., chapter 1090, it was believed that agency evasion of rulemaking procedures was widespread and was attempted on the grounds that the action involved was a "manual", "memo", "guideline", or "policy" rather than a "rule". *See* Bonfield, p. 827.

June 17, 1980

MENTAL HEALTH: MOTOR VEHICLES: Entitlement to a Driver's License. Sections 228.7, 229.9, 229.30, 321.177(5), The Code 1975; §§218.95, 229.2, 229.13, 229.27(1)(3), 229.39(1)(2), 321.177(5)(7), The Code 1979. Persons who were involuntarily committed to a mental health facility and discharged therefrom prior to the enactment of present chapter 29 may be denied a license under §321.177(5), unless discharged from the facility in good mental health, or may be denied a license where good cause exists for such denial under §321.177(7). Persons voluntarily admitted to and discharged from a mental health facility prior to present chapter 229 are entitled to a driver's license unless, under §321.177(7), the Department of Transportation obtains substantial evidence that their ability to operate a motor vehicle is impaired. Persons admitted to a mental health facility, either voluntarily or involuntarily, prior to the enactment of present chapter 229, but who have been or will be discharged subsequent to its enactment, may not be denied a license on the basis of mental incompetency, unless specifically adjudged to be incompetent, or unless good cause for the denial is established by substantial evidence. (Mann to Reagen, Commissioner, Department of Social Services, 6-17-80) #80-6-6 (L)

June 18, 1980

TAXATION: Property Acquisitions by the Iowa Department of Transportation. 1979 Session, 68th G.A., ch. 68, §6 (Senate File 159): §449.1, The Code 1979. The Department of Transportation is subject to the provisions of §6 of Senate File 159, when property is acquired for use as a public highway after July first of each year and the property so acquired was taxable property on the tax rolls on July first. In the event that the Department acquires only a portion of a real estate tract assessed as one item, the Department and the seller may agree how the tax shall be payable between themselves or, if no agreement was made, application can be made to the board of supervisors for apportionment of the tax obligation. Real estate taxes are not a personal obligation of the property owner. (Price to Kassel, Director, Dept. of Transportation, 6-18-80) #80-6-7 (L)

June 18, 1980

PUBLIC RECORDS; SCHOOLS: §§68A.1, 68A.7, 68A.8, 68A.9, The Code 1979; 20 U.S.C. 1232g. Names and addresses of students contained in public records in the custody of public schools are not confidential, for purposes of §568A.7, and therefore, are open to public inspection. 20 U.S.C. 1232g, as incorporated by §68A.9, however, requires that the school provide parents of students or adult students with an opportunity to inform the school that they do not want this information to be released without their prior consent. (Norby to Benton, Superintendent, Department of Public Instruction, 6-18-80) #80-6-8 (L)

June 18, 1980

MOTOR VEHICLES — Vehicle registration and drivers licensing — Nonresident Exemptions. §§47.4(4), 321.53, 321.54, 321.55, 321.174, 321.176. While considerable weight should be accorded a declaration of residency in Iowa for voting purposes, it does not automatically deny an individual nonresident status regarding vehicle registration and drivers licensing exemptions. (Dundis to Kelly, Jefferson County Attorney, 6-18-80) #80-6-9 (L)

June 18, 1980

CONSTITUTIONAL LAW; Private Use of City Property; IOWA CONST. art. III, §31, §721.2(5), The Code 1979, §903.1(2), The Code

1979, §740.20, The Code 1977. Absent the vote of two-thirds of the members of each branch of the General Assembly, a city may not, consistent with the Iowa Constitution, authorize the use of city property by city employees for their private use. (McNulty to Rush, State Senator, 6-18-80) #80-6-10

The Honorable Bob Rush, State Senator: You have requested the opinion of this office regarding the meaning of Iowa Code section 721.2(5). This section provides that any public officer or employee, or any person acting under color of such office or employment who knowingly "[u]ses or permits any other person to use the property owned by the state or any subdivision or agency of the state for any private purpose and for personal gain, to the detriment of the state or any subdivision thereof" is guilty of a serious misdemeanor.[1]

You ask whether a city, consistent with section 721.2(5), may authorize the use of city-owned equipment by city employees for their own purposes as a fringe benefit of their employment. You note that the prior criminal statute on private use of public property, section 740.20, The Code 1977,[2] had been interpreted by this office to prohibit such authorization. *See* 1978 Op. Att'y Gen. 191.

In contrast to section 740.20 of the 1977 Code, present Code section 721.2(5) requires proof of personal gain and detriment to the governmental body in addition to the existence of a private purpose to establish a criminal violation. Regardless of the effect section 721.2(5) has on the continued validity of our prior opinion concerning section 740.20 of the 1977 Code, we have concluded that the Iowa Constitution generally prohibits a city from authorizing the use of city-owned property by city employees for their own purposes. Article III, section 31 of the Iowa Constitution 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].

This constitutional provision is applicable to cities. *Love v. City of Des Moines.* 210 Iowa 90, 101, 230 N.W. 373, 378 (1930). The constitution makes no attempt to define private purpose nor has the Supreme Court of Iowa articulated a concrete definition. What is clear, however, is that the use to which the property is put determines, in large part, its private

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[1] A serious misdemeanor is punishable by imprisonment not to exceed one year, or a fine not to exceed one thousand dollars, or both. §903.1 (2), The Code 1979.

[2] *740.20 Private use of public property.* No public officer, deputy or employee of the state or any governmental subdivision, having charge or custody of any automobile, machinery, equipment, or other property, owned by the state or a governmental subdivision of this state, shall use or operate the same, or permit the same to be used or operated for any private purpose.

or public nature. *See* 81A C.J.S. *States* §205 (1977). *See also* 63 AM. JUR. 2d *Public Funds* §59 (1972). Otherwise stated, an appropriation of public money or property, to be valid, must be utilized by the governing body in the exercise of its governmental functions. 81A C.J.S. *States* §205 (1977). It cannot be gainsaid that the use of city-owned equipment by city employees for their own use is private in nature. No governmental functions are involved. It is irrelevant that a resolution authorizes such use as a fringe benefit. The private nature of the use remains the same. Moreover, the benefits that would flow to the public from such use of city equipment, e.g., city employee morale, seem indirect and remote. Therefore, absent the vote of two-thirds of the members of each branch of the General Assembly, it is unconstitutional for a city to authorize its employees to use city equipment for their own purposes.

Such authorization and use is impermissible whether or not particular facts give rise to criminal liability under section 721.2(5), The Code 1979. The fact that a city council feels that certain private use of city property is not detrimental to the city is not binding on a trier of fact at a criminal trial.[3] *See State v. Striggles*, 202 Iowa 1318, 1320, 210 N.W. 137, 138 (1926). *Cf. John R. Grubb, Inc. v. Iowa Housing Finance*, 255 N.W.2d 89, 93 (1977) (legislative declaration of public purpose is not final, binding, or conclusive on the courts).

June 19, 1980

SCHOOLS: Employment of legal counsel. §279.37, The Code 1979; 1980 Session, 68th G.A., S. F. 426. A school board has discretionary power to employ legal counsel to represent a superintendent or principal before the Professional Teaching Practices Commission. (Norby to Robinson, State Senator, 6-19-80) #80-6-11 (L)

June 19, 1980

AGRICULTURE: Property Law: Criminal Law. Recordation of Contract Sales of Agricultural Real Property; Criminal Prosecution for Failure to Record Conveyances and Leases of Agricultural Property. §558.44, The Code 1979. A contract sale of agricultural real property is a conveyance within the meaning of §558.44, The Code 1979. The action to enforce the provisions of §558.44, The Code 1979, is a criminal prosecution. (Willits to Frisk, Harrison County Attorney, 6-19-80) #80-6-12 (L)

June 19, 1980

COUNTIES AND COUNTY OFFICERS: County attorney's duties. §§29A.34, 336.2(1)(11), The Code 1979. County attorney is afforded some discretion in the decision whether to bring action to recover military property or its value, when asked to do so by Iowa Army National Guard company commander. Costs of bringing action are treated in same manner as costs in other civil actions brought by county attorney. (Hyde to Riepe, Henry County Attorney, 6-19-80) #80-6-13 (L)

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[3] A report from the Citizen's Aide/Ombudsman's Office has been provided to us regarding the private use of city property by a city employee in Center Point. We express no opinion on the application of section 721.2(5) to that situation.

June 24, 1980

COUNTIES: OPEN MEETINGS: POOR FUND: MENTAL HEALTH INSTITUTIONAL FUND. Chapter 28A, §28A.5, Chapter 217, §217.30, Chapter 252, Chapter 222, The Code 1979. The county board of supervisors may meet in closed session to evaluate claims against the county poor fund and some placements of mentally retarded persons paid from the mental health institutional fund. The auditor's record of claims and the amount of assistance paid are public information. The names of persons receiving assistance from the poor fund may not be published in the newspaper, but the names of claimants on the mental health institutional fund are to be published as regular claims. (Morgan to Casper, Madison County Attorney, 6-24-80) #80-6-14

John E. Casper, Madison County Attorney: You requested an Attorney General's opinion regarding the legality of closed meetings of a county board of supervisors ("supervisors") to discuss claims upon the poor fund and mental health institutional fund. Specifically, you ask the following questions:

1. May the evaluation and deliberation by the county board of supervisors on claims made upon the Poor Fund under Iowa Code Chapter 252 and the Mental Health Institutional claims under Chapter 222, be taken during a closed session pursuant to Iowa Code Chapter 28A.5?

2. May the county board of supervisors' resolution acting on each claim not disclose the name of the claimant?

After a review of the applicable statutes, cases, and previous opinions of the attorney general, we have concluded that personal, social, and medical information regarding claimants may not be disclosed by the supervisors in evaluating claims upon the poor fund but may be disclosed in evaluating claims of mentally retarded persons making claims on the mental health institutional fund. The names of claimants, the amount of each claim and other information regarding payment and collection of funds owed to the county or state are public information.

A county board of supervisors may hold a closed session upon vote of the appropriate majority of persons present if a closed session is necessary "to review or discuss records which are required or authorized by state or federal law to be kept confidential. . . ". Section 28A.5(1)(a), The Code 1979.

The confidentiality of information concerning assistance provided from the poor fund is delineated by §217.30(6), The Code 1979. In general, the county is required to keep confidential both the names and addresses of individuals receiving services or assistance and the types of services or amounts of assistance provided. Section 217.30(1)(a), The Code 1979. Information may be disclosed for purposes of administration of programs of services or assistance to agencies who maintain the same standards of confidentiality, §217.30(2), The Code 1979, and information shall be disclosed to public officials for use in connection with their official duties relating to auditing and other purposes. Section 217.30(4)(b), The Code 1979.

Section 217.30(6), The Code 1979, states that the "reports required to be prepared by the Department" with respect to Chapter 252 shall be prepared by the person or officer who is the overseer of the poor. Apparently the reports referred to in §217.30(6), The Code 1979, are those which the Iowa Department of Social Services is required to prepare in §217.30(4a). These reports include the name and address of all

recipients of assistance together with the amount paid to each recipient during the preceding calendar quarter. The reports are public records but are to be viewed only by those who sign a statement that the information will not be used for commercial or political purposes. The use or disclosure of information protected by this chapter in an unauthorized manner constitutes a serious misdemeanor. Section 217.30(4d) and (7), The Code 1979. The intent of the statute is to keep confidential all information regarding recipients of assistance other than name, address and amount of assistance paid during the preceding quarter. Only a minimal amount of information regarding assistance paid is public information. The statute expressly protects much of the information which the supervisors would need to evaluate claims. It would appear that the supervisors are authorized to meet in a closed session to discuss merits of claims and that they would be well advised not to discuss publicly the details of individual requests for assistance. Section 217.30, The Code, 1979.

Some matters pertaining to the commitment and subsequent placements of mentally retarded persons who are adjudicated to be mentally retarded or committed to a state hospital school pursuant to Chapter 222 of The Code fall within the auspices of the Iowa Department of Social Services and are protected from public disclosure by §217.30 of The Code. Section 222.31 and §222.59. (*See also* §218.22 regarding records of patients within state institutions.) In evaluating the merits of the placement of any person who is receiving services or assistance from the Iowa Department of Social Services the supervisors may use the general confidentiality provisions of §217.30(1), The Code 1979, to confine their discussions to a closed session, provided that the information discussed is confidential to the Department and required to be conveyed to the supervisors to carry out a Department function. Section 217.30(2), The Code 1979. We have identified no statute which would protect from public discussion the medical, social or personal information of mentally retarded persons absent the communication of Department information to the supervisors for purposes of Department program administration. Many of the discussions of claims for placement and other expenses of mentally retarded persons will be raised to the supervisors by Department employees. Any other communications regarding mentally retarded persons are public and must be discussed in open session.

Claims on the county mental health institutional fund for the benefit of mentally retarded persons are not protected as "confidential" by any language in the statute. Previous opinions of the Attorney General have examined questions of the confidentiality of the county auditor's records of other expenditures from the mental health institutional funds, 1978 Op. Att'y. Gen. 425; 1976 Op. Att'y Gen. 503, and the public nature of claims signed by the supervisors, 1968 Op. Att'y Gen. 742. The Iowa Supreme Court has recently stated that the county auditor's records of payments made from the mental health institutional fund for mentally ill persons are public records. *Howard v. Des Moines Register and Tribune*, 283 N.W. 2d 289 (Iowa 1979), *cert. den.*, U.S. , 100 S.Ct. 1081, L.Ed.2d (1980).

The auditor's records were required to be kept by statute, see §230.26, The Code 1966, and would have been deemed public records even before chapter 68A was enacted. *Linder v. Eckard*, 261 Iowa at 220, 152 N.W.

2d at 836. They are well within the definition of public records in Chapter 68A. See *Osmundson*, 248 N.W. 2d at 501.

283 N.W. 2d at 300.

The county supervisors and auditor are required to maintain a claim register and warrant book, neither of which is required to be kept confidential. Claims upon the county are required to show the general nature of the claim and the name of the claimant. Pursuant to §349.18, The Code 1979, the county supervisors are to publish the name of each individual to whom an allowance is made and for what the bill is filed, "except that names of persons receiving relief from the county poor fund shall not be published." We have located no similar provision of privacy for claimants of the mental health institutional fund.

To summarize, it is our reading of applicable Iowa law that the county board of supervisors is permitted to meet in closed session to discuss the name of and personal, social and medical information regarding claimants upon the poor fund while they may not meet in closed session to discuss mentally retarded claimants of the mental health institutional fund unless programs of the Iowa Department of Social Services require that the discussions be confidential. The name and amount claimed for expenses paid from both funds are public information to the extent that claimants of the poor fund are to be listed quarterly in a record available for limited public inspection. Section 217.30(4)d, The Code 1979. The names of poor fund claimants are not to be published with the regular county claims in the official newspaper. Section 349.18, The Code 1979. In addition, claims paid by the county auditor for the mental health institutional fund are public records. *Howard, supra*. The names of the claimant and general nature of the claim are to be published.

The questions you ask raise conflicting public policies. While the general public has an interest in requiring local officials to be accountable for the expenditure of public revenues and in assuring that needy and mentally retarded persons are provided suitable resources and support, the individuals who need assistance have an interest in keeping private personal information regarding social activities, mental capacity and medical evaluation. As a practical matter, we would suggest an alternative method to deliberation and evaluation by the supervisors of each claim for assistance from the poor fund. Where permissible, the supervisors could adopt rules establishing an objective standard for receiving assistance with primary responsibility for administration of the general relief program vested in the general relief director. See Chapter 252, The Code 1979, *as amended* 1979 Session, 68th G.A., Ch. 57. The supervisors would then be responsible for deliberation of only those claims for which the applicant was dissatisfied with the general relief director's decision, thereby limiting questions of cofidentiality to a few cases. Section 252.37, The Code 1979, *as amended* 1979 Session, 68th G.A., Ch. 57, §4 and §9. Such an approach would permit public evaluation of the standards for receipt of general relief or emergency assistance without sacrificing the applicant's or recipient's need for privacy.

June 24, 1980

PUBLIC BONDS: SCHOOLS; BONDS. 1980 Session, 68th G.A., S. F. 500; §296.1, The Code 1979. The increased interest rates payable on school bonds may not be paid on bonds authorized by an election held prior to the effective date of S. F. 500. The prior limitation contained in §296.1, The Code 1979, applies to bonds authorized by elections held prior to the effective date of S. F. 500, which was April 12, 1980. (Norby to Tieden, State Senator, 6-24-80) #80-6-15 (L)

June 24, 1980

PUBLIC EMPLOYEE: Grievances: U.S. Const. amend. I, Sections 20.10 (2)(e), 20.10(2)(f), 20.14, 20.15, 20.16, 20.17, 20.17(1), The Code 1979. A public employee may seek to adjust an individual complaint with a public employer. A public employer is under no duty to meet with an individual employee. A public employer may not prohibit public employees from speaking at public meetings. (Powers to Hansen, State Senator, 6-24-80) #80-6-16 (L)

June 24, 1980

ELECTIONS; SCHOOLS: Campaign Finance Disclosure Commission. Ch. 56, §§56.2(6), 274.1, 296.3, 298.32, The Code 1979. A school district is not subject to the campaign finance disclosure requirements of ch. 56, The Code 1979, since it has no authority to engage in activity that would bring it within the definition of a political committee, i.e., accept contributions, make expenditures or incur indebtedness exceeding $100 in any one calendar year to support or oppose a candidate for public office or ballot issue. (Hyde to Eisenhauer, Executive Director, Campaign Finance Disclosure Commission, 6-24-80) #80-6-17 (L)

June 25, 1980

COUNTIES AND COUNTY OFFICERS: Eligibility of a private nonprofit corporation to receive federal revenue sharing funds from a county. 31 U.S.C. §§1221-1245 (1976) (Supp. 1980), 31 C.F.R. §§51.0-51.225 (1977), Iowa Const., art. III, §39A. A private nonprofit corporation is eligible to receive federal revenue sharing funds from a county, as well as from another unit of local government or the state. The transfer of such funds must, however, be permitted by both state and local law and is subject to continuing compliance by the recipient corporation with certain federal revenue sharing regulations. (Stork to Arends, Humboldt County Assistant Attorney, 6-25-80) #80-6-18(L)

June 25, 1980

FIREWORKS: §727.2 of 1979 Code of Iowa. The devices known as Champagne Party Poppers, Ozark Smoke Bombs and Pop-Its are categorized as fireworks prohibited under §727.2 of the 1979 Code of Iowa. (Ormiston to Poppen, Wright County Attorney, 6-25-80) #80-6-19 (L)

June 25, 1980

CRIMINAL LAW: BRIBERY; PUBLIC OFFICIALS; GIFTS AND GRATUITIES. 1980 Session, 68th G.A., House File 687, §§6-8; §§68B.5, 68B.8, The Code 1979. A determination of whether two or more gifts constitute "one occurrence" is to be made by reference to the totality of the circumstances surrounding the gifts in question. If the gifts involved are related to one another, they are likely part of the same occurrence. If the gifts in question are of a similar nature or are related to one another, if the gifts were made in the same or a similar setting, if the relationship between the donor and the donee has its roots in the public employment status of the donee rather than in the personal relations between the parties, and if there was a relatively brief period of time separating the gifts in question, such gifts would

likely be found to constitute one occurrence. (Miller and Fortney to Pope, State Representative, 6-25-80) #80-6-20

The Honorable Lawrence Pope, State Representative: You have requested an opinion of the Attorney General regarding the meaning of the term "in any one occurrence" as it appears in 1980 Session, 68th G.A., House File 687, relating to limitations on gifts to public officials and employees. It is our opinion that a determination of whether two or more gifts constitute "one occurrence" is to be made by reference to the totality of the circumstances surrounding the gifts in question. If the gifts involved are related to one another, they are likely part of the same occurrence. If the gifts in question are of a similar nature or are related to one another, if the gifts were made in the same or a similar setting, if the relationship between the donor and the donee has its roots in the public employment status of the donee rather than in the personal relations between the parties, and if there was a relatively brief period of time separating the gifts in question, it is our opinion that such gifts would likely be found to constitute one occurrence.

House File 687, §8, amended §68B.5, The Code 1979, by striking the section and inserting in lieu thereof the following:

An official, employee, local official, local employee, member of the general assembly, candidate, or legislative employee shall not, directly or indirectly, solicit, accept, or receive any gift having a value of fifty dollars or more *in any one occurrence.* A person shall not, directly or indirectly, offer to make any such gift to an official, employee, local official, local employee, member of the general assembly, candidate or legislative employee which has a value in excess of fifty dollars *in any one occurrence.* [Emphasis supplied]

While prohibiting gifts in excess of fifty dollars in any one occurrence, the bill failed to provide a definition of what constituted an "occurrence". This omission is particularly striking given the fact that the bill provided a lengthy definition of the term "gift", as well as defining "candidate", "local official", "local employee", "public disclosure', and "immediate family members'. *See* House File 687, §6.

In addition to amending the prohibitions in §68B.5, House File 687 included an innovative reporting system. Section 7 of the bill mandated that reporting rules be adopted by the house of representatives, the senate, the governor, and the Supreme Court.[1] A political subdivision's governing body may develop such rules as well. These provisions of House File 687 are uniform to the extent that they require such reporting rules to be applicable to any gift "which exceeds fifteen dollars in value *in any one occurrence.*" *See* House File 687, §7(1)-(4). [Emphasis supplied] As with the general prohibition on gifts in excess of fifty dollars in value found in §8, the reporting provisions of §7 fail to define the term "in any one occurrence".

The evolution of House File 687 through the General Assembly does not offer much assistance in interpreting the term "occurrence". On

[1] The rules adopted by the house and senate are applicable to members of the general assembly, legislative employees, and immediate family members. Those adopted by the governor are applicable to officials and employees of the executive branch and their immediate family members. Those adopted by the Supreme Court are applicable to officials and employees of the judicial branch and their immediate family members.

April 27, 1979, the house rejected H-4156, an amendment that would have prohibited the receipt of gifts "of ten dollars per occurrence and twenty-five dollars per year from any one source. . ." On the same date, the house adopted H-4157, an amendment which prohibited the receipt of gifts "exceeding twenty-five dollars in value in any one instance or one hundred dollars in value from any one source during a calendar year". House action on these amendments does not greatly assist in resolving the meaning of "occurrence" in that these amendments respectively failed to define "occurrence" and "instance".

On the senate side of the General Assembly, S-3629 was adopted on April 25, 1979. This amendment represents the first attempt to impose a reporting mechanism for the receipt of gifts. The amendment provided, in pertinent part:

An official, employee, member of the general assembly, or legislative employee shall file a report with the secretary of state describing the nature, amount, date and donor of any gift received by that person which exceeds ten dollars in value.

The House concurred in S-3629 on April 30, 1979. *See* H-4141. In contrast to the final version of House File 687, §7, S-3629 required the reporting of all gifts in excess of a set dollar amount. House File 687, §7 requires the reporting of all gifts in excess of a set dollar amount in any one occurrence.

The difference between the house and senate versions of House File 687 remained unresolved at the close of the 1979 Session. A conference committee was established. This committee filed its report on February 14, 1980. The language suggested by the committee with regard to reporting of gifts was adopted in its entirety by the General Assembly with House action on February 19 and Senate concurrence on February 21. There were no relevant amendments offered which might clarify the intended meaning of "occurrence".

Following the passage of House File 687, both the house of representatives and the senate adopted rules for the reporting of gifts. House Resolution 110, §b provides in pertinent part:

A person who provides a gift which exceeds fifteen dollars in value *in any one occurrence* to a member, officer or employee of the house of representatives or their immediate family members shall report the gift.

* * *

A member, officer or employee and their immediate family members shall not receive more than one gift which is required to be reported from the same person in any one occurrence. [Emphasis added]

During the debate on House Resolution 110, an amendment, H-6412, was offered which would have resulted in the above sentence reading as follows:

A member, officer or employee and their immediate family members shall not receive more than one gift which is required to be reported from the same person *in any one calendar day.* [Emphasis supplied]

The house of representatives rejected this amendment, thus providing some indication that, at least to the members of the house, an "occurrence" differed from one day. This does not, however, resolve the question of whether an "occurrence" could in fact be a period of time greater than twenty-four hours.

Senate Resolution 114, §19(1) provides:

Persons who have made gifts to a senator, senate employee, or an immediate family member of a senator or senate employee shall file a report with the secretary of the senate which includes:

(1) a list of senators, senate employees, or their immediate family members for whom a gift which has a value in excess of fifteen dollars was made *on any one occurrence*, the date of the occurrence, and the nature and amount of the gift. [Emphasis supplied]

Senate Resolution 114, §20 provides in pertinent part:

Senators and employees of the senate shall file a report with the secretary of the senate of the acceptance of a gift made to them or their immediate family members which exceeds fifteen dollars in value *on any one occurrence*. The report shall list the nature, amount, date and donor of the gift. [Emphasis supplied]

Neither the house rules nor the senate rules provide any definition of the term "occurrence" as it relates to the reporting of gifts as mandated by House File 687, §7. We would encourage those charged with developing such rules to give attention to the need to clarify this question in the future.

When the terms of a statute are unclear or ambiguous, it is necessary to interpret the statute according to the principles of statutory construction. *Hartman v. Merged Area VI Community College*, 270 N.W.2d 822 (Iowa 1978). In the absence of a statutory definition of the term "occurrence" we are compelled to ascertain what was intended by the General Assembly when it employed the term. In doing so, we look to the purpose of the bill and what policies the legislature was attempting to promote in adopting House File 687. We are guided in this endeavor by established precepts of statutory construction. The goal in interpreting a statute is to ascertain legislative intent and to give effect to such intent. *Doe v. Ray*, 251 N.W.2d 496 (Iowa 1977). Legislative intent is determined by construing the statute in its entirety and not from any one particular provision. *City of Des Moines v. Elliott*, 267 N.W.2d 44 (Iowa 1978). Words not defined by statute are generally given their ordinary meaning unless possessed of a peculiar and appropriate legal meaning. *Pottawattamie County v. Iowa Department of Environmental Quality, Air Quality Commission*, 272 N.W.2d 448 (1978).

It is clear that in enacting House File 687, §§6-8, it was the intent of the General Assembly to establish the scope of those gifts which public officials may properly accept. To knowingly and intentionally accept a gift which goes beyond the parameters established by the statute constitutes a serious misdemeanor. *See* §68B.8, The Code 1979. Any interpretation given to the term "occurrence" must, by necessity, be of a nature which does not emasculate the prohibition and render the purpose of the bill incapable of attainment. *Iowa State Ed. Ass'n — Iowa Higher Ed. Association v. Public Employment Relations Bd.*, 269 N.W.2d 446 (1978); *Wilson v. Iowa City*, 165 N.W.2d 813 (1969). If each item given by a donor to the same recipient is considered a separate and unique occurrence with no inquiry being made as to the relationship, if any, between the separate items, an interpretation would have been placed on the term "occurrence" which would have the effect of facilitating avoidance of the law's prohibitions. For example, if we were to hypothesize a situation in which the "gift" in question consisted of the

use of a lakeside cabin for three days and the cabin generally rented for fifty dollars per day one could construe the situation as one occurrence involving a gift of one hundred fifty dollars or three occurrences, each involving a fifty dollar gift. Under the first construction, a violation of the gift law would have occurred; under the second construction there would be no violation. It is unreasonable to assume that the legislature intended a construction which allows what appears to be a single transaction to be broken down into its component parts so as to avoid the intended effects of the gift law. It is more reasonable to assume that the legislature intended to have a transaction evaluated by reference to the totality of the circumstances surrounding the gift. If the gifts involved are related to one another, they are likely part of the same occurrence. In making a determination as to the relatedness of more than one gift, it is our opinion that one would look to such factors as the nature and similarity of the gifts, the setting in which the gifts are given, the nature of the relationship between the donor and the donee, and the time lapse between the gifts in question. If the gifts in question are of a similar nature or are related to one another,[2] if the gifts were made in the same or a similar setting, if the relationship between the donor and the donee has its roots in the public employment status of the donee rather than in the personal relations between the parties, and if there was a relatively brief period of time separating the gifts in question, it is our opinion that such gifts would likely be found to constitute one occurrence.

It should be noted that it is impossible, in the context of an opinion, to conclusively state whether two particular gifts are part of one occurrence. Such a determination requires resolution of factual questions which are neither easily, nor appropriately, addressed in an opinion of the Attorney General. We can, however, point out those factors which we believe a court would consider in reaching a determination. The factors enumerated above are not intended to be exhaustive. They are intended as suggestive of the nature of the inquiry we believe would be appropriate. Each situation must, of necessity, be evaluated in context and on its own merits. In making this evaluation, a public official who is the recipient of more than one gift which are claimed to be separate occurrences should be able to point to facts which support the contention that the gifts are discrete.

We are not unmindful of the fact that some may say House File 687, §§6-8, are void for vagueness. Arguably, public officials face the potention of criminal prosecution for violating a statute whose terms are subject to conflicting interpretations. However, if the gifts which are alleged to violate the statute's proscriptions are of a nature such that they clearly are part of one occurrence, we do not believe that the official would be found to have standing to raise the void for vagueness argument. As applied to that official, in that context, the statute would not be void. Admittedly, there could be situations in which a serious question would arise as to whether there was in fact only one occurrence. In such a situation, the public official would perhaps have a colorable argument that the statute is void for vagueness as applied to him or her. Recogniz-

[2] For example, dinner followed by a movie would probably constitute one occurrence made up of both the dinner and the movie.

ing this potentially "grey area", we would still advise caution on the part of public officials when presented with a gift. It is our opinion that it would be advisable for an official to err on the side of caution.

As discussed above, we believe that this broader interpretation of the term "in any one occurrence" serves to aid in the attainment of the policy objectives contained in House File 687. In addition, the legislative history of the bill lends support for this interpretation. For example, Senate amendment S-3629, which was adopted by both houses of the legislature, required the reporting of all gifts in excess of ten dollars in value. Had S-3629 employed language similar to the final version of House File 687, §7, it would have required the reporting of all gifts in excess of ten dollars in value in any one occurrence. The second version is more expansive. Under S-3629 a donee could receive two separate gifts, each having a value of eight dollars, and be required to report neither gift, even though both gifts were part of the same occurrence. House File 687 requires a combining of values to determine the need for reporting. Following the submission of the conference committee report in February, 1980, both houses elected to adopt the "in any one occurrence" language. In doing so, they abandoned the language adopted earlier in S-3629.

Finally, the construction courts have generally placed on the term "occurrence" has been of the nature we have suggested. Cases construing the term have usually arisen in the context of liability insurance litigation and have revolved around the question of whether a series of events constituted one or more than one occurrence. For example, in *Olsen v. Moore*, 202 N.W.2d 236, 56 Wis.2d 340 (1972), the court held that where the insured's vehicle struck two vehicles almost simultaneously, and there was virtually no time or space interval between the two impacts, and the insured never regained his control over the vehicle prior to its striking the second automobile, there was but one accident or "occurrence" for purposes of a policy which provided stated limits of liability for "each occurrence". Similarly, in *Deodato v. Hartford Ins. Co.*, 363 A.2d 361, 143 N.J. Super. 396 (1976), the court held that for purposes of construing the phrase "occurrence during the policy period" to determine insurer's liability under contract of insurance which limits liability to "occurrences" which arise during the policy period, an "occurrence" need not be a sudden event but may be a process, so long as the incident or event is not designed or expected. Thus, courts have placed a construction on the word "occurrence" which contemplates a consideration of the time and space relationship between a number of acts; a consideration of the process which might be comprised of a number of acts.

In conclusion, it is our opinion that a determination of whether two or more gifts constitute "one occurrence" is to be made by reference to the totality of the circumstances surrounding the gifts in question. If the gifts involved are related to one another, they are likely part of the same occurrence. If the gifts in question are of a similar nature or are related to one another, if the gifts were made in the same or a similar setting, if the relationship between the donor and the donee has its roots in the public employment status of the donee rather than in the personal relations between the parties, and if there was a relatively brief period of time separating the gifts in question, it is our opinion that such gifts would likely be found to constitute one occurrence.

June 27, 1980

COUNTIES AND COUNTY OFFICERS: Incompatibility and Conflict of Interest. §§230A.3, 230A.12, 230A.13, 230A.16, 230A.17, 230A.18, 331.1, 332.3, 504A.14, 504A.17, The Code 1979; S. F. 2015, 68th G.A., 1980 Session. A member of the board of directors of a nonprofit corporation organized under Chapter 504A to administer a community health center is not a public officer and therefore is not barred by the doctrine of incompatibility of offices from concurrently occupying a position on the county board of supervisors. Such concurrent service is not directly violative of §230A.16. An individual who concurrently occupies the positions of county supervisor and director of a nonprofit corporation administering a community mental health center is, however, subject to a conflict of interest objection. (Stork to Neary, Palo Alto County Attorney, 6-27-80) #80-6-21 (L)

June 30, 1980

COUNTIES AND COUNTY OFFICERS: Conflict of interest. §358A.8, The Code 1979. The members of a county zoning commission are appointed by the county board of supervisors to make independent recommendations to the board concerning property boundaries, and regulations or restrictions related thereto. A member of the zoning commission who votes on a recommendation in which he or she has a conflict of interest voids his or her individual vote as well as the recommendation voted upon. (Stork to Brown, State Senator, 6-30-80) #80-6-22

Honorable Joe Brown, State Senator: We are in receipt of your letter requesting an opinion on the following matter:

Is the zoning board an arm or an extension of the board of supervisors, thereby subjecting the board of supervisors and/or the appointee(s) to the zoning board to conflict of interest objections, when the appointee(s) may potentially profit or benefit from his/her recommendations to the board of supervisors?

Your letter raises two separate questions: First, the legal status of a county zoning authority in relation to a county board of supervisors; second, whether a conflict of interest situation exists if an appointee to the zoning authority personally profits or benefits from recommendations made to the board of supervisors.

Chapter 358A, The Code 1979, establishes and governs the county zoning commission. Section 358A.8 sets forth the method of appointment to and powers of the county zoning commission:

In order to avail itself of the powers conferred by this chapter, the board of supervisors shall appoint a commission, a majority of whose members shall reside within the county but outside the corporate limits of any city, to be known as the county zoning commission, to recommend the boundaries of the various original districts, and appropriate regulations and restrictions to be enforced therein. Such commission shall, with due diligence, prepare a preliminary report and hold public hearings thereon before submitting its final report; and the board of supervisors 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 board of supervisors amendments, supplements, changes or modifications. The zoning commission, with the approval of the board of supervisors, may contract with professional consultants, regional planning commissions, the Iowa development commission, or the federal government, for local planning assistance.

Several aspects of §358A.8 should be noted. First, the requirement that the board of supervisors appoint the commission is mandatory. The sec-

tion does not, however, mention the number of members to be appointed or any other standards for appointment to the commission except that a majority of members appointed must reside within the county but outside the corporate limits of any city. Second, the commission has advisory powers only with respect to district boundaries and appropriate regulations or restrictions to be enforced thereon. The commission acts as a distinct agency apart from the board of supervisors in preparing a preliminary report of recommendations, holding public hearings, and submitting a final report to the board of supervisors for adoption. The commission then has the authority to recommend amendments, supplements, changes, or modifications to the board at any time. Finally, the commission may, with approval of the board of supervisors, contract with professional consultants, regional planning commissions, the Iowa Development Commission, or the federal government, for local planning assistance.

In answer to the first question presented, a county zoning commission may be described as an arm or extension of the board of supervisors to the extent that its members are appointed by the board and its decisions are subject to board approval. The zoning commission is, nevertheless, an independent body charged with distinct statutory responsibilities. Accordingly, the commission must hold its own public hearings and make its own recommendations to the board of supervisors. The zoning commission therefore performs functions wholly apart from those exercised by the board of supervisors.

The second question presented relates to whether a conflict of interest exists where an appointee to the zoning commission may personally profit or benefit from his or her recommendations to the board of supervisors. No statutory provision delineates what action of a member of a county zoning commission may constitute an illegal conflict of interest. In the absence of such a provision, the issue of whether an individual has an illegal conflict of interest depends generally upon whether he or she uses the position of public trust and authority to further his or her own personal gain. The Iowa Supreme Court has set forth the following rule with respect to the determination of an illegal conflict of interest:

> It is a well-established and salutory rule in equity that he who is entrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. This rule does not depend upon reason technical in character, and is not local in its application. It is based upon principles of reason, of morality and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails.

Wilson v. Iowa City, 165 N.W.2d 813, 819 (Iowa 1969).

Under the guidelines set forth above, the issue of whether a conflict of interest exists depends upon the precise facts of a particular transaction or event. The facts presented in connection with your request for an opinion do not clearly indicate the existence of a conflict of interest under the guidelines set forth in the *Wilson* case. There is no indication that an appointee to the zoning commission has specifically endeavored to secure action by the board of supervisors that would further his or her personal interests, either financially or otherwise. In this regard, it is noted that final action by the zoning commission on recommendations to

the board of supervisors requires the affirmative vote of a quorum of the members of the commission. *See* 1972 Op. Atty. Gen. 359. Hence, the board of supervisors lawfully can consider only those final recommendations approved by a majority of commission members rather than the recomendations made by any one member of the commission.

Another issue would be raised in this situation if facts clearly did indicate the existence of a conflict of interest. If, for example, a member of the zoning commission made a recommendation pursuant to personal gain that was subsequently approved by both the zoning commission and the board of supervisors, the legal effect of the approval would be subject to question. The Iowa Supreme Court considered this issue under a different factual situation in *Wilson v. Iowa City*, 165 N.W.2d 813 (Iowa 1969) and held that the vote by a member of a city council in violation of a statutory conflict of interest provision was void and that the result reached by the council on the matter was also void even if the vote was not needed to obtain the result. Although the decision in *Wilson* was premised upon statutory provisions, the Court emphasized the importance and general applicability of conflict of interest rules:

> 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 *potential* for conflict of interest which the law desires to avoid. [Emphasis in original.]

The holding and the public policy set forth in *Wilson* suggest the following conclusions in a situation where facts clearly indicate that a member of a zoning commission obtains personal gain through a recommendation to be approved by both the zoning commission and the board of supervisors. The individual vote of the member making the recommendation is void regardless of whether the vote is needed to send the recommendation to the board of supervisors for approval. The approval of the recommendation by the zoning commission also is void. Similarly, subsequent approval of the recommendation by the board of supervisors is void. Importantly, each action is deemed void rather than merely voidable; hence, no action on the recommendation can have legal force or binding effect.

June 30, 1980

STATE OFFICERS AND DEPARTMENTS, LAW ENFORCEMENT ACADEMY, STATE FINANCE, REPAYMENT RECEIPTS: IOWA CONST. art. 3, §24; Sections 80B.13(3), 12.10, 8.2(5), 8.30-8.32, 8.44, 444.21, The Code 1979. The Law Enforcement Academy Council may authorize the sale of additional and replacement shoulder patches to qualifying graduates. Funds received from the sale of shoulder patches must be deposited in the general fund of the State but the Academy can purchase additional shoulder patches with these funds provided that the funds are properly allotted under Code §8.31. (Cleland to Callaghan, Director, Iowa Law Enforcement Academy, 6-30-80) #80-6-23

Mr. John F. Callaghan, Director, Iowa Law Enforcement Academy: **You have requested an opinion of the Attorney General concerning Chapter 80B, The Code 1979. You pose the following questions for our consideration:**

1. Can the Iowa Law Enforcement Academy sell additional or replacement shoulder patches at cost to peace officers who have graduated from an Academy certifying course?

2. If the Academy can sell shoulder patches at cost, can the Academy use that money for the purchase of additional shoulder patches?

The answer to both questions is yes. The Iowa Law Enforcement Academy Council has authority under Chapter 80B to authorize the Academy to sell additional or replacement shoulder patches at cost to peace officers who have graduated from an Academy certifying course. Funds received from the sale of shoulder patches which were purchased with appropriated funds constitute "repayment receipts" and are appropriated to the Academy under the operation of §8.32, The Code 1979.

It is our understanding that the questions set forth above are premised upon the following facts. The Iowa Law Enforcement Academy has been issuing two shoulder patches to students graduating from a certifying course. These patches are paid for with money appropriated for that purpose by the General Assembly. Some officers graduating from certifying courses have requested additional patches for other uniforms, or as replacements for their original issue, but due to budget limitations these requests cannot be satisfied.

1. *Can the Academy Sell Shoulder Patches At Cost?*

The Iowa Law Enforcement Academy and the Iowa Law Enforcement Academy Council were established and function pursuant to Chapter 80B of the Code of Iowa. Each entity, the Academy and the Council, are provided separate and particular powers under Chapter 80B.

An examination of Chapter 80B reveals no authority which would allow the Academy to issue shoulder patches. However, with regard to the Council, it is empowered under §80B.13(3), The Code 1979, to "[a]uthorize the issuance of certificates of graduation or diplomas by approved law enforcement training schools to law enforcement officers who have satisfactorily completed minimum courses of study." Thus, the first issue which must be resolved is whether a "shoulder patch" is either a "diploma" or a "certificate of graduation."

In *State v. Rhine*, 84 Iowa 169, 172, 50 N.W. 676, 677 (1891), the Iowa Supreme Court defined "certificate" as follows: "A certificate is . . . 'a writing by which an officer or other person bears testimony that a fact has or has not taken place.' 1 Bouv. Law Dict. Also, a 'written testimony to the truth of any fact.' Webst. Dict." In *Valentine v. Independent School District*, 191 Iowa 1100, 1105, 183 N.W. 434, 437 (1921), the Iowa Supreme Court defined "diploma," and set forth the purpose of a diploma as follows:

A diploma is the written or printed evidence endorsed by the proper authorities that the person named thereon has completed a prescribed course of study in the school or institution named therein. A graduate is one who has honorably passed through a prescribed course of study and received a diploma certifying to that effect. A diploma, therefore, is prima facie evidence of educational worth, and is the goal of the matriculate.

Although a shoulder patch is not literally a "certificate" or a "diploma," a shoulder patch issued to an Academy graduate serves the same purpose

as a "certificate" or "diploma." Because shoulder patches are issued only to graduates from certifying courses, they serve as "evidence of educational worth." Shoulder patches issued by the Academy show that their wearer has graduated from a certifying course just as a "certificate of graduation" or a "diploma" shows that the person named therein has graduated from a certifying course. All serve the same purpose as evidence of graduation.

It is our opinion, based on the preceding analysis, that the Council has discretion to authorize the Academy to issue shoulder patches. *See Elk Run Telephone Co. v. General Telephone Co.*, 160 N.W.2d 311, 315-316 (Iowa 1968). However, the preceding analysis is not without some common sense limitations. Otherwise, there would be no limit on what the Council could authorize as "evidence of educational worth." The issuance of shoulder patches in this instance is acceptable because shoulder patches are often used as symbols of achievement and have little or no value as anything else.

So far we have not decided anything more than that the Council can authorize the issuance of shoulder patches. Specifically, the question whether the Council can authorize the *sale* of additional or replacement patches *at cost* is still unanswered. The answer to this question depends on a detailed analysis of the Council's authority.

Administrative bodies are statutory creations, and "have only such powers as is specifically conferred, or is to be necessarily implied, from the statute creating them." *Quaker Oats Co. v. Cedar Rapids Hum. R. Comm'n.*, 268 N.W.2d 862, 868 (Iowa 1978); *Iowa State Highway Commission v. Hipp*, 259 Iowa 1082, 147 N.W.2d 195, 198 (1966); *Howell School Board Dist. v. Herbert*, 246 Iowa 1265, 70 N.W.2d 531, 535 (1955).

> [Administrative bodies] exercise purely statutory powers and must find within the governing statutes warrant for the exercise of any claimed authority . . . Administrative agencies possess only such authority as is legally conferred by express provision of law or such as, by fair implication and intendment, is incident to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the objectives for which these agencies were created.
>
> *Quaker Oats Co. v. Cedar Rapids Hum. R. Com'n*, 268 N.W.2d at 868 quoting *Fahey v. Cook County Police Dep't. Merit Board*, 21 Ill.App.3d 579, 315 N.E. 573, 576 (1974).

In order to answer your question it is necessary to determine whether Code §80B.13(3) confers either an express or implied power to "sell" shoulder patches. The problem is one of statutory construction. *Joseph Burstyn v. Wilson*, 303 N.Y. 242, 101 N.E.2d 665 (1951), *revd on other grounds* 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952). The quest of our analysis is to find the legislative intent. *Addison v. Holy Hill Fruit Products*, 322 U.S. 607, 64 S.Ct. 1215, 88 L.Ed. 1488 (1944), *reh. den.* 323 U.S. 809, 65 S.Ct. 27, 89 L.Ed. 645 (1944).

Section 80B.13(3) provides that "[t]he Council *may* . . . authorize the *issuance* of certificates of graduation or diplomas . . . ." (Emphasis added.) First, it must be noted that this statute does not provide that the Council may authorize the "sale" of certificates of graduation, diplomas, or shoulder patches. Thus, if this statute expressly authorizes the "sale" of shoulder patches, it must do so through the use of the word "issuance."

Section 4.1(2), The Code 1979, provides that "[w]ords and phrases shall be construed according to the context and approved usage of the language . . . ." The word "issue" is defined, *inter alia*, as follows:

> the act of officially putting forth or getting out or printing (as new currency or postage stamps) or making available or distributing (as surplus or material) or giving out or granting (as licenses) or proclaiming or promulgating (as a written order or directive) . . . the act of bringing out (as a new book or a revised edition of a book or a new number of a magazine or a fresh printing of a newspaper) for distribution to or sale or circulation among the public . . . the act of offering securities for sale to investors . . . .

Webster's Third International Dictionary (1961). This definition is not particularly helpful. It does not answer the critical question of whether the legislature intended to expressly confer upon the Council the discretion to make shoulder patches available (issue) at cost.

The use of the word "may" in Code §80B.13 confers a "power" on the Council to authorize the issuance of shoulder patches. See §4.1(36)(c), The Code 1979. Under the principles discussed above, this specific grant of authority carries with it an implied grant of authority to do whatever is necessary to exercise that authority. The only limitation on the scope of this implied power is that the Academy must operate within the confines of both the United States and Iowa Constitutions as well as Chapter 80B and other express provisions of the Code. In other words, the Council has implied power to authorize the sale of shoulder patches when, as a factual matter, sale is necessary in order to make shoulder patches available to those who are entitled to them. According to the facts which you have provided, due to the budget limitations, requests for additional or replacement shoulder patches cannot be satisfied unless they are sold. Therefore, it is our opinion that the Council may authorize the sale of shoulder patches.

Our opinion is reinforced by the fact that the Iowa Supreme Court has recognized that "some legislative powers may be delegated to administrative bodies." *Elk Run Telephone Co. v. General Telephone Co.*, 160 N.W.2d 311, 315 (1968). A delegation of "legislative powers" to an administrative agency is proper provided it "is a reasonable one permitting the administrative body only to 'fill in details' to accomplish a general purpose or policy announced by the legislature . . . ." *Elk Run Telephone Co.*, 160 N.W.2d at 316. Under these circumstances, the "means" may be left to the judgment and discretion of the administrative officials. *Elk Run Telephone Co.*, 160 N.W.2d at 315. Thus, under this theory, it is within the discretion of the Council to authorize the sale of shoulder patches in order to accomplish the general purpose of "issuing" shoulder patches.

The preceding analysis does not suggest that the Council can authorize the sale of shoulder patches at more than cost. There are two reasons why this option is not available to the Council. First, a "profit" on the sale of shoulder patches is not "necessary" in order to effectuate the issuance of shoulder patches to those who are entitled to them. Therefore, the authority to authorize the sale of shoulder patches at more than cost cannot be inferred from Code §80B.13(3). Second, in our opinion, there is an implicit requirement that any fee charged for shoulder patches be reasonable. *Cf. Idaho Power and Light Co. v. Blomquist*, 26 Idaho 222,

254-53, 141 P. 1083 (1914) (power to fix utility rates limited by standard of reasonableness even absent express statutory language to that effect). In this case, we are aware of no justification which would allow the Academy to sell shoulder patches at more than cost and to do so without express authorization would probably be unreasonable.

2. *Can the Academy Use Funds Received from the Sale of Shoulder Patches to Purchase Additional Patches?*

Your second question concerns whether the Academy can retain the *use* of funds derived from the sale of shoulder patches. It is our understanding that the Academy's present appropriation includes funds for the purchase of shoulder patches. If possible, you want to use funds received from the sale of patches which were purchased with appropriated funds to purchase additional patches.

a. *Funds Received From The Sale of Shoulder Patches Should Be Deposited in the General Fund.*

If the Academy does sell shoulder patches, it is required by §12.10, The Code 1979, to deposit 90 percent of all moneys collected with the state treasurer and no money collected can be held more than thirty days. *See* 1974 Op. Att'y Gen. 433. Moreover, as a condition to the use of receipts through the allotment system (to be discussed below) such receipts must be deposited in either the general or a special fund. Section 8.32, The Code 1979. Any funds received from the sale of shoulder patches must be reported to the state comptroller within thirty days of the receipt of such funds. Section 8.44, The Code 1979.

There is one general fund. In addition, there are numerous segregated funds.[1] Segregated funds are either specific or special. The general fund consists of (1) "taxes levied for state general revenue purposes," (2) amounts derived "from other sources which are available for appropriations for general state purposes," and (3) "all other money in the state treasury which is not by law otherwise segregated . . . ." Section 444.21, The Code 1979. Special funds include "any and all government fees and other revenue receipts earmarked to finance a governmental agency to which no general appropriation is made by the state." Section 8.2(4), The Code 1979. Specific funds include those funds which are segregated by law. For example, the physician's assistants fund (Section 148B.6, The Code 1979), highway beautification fund (Section 306C.18, The Code 1979, beer and liquor control fund (Section 123.53, The Code 1979), and the state conservation fund (Section 107.17, The Code 1979) are specific funds.

It is clear from the discussion above that funds received from the sale of shoulder patches should be deposited in the general fund. In short, there is no law enforcement academy fund established by law in which

[1] In light of our opinion that funds received from the sale of shoulder patches should be deposited in the general fund, it is unnecessary to determine what effect, if any, Iowa Const. art. III, §24 would have on funds deposited in segergated funds. *See, e.g., Farrell v. State Board of Regents*, 179 N.W.2d 533, 545-46 (1970) (certain student tuitions, fees, and institutional income not "state funds," and therefore, not subject to appropriation requirement under Iowa Const. art. VIII, §5).

money from the sale of shoulder patches can be deposited. Nevertheless, in our opinion, these funds may still be allotted to the Academy so that the Academy would not lose the use of these funds.

b. *Funds Received From The Sale of Shoulder Patches Constitute Repayment Receipts, and Therefore, Are Available to Satisfy the Academy's Allotments Under §§8.31 and 8.32, The Code 1979.*

Article III, §24 of the Iowa Constitution provides that "[n]o money shall be drawn from the treasury but in consequence of appropriations made by law." Since it has been established that funds received from the sale of shoulder patches should be deposited in the general fund of the state treasury, these funds cannot be drawn out absent an appropriation. It is necessary to examine the major decisions relating to Iowa Const. art. III, §24 in order to determine what constitutes an appropriation.[2]

The leading case is *Prime v. McCarthy*, 42 Iowa 569, 61 N.W. 220 (1894). In *Prime*,

the statute in question [§120, The Code 1888-89] granted to the Executive Council authority to pay "such other necessary and lawful expenses as are not otherwise provided for" and provides [sic] that "warrants drawn therefor be paid by the treasurer of the state." The language of the statute did not contain the word "appropriation" but did grant specific authority for payment of "such other necessary and lawful expenses as are not otherwise provided."

68 Op. Att'y Gen. 132, 148. The Iowa Supreme Court held that the statute conferred upon the Executive Council the authority to pay certain expenses upon a showing that they were necessary and lawful, and that the statute constituted an appropriation of funds not otherwise appropriated. In reaching its conclusion, the Court cited the following language from *Ristine v. State*, 20 Ind. 328, 338 (1863):

Appropriations, as applied to the general fund in the treasury, may perhaps be defined to be an authority from the legislature, given at the proper time, and in legal form, to the proper officers, to apply sums of money out of that which may be in the treasury, in a given year, to specified objects or demands against the state.

One of the primary factors which the Iowa Supreme Court relied upon to determine legislative intent was the legislative practice relating to §120, The Code 1888-89. The Court noted:

For many years expenses incurred in providing the several offices named in section 120, as therein authorized, have been paid under the authority of that section alone; no special appropriations having been made therefor. Many other items of expenses authorized by law, but for which no specific appropriation was made, have also been paid upon the certificate of the executive council under said section 120. These payments, made during the biennial periods, have been reported in detail to each succeeding general assembly.

61 N.W. at 223.

The next major case regarding what constitutes an appropriation was *O'Connor v. Murtaugh*, 225 Iowa 785, 281 N.W. 455 (1938). *Murtaugh* involved a statute enacted in 1929 which set the attorney general's salary

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[2] *See* 1936 Op. Att'y Gen. 682 for a discussion of additional opinions and cases not covered below.

at $6,000 per annum. The attorney general claimed, based on *Prime v. McCarthy, supra*, that this statute constituted a continuing appropriation. The Iowa Supreme Court rejected the attorney general's claim noting that in each of the preceding 69 years, including 1929, the legislature provided a specific appropriation for the attorney general's salary. The Iowa Supreme Court distinguished *Prime v. McCarthy* as follows:

And if there is one outstanding feature in the legislative history that has been outlined, it is the fact that every succeeding biennial legislature, without exception, has made specific appropriations for salaries of the attorneys general. In *Prime v. McCarthy, supra*, it is said: "It seems to us reasonably clear that *if it was not intended* that the expense incurred for the several purposes named in section 120 * * * were to be paid under authority of that section, *the general assembly would surely have made specific appropriation therefor.*" (Italics supplied.) Conversely, the specific appropriations, for so long made by every general assembly, relegate to "innocuous desuetude" the theory that continuing appropriations had been provided.

281 N.W.2d 459.

O'Connor v. Murtaugh was followed in 1946 by an opinion of the attorney general. 46 Op. Att'y Gen. 87. In that opinion, the secretary of state posed the question of whether 51st G.A., ch. 96, §14, constituted an appropriation. Section 14 provided as follows:

All fees and charges collected by the commission under the provisions of this chapter shall be paid into the general fund in the state treasury. All expenses incurred by the commission under the provisions of this chapter, including compensation to the director, clerks and assistants shall be paid out of the general fund in the state treasury. No expenditure shall be made in excess of the license fee and receipts under the provisions of this chapter during any fiscal year of its operation.

The following language from that opinion is relevant to the question now under consideration:

The following is taken from 59 Corpus Juris, at pages 245 and 246:

"In general, to an appropriation, within the meaning of the constitution, *nothing more is requisite than a designation of the amount and the fund out of which it shall be paid*, and any action of the state legislature setting apart or assigning to a particular use a certain sum or fund of money for a particular purpose so that public officials are authorized to draw and use the money so set apart, and no more, for the specified purpose only, is sufficient to constitute an appropriation."

In *Himbert v. Dunn*, 84 Calif., 57, 24 Pac. 111, the court said:

"Has the legislature *fixed the amount of the claim, and designated its payment out of a certain fund?* These are the only things necessary to the validity of an appropriation."

and in *People v. Brooks*, 16 Calif. 11 quoted and approved in Ingram v. Colgan, 106 Calif. 113, 38 Pac. 315, 39 Pac. 437, 28 L. R. A. 187, is the following:

"To an appropriation, within the meaning of the constitution, nothing more is requisite than *a designation of the amount, and the fund out of which it shall be paid.*"

The following quotation is taken from 42 American Jurisprudence, at page 749:

"It is sufficient if an intention to make an appropriation is clearly evinced by the language of the statute, or that no effect can be given to the statute unless it is considered as making an appropriation."

When we apply the foregoing authorities to the language of Section 14 of the Act, there can be no question but that the legislature intended to make an appropriation. And it is further apparent that the provisions of the entire enactment will fail unless said section be considered as making an appropriation. It is equally clear that the language used meets the requirement that the fund out of which payment shall be made be designated for the following appears therein:

"shall be paid out of the general fund in the state treasury."

It is true that the section in question does not specify a definite amount in dollars that can be used for the intended purpose, but it does provide that "no expenditure shall be made in excess of the license fees and receipts under the provisions of this chapter during any fiscal year." This quoted language has the effect of fixing the maximum expenditures for any fiscal year, at the amount of charges and fees collected in such fiscal year, and this is a sufficient designation of amount as evidenced by the rule announced in *State v. Moore*, 50 Nebraska 88, 69 N.W. 373 as follows:

"*An appropriation may be specific*, according to any of the definitions heretofore given, *when its amount is to be ascertained in the future from the collection of revenue.*"

and in 42 American Jurisprudence, page 749, as follows:

"It has been held that *an appropriation bill is not void for uncertainty in not specifying a stated amount, if it fixes the extent to which the treasury will be drawn upon.*"

and in 59 C.J. 250, where the following appears:

"An appropriation may be valid when its amount is to be ascertained in the future from the collection of the revenue."

46 Op. Att'y Gen. at 90, 91 (emphasis added).

Graham v. Worthington, 259 Iowa 845, 146 N.W.2d 626 (1966) involved a constitutional challenge to §25A.11, The Code, which provides that payment of claims under the Iowa Tort Claims Act shall be paid "out of any money in the state treasury not otherwise appropriated." The Supreme Court held that this provision does not violate Art. III, §24. An important factor in the Court's analysis appears to have been the fact that the expenditure of funds under Code §25A.11 was limited by the amount of valid claims against the state. *Graham*, 146 N.W.2d at 638. The Court might have also noted that expenditure of funds under Code §25A.11 is limited by the amount of "money in the state treasury not otherwise appropriated."

Finally, in 1968, Attorney General Turner determined that federal grant money accepted by the Governor under §7.9, The Code 1966,[3] becomes part of the state treasury and is subject to the appropriation requirement of Iowa Const. art. III, §24. 1968 Op. Att'y Gen. 132. *But see* Op. Att'y Gen. #79-4-40; 81A C.J.S. *States* §233 at 811 and cases cited at footnote 10.

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[3] Section 7.9, The Code 1966, provided:

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

In part III of his opinion, Attorney General Turner concluded that Code §7.9 did not include within its provisions an implied appropriation of state matching money for federal grants accepted by the governor under that provision. Section 7.9 did not contain language clearly evincing an intention to make an appropriation and §7.9 was not incapable of being given effect without an appropriation of matching funds being implied.

In our opinion, the preceding authority supports the following generalizations. An appropriation is a legislative authorization to draw money from the state treasury. It need not be for a sum certain or even contained in an appropriation bill. It need not use the word appropriate. The legislature need only have intended to authorize the expenditure. Nevertheless, the appropriation must be given at the proper time, in the proper legal form, and to the proper officers to be effective. Finally, it must set forth what the money is to be spent for.

Chapter 80B does not contain an appropriation. It is therefore necessary to turn to chapter 8 to determine if it contains an appropriation which would cover funds received from the sale of shoulder patches. Before making that determination, it is necessary to determine the character of the funds in question.

In our opinion, funds received from the sale of shoulder patches would be "repayment receipts." "Repayment receipts" are defined in §8.2(5), The Code 1979, as "those moneys collected by a department or establishment that supplement an appropriation made by the legislature." While the exact parameters of this definition are unclear, it appears reasonably certain that "repayment receipts" do not include funds collected by an agency either for general state purposes or for a specific purpose other than to supplement the agency's appropriation. *See, e.g.*, §§98.6 and 148B.6, The Code 1979, respectively. This much follows from the fact that "repayment receipts" supplement the collecting agency's appropriation. Moreover, the use of the term "repayment" suggests that "repayment receipts" include recovered or recaptured appropriated funds. In this regard, it is noted that in the Budget Report for the Biennium Beginning July 1, 1979 and Ending June 30, 1981, some "repayment receipts" are apparently reported as "refunds and reimbursements." *See, e.g.*, p. RF-29.[1]

Money collected from the sale of shoulder patches would constitute a recovery (repayment) of appropriated money used to purchase the shoulder patches which were sold in the first place. Such funds would not be collected for general state purposes or for some other specific purpose other than to supplement the Academy's appropriation. Therefore, such funds would be repayment receipts.

In light of our opinion that funds received from the sale of shoulder patches would be repayment receipts, they may be used to satisfy the Academy's allotments provided that they are properly appropriated. The relevant Code sections are set forth below:

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[1] This opinion should not be construed to mean that repayment receipts are limited to refunds and reimbursements. Specifically, we do not now express an opinion on whether certain federal grants constitute repayment receipts under Code §8.2(5).

8.30 Availability of appropriations. The appropriations made shall not be available for expenditures until allotted as provided for in section 8.31. All appropriations now or hereafter made are hereby declared to be maximum and proportionate appropriations, the purpose being to make the appropriations payable in full in the amounts named in the event that the estimated budget resources during each fiscal year of the biennium for which such appropriations are made, are sufficient to pay all of the appropriations in full. The governor shall restrict allotments only to prevent an overdraft or deficit in any fiscal year for which appropriations are made.

8.31 Quarterly requisitions — exceptions — modifications. Before an appropriation for administration, operation and maintenance of any department or establishment shall become available, there shall be submitted to the governor, not less than twenty days before the beginning of each quarter of each fiscal year, a requisition for an allotment of the amount estimated to be necessary to carry on its work during the ensuing quarter. Such requisition shall contain such details of proposed expenditures as may be required by the governor.

. . . .

Provided, however, that the allotment requests of all departments and establishments collecting governmental fees and other revenue which supplement a state appropriation shall attach to the summary of requests a statement showing how much of the proposed allotments are to be financed from (1) state appropriations, (2) stores, and (3) repayment receipts.

. . . .

8.32 Conditional availability of appropriations. All appropriations made to any department or establishment of the government as receive or collect moneys available for expenditure by them under present laws, are declared to be in addition to such repayment receipts, and such appropriations are to be available as and to the extent that such receipts are insufficient to meet the costs of administration, operation, and maintenance, or public improvements of such departmnets:

Provided, that such receipts or collections shall be deposited in the state treasury as part of the general fund or special fund in all cases, except those collections made by the state fair board, the institutions under the state board of regents and the state conservation commission.

Provided further, that no repayment receipts shall be available for expenditures until allotted as provided in section 8.31 . . . .

The issue now focuses on whether §8.32 constitutes an appropriation. It is a question of legislative intent. Pursuant to §8.30, The Code 1979, appropriations are not available to a department until "allotted" to that agency in accordance with §8.31, The Code 1979. Under Code §8.31, an agency must submit a requisition to the Governor at least 20 days before the beginning of each quarter. Those departments which receive other revenue which supplements their appropriation must include a "statement showing how much of the proposed allotments are to be financed from (1) state appropriations, (2) stores, and (3) repayment receipts." Section 8.31, The Code 1979. Thus, the General Assembly not only anticipated that a state agency could receive money outside of its "appropriation," but also anticipated that the agency use this money to satisfy its allotment.

The actual mechanism for this appropriation is found in Code §8.32.[5] Under Code §8.32, an appropriation is available to a department only to the extent that the repayment receipts of that department are insufficient to cover the costs of administration, operation, and maintenance, or public improvements. In our opinion, the General Assembly had a twofold purpose in enacting Code §8.32. First, this section was meant to appropriate repayment receipts. Second, it was the intent of the General Assembly to make the availability of other appropriations depend upon the insufficiency of repayment receipts to satisfy the expenditures of those departments collecting repayment receipts. Otherwise, repayment receipts would not be available for allotment, and other appropriations would never be conditional under Code §8.32.[6] This result would be inconsistent with the clear language of Code §8.32.

There is no question under Code §8.32 as to the object of the appropriation. *See Prime v. McCarthy*, 42 Iowa 569, 61 N.W. 220, 223 (1894). Sections 8.31 and 8.32 establish that allotted repayment receipts must be used to satisfy the costs of administration, operation, and maintenance, or public improvements.[7] *Compare* §8.22, The Code 1979[8] and 1979 Session, 68th G.A., ch. 11, §2 with Code §8.32. The amount of the appropriation can be ascertained and is limited by both the amount of repayment receipts collected and the costs to be paid from such funds. *See Graham v. Worthington*, 259 Iowa 845, 146 N.W.2d 626, 638 (1966); 46 Op. Att'y Gen. 87, 90-91. Moreover, Code §§8.31 and 8.32 also serve to designate the fund out of which a particular cost must be paid as that fund containing allotted repayment receipts.[9] *See* 46 Op. Att'y Gen. 87, 90-91.

[5] Even though we conclude that repayment receipts are appropriated under Code §8.32, and therefore, that the Academy can use these funds to purchase additional shoulder patches, it is noted that the use of repayment receipts is subject to the limitations of §§8.33 (reversion), and 8.34 (charging off of unexpended appropriations), The Code 1979.

[6] This argument assumes that Code §8.32 is not limited to those agencies with enabling legislation which specifically appropriates repayment receipts. This contention is discussed below and rejected.

[7] In our opinion, our interpretation of Code §8.32 does not create an unconstitutional delegation of legislative authority in violation of Iowa Const. art. III, §1. *See generally* 1968 Op. Att'y Gen. 477; Op. Att'y Gen. #79-11-11. Of course, if we are incorrect, then there would be serious doubts as to the constitutionality of appropriations made pursuant to §8.22, The Code 1979.

[8] Section 8.22, The Code 1979, provides in relevant part as follows:
Such approriation bills shall indicate the funds, general or special, from which such appropriations shall be paid, but such appropriations need not be in greater detail than to indicate the total appropriation to be made for:

1. Administration, operation, and maintenance of each department and establishment for each fiscal year of the biennium.

2. The cost of land, public improvements, and other capital outlays for each department and establishment, itemized by specific projects or classes of projects of the same general character.

[9] Section 8.31 can be distinguished from Code §7.9, The Code 1966. *See* 1968 Op. Att'y Gen. 132, 148 (discussed above). Code §8.32 deals specifically with the expenditure of state funds. Moreover, Code §8.32 adequately sets forth the source of the funds to be expended, the purpose of the expenditure, and a direction of payment.

Legislative treatment of repayment receipts reinforces our opinion that such receipts are appropriated through Code §8.32. *See Prime v. McCarthy*, 42 Iowa 569, 61 N.W. 220, 223 (1894); *O'Connor v. Murtaugh*, 225 Iowa 785, 281 N.W. 455, 459 (1938). Sections 8.30 through 8.32 of the Code were enacted in 1933 as part of the Budget and Financial Control Act. 45th G.A., ch. 4, §§23-25. There have been no substantial changes in these provisions since they were enacted. This act was made effective in two stages with the "system of budgeting and of making allotments of all appropriations bills" becoming effective on July 1, 1933, and the "new system of central budget and proprietary accounting and reporting" becoming effective on December 1, 1933. 45th G.A., ch. 4, §33.

The first budget report prepared by the state comptroller (reports under prior law were prepared by the director of the budget) was prepared in 1934 and submitted to the Forty-sixth General Assembly. *See generally* Budget Report for the Biennium Beginning July 1, 1935 and Ending June 30, 1937. The following figures from the Justice Department's budget as reflected in the 1935 report are illustrative.

RECEIPTS	1933	1934
State appropriations	109,950.00	86,973.80
Balance brought forward	2,510.17	
Gas tax refunds, etc.	2,375.65	659.65
Copy fees	684.25	59.25
Total receipts	115,520.07	87,692.70
DISPOSITION OF RECEIPTS		
Total expenditure from appropriation	113,790.03	87,157.33
Remitted to State Treasury	684.25	59.25
Reverted to general revenue	1,045.79	476.12
Total	115,520.07	87,692.70

While the figures set forth above do not necessarily reflect the intent of the General Assembly in enacting Code §8.32, they do reveal two interesting facts.

First, funds received as copy fees were remitted directly to the state treasury. The reason this was done is not immediately apparent since the same report indicates that the Executive Council received $21,426.00 in 1934 from the sale of supplies which was not "remitted" to the state treasury. One possible explanation which would be consistent with the interpretation of Code §8.32 set forth above is that with regard to the Executive Council, the supplies were purchased with appropriated money and the sale of those supplies constituted a "recapture" or "repayment" of that money. Second, and most importantly, the figures set forth above reveal that the Comptroller was reporting the expenditure of refunds to the General Assembly as expenditures from appropriations. For example, the $87,157.33 figure representing the expenditure from appropriations for 1934 includes $86,973.80 from "state appropriations" and $183.53 from the "gas tax refunds, etc." category. This treatment is consistent with our interpretation of Code §8.32.

The 1945-47 budget report reflected a similar practice. *See* Budget Report for the Biennium Beginning July 1, 1945 and Ending June 30, 1947, p. G-95 (Library Commission, Medical Division). It is also noteworthy that during these years the Comptroller did not estimate receipts for the next biennium. This is important because it is through this

practice that later budgets and corresponding appropriations most clearly reflect the legislative intent regarding Code §8.32.

The budget report for 1955-1957 does include estimated receipts. In this report, the Governor recommended a budget of $615,419.00 for the Executive Council (general office) for each year of the biennium to be paid from "appropriations." The appropriations consisted of a "state appropriation" of $512,300.00 and "refunds and reimbursements" of $103,119.00. *See* Budget Report for the Biennium Beginning July 1, 1955 and Ending June 30, 1957, p. G-87. The General Assembly "appropriated" $511,000.00 to the Executive Council. 57th G.A., ch. 1, §13. It appears that the General Assembly reduced the Governor's recommended "state appropriation" by $1,300.00. Thus, under this appropriation, the receipts available to satisfy the Executive Council's recommended budget included $511,000.00 in direct appropriations plus repayment receipts (which might be more or less than $103,119.00). This result supports our interpretation of Code §8.32 since it tends to show that the General Assembly considers repayment receipts as automatically appropriated thus eliminating the necessity of specifically appropriating those funds.

The 1969-71 budget report reflects a similar pattern. In that report, the Governor's recommended appropriation for the Comptroller (general office) was $373,000.00. In order to satisfy this request, the Governor proposed to use a "state appropriation" of $358,190.00 plus "refunds and reimbursements" of $14,810.00. *See* Budget Report for the Biennium Beginning July 1, 1969 and Ending June 30, 1971, p. G-41. It would have been constitutionally impossible under Iowa Const. art. III, §24 for the Governor to do so absent an "appropriation" and Code §8.32 appears to be the only possible provision which would apply.

Finally, the Sixty-eighth General Assembly appropriated $5,220,737.00 from the general fund to the Division of Data Processing for the fiscal year 1980-81. 1979 Session, 68th G.A., ch. 4, §6(b). This was exactly the amount recommended by the Governor. *See* Budget Report for the Biennium Beginning July 1, 1979 and Ending June 30, 1981, p. RF-31. However, the Governor recommended total expenditures of $8,242,493.00. The difference amounted to $3,021,756.00 and is reflected under RESOURCES as REFUNDS and REIMBURSEMENTS (repayment receipts). The fact that the specific appropriation was for $5,220,737.00 rather than $8,242,493.00 reflects, in our opinion, a legislative practice of treating repayment receipts (refunds and reimbursements) as automatically appropriated. Our conclusion regarding the legislative treatment of repayment receipts is reinforced by the fact that for the fiscal means that for fiscal year 1977-78 the Division of Data Processing were $6,495,651.00. Since the general fund appropriation available to the Division of Data Processing for that period was only $4,056,622.00, this means that for ifscal year 1977-78 the Division of Data Processing actually spent approximately $930,352.00 in refunds and reimbursements. This information was reported to the General Assembly in the budget report. Thus, it appears that agencies collecting refunds and reimbursements spend those receipts just as they would spend their general appropriations. Moreover, the General Assembly is aware of the practice and apparently adjusts its general appropriations to account for the expenditure of refunds and reimbursements.

The few examples set forth above do not establish conclusively that the General Assembly intended Code §8.32 as an appropriation of repayment receipts. However, these practices must be taken into account in interpreting Code §8.32 and, on the whole, support our interpretation of that section.

It could be argued that Code §8.32 has no independent appropriating effect. Under this interpretation, the only effect of Code §8.32 would be to make the availability of state appropriations from the general fund depend upon the unavailability of appropriated repayment receipts. In order to determine whether repayment receipts had been appropriated, that is, were available, it would be necessary to look to the enabling legislation of the department collecting the repayment receipts. *See, e.g.*, Ex. Sess., 45th G.A., ch. 24, §§43-45. In our opinion, this interpretation is incorrect. First, there is no reason to adopt such a restrictive interpretation of Code §8.32 in view of the alternative remedies available to the General Assembly to monitor the use of repayment receipts. *See, e.g.*, 1979 Session, 68th G.A., ch. 11, §1(b). *See also* Op. Att'y Gen. #79-4-40. Second, such an interpretation would be inconsistent with the legislative practice set forth above. In short, there is nothing in the enabling legislation of the above cited departments and agencies (with the possible exception of the Library Commission, *see* §4541.03(10), The Code 1939) which would justify the actual legislative practice.

SUMMARY

On the basis of the preceding analysis it is our opinion that the Council may authorize the sale of additional and replacement shoulder patches to qualifying graduates. However, the Academy is not authorized to sell shoulder patches at more than cost. Further, it is our opinion that funds received from the sale of shoulder patches must be deposited in the general fund of the State but that the Academy can purchase additional shoulder patches with these funds provided that the funds are properly allotted under Code §8.31.

July 7, 1980

SAVINGS AND LOAN ASSOCIATIONS: Sale of home performance insurance. 1980 Session, 68th G.A., H. F. 2492, §3. A savings and loan association may charge an inspection fee in connection with the sale of home performance insurance, and this fee is not considered as part of loan processing fees as long as purchase of the insurance is not a contingency to approval of a loan. (Norby to Pringle, Supervisor, Savings and Loan Associations, State Auditor's Office, 7-8-80) #80-7-1(L)

July 8, 1980

ELECTIONS: Definition of "ballot issue". Ch. 56, The Code 1979. A proposed question becomes a "ballot issue" for purposes of triggering disclosure requirements of ch. 56, The Code 1979, when the government entity charged with the responsibility of presenting the measure to the electorate complies with its statutory duty to call an election or cause the measure to be submitted at a scheduled election. (Hyde to Rush, State Senator, 7-8-80) #80-7-2(L)

July 8, 1980

COUNTIES AND COUNTY OFFICERS: Sale of county real property. Sections 306.22-306.25, 331.3(13), The Code 1979. Sale of county real property no longer required for highway purposes under authority of §§306.22-306.25, The Code 1979, must be conducted according to procedures set out in §331.3(13), The Code 1979. (Hyde to Folkers, Mitchell County Attorney, 7-8-80) #80-7-3 (L)

July 8, 1980

COUNTIES AND COUNTY OFFICERS: Candidate's leave for deputy sheriffs. Ch. 341A, The Code 1979; §§341A.7, 341A.11, 341A.18, The Code 1979. Section 341A.18, The Code 1979, requires a deputy sheriff covered by civil service, including a deputy sheriff on probationary status, who becomes a candidate for a partisan elective office for remuneration, to take a 30-day leave of absence immediately prior to the primary and general elections. Chief deputy sheriffs are not subject to ch. 341A, The Code 1979, and are not required to take such a leave. A deputy sheriff subject to §341A.18, The Code 1979, may elect to take vacation and receive vacation pay already accrued during the required 30-day leave of absence. (Hyde to Hoth, Des Moines County Attorney, 7-8-80) #80-7-4

Steven S. Hoth, Des Moines County Attorney: We have received your request for an opinion from this office concerning statutory restrictions on political activities by deputy sheriffs covered by ch. 341A, The Code 1979, "Civil Service for Deputy Sheriffs." You have asked whether the leave provision of §341A.18, The Code 1979, has application to a chief deputy sheriff or a deputy sheriff on probationary status pursuant to §341A.11, The Code 1979, and whether a deputy sheriff subject to §341A.18, The Code 1979, may elect to take vacation and receive accumulated vacation pay during the required 30-day leave of absence.

Civil Service status for deputy sheriffs was established in 1973 with the enactment of 1973 Session, 65th G.A., ch. 227, now ch. 341A, The Code 1979. Section 341A.18, The Code 1979, entitled "Civil Rights Respected", imposes restrictions on certain political activity by deputy sheriffs covered by civil service, while extending other protections, as follows:

A person shall not be appointed or promoted to, or demoted or discharged from, any position subject to civil service, or in any way favored or discriminated against with respect to employment in the sheriff's office because of his political or religious opinions or affiliations or race or national origin or sex, or age.

A person holding a position subject to civil service shall not, during his scheduled working hours or when performing his duties or when using county equipment or at any time on county 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.

A person shall not seek or attempt to use any political endorsement in connection with any appointment to a position subject to civil service.

A person shall not use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in the appointment to a position subject to civil service, or an increase in pay or other advantage in employment in any such position, for the purpose

of influencing the vote or political action of any person or for any consideration.

An employee shall not use his official authority or influence for the purpose of interfering with an election or affecting the results thereof.

Any officer or employee subject to civil service who violates any of the provisions of this section shall be subject to suspension, dismissal, or demotion subject to the right of appeal herein.

All employees shall retain the right to vote as they please and to express their opinions on all subjects.

Any officer or employee subject to civil service who shall become a candidate for any partisan elective office for remuneration shall, commencing thirty days prior to the date of the primary or general election and continuing until such person is eliminated as a candidate, either voluntarily or otherwise, automatically receive leave of absence without pay and during such period shall perform no duties connected with the office or position so held. [Emphasis supplied.]

It is apparent that the Legislature enacted these restrictions to prevent political considerations from infecting, however subtly, the integrity and efficiency of the law enforcement offices involved, and to ensure that full value is received for the expenditure of public funds. Thus, §341A.18, The Code 1979, restricts working-hours political activity and involvement that will impair efficiency during working hours. Further, recognizing that involvement in a political campaign for partisan office may require a personal, emotional and physical dedication that could seriously detract from attention to duties, and could promote opportunity for application of unwholesome influence, the Legislature requires an employee subject to ch. 341A, The Code 1979, to take a leave of absence prior to a primary or general election, and to perform no official duties during that time. Civil service statutes containing limitations on political activity more restrictive than §341A.18, The Code 1979, have been upheld as serving valid and important state interests. *See Broderick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *United States Civil Service Commission v. National Association of Letter Carriers*, AFL-CIO, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973).

The civil service system established by ch. 341A, The Code 1979, does not, however, cover all county employees who are designated "deputy sheriff". Section 341A.7, The Code 1979, provides:

The classified civil service positions covered by this chapter shall include persons actually serving as deputy sheriffs who are salaried pursuant to section 340.8, *but do not include a chief deputy* sheriff, two second deputy sheriffs in counties with a population of more than one hundred thousand, and four second deputy sheriffs in counties with a population of more than two hundred thousand, . . . [Emphasis supplied.]

Earlier opinions from this office have interpreted this section to mean that the chief deputy sheriff in a county is not covered under the umbrella of civil service, and not subject to the provisions of ch. 341A. 1976 Op. Atty. Gen. 215; 1974 Op. Atty. Gen. 193. Thus, in response to your first question, a chief deputy sheriff would not be required to take a thirty-day leave of absence when he or she becomes a candidate for any partisan elective office for remuneration, pursuant to §341A.18, The Code 1979.

The question of whether a probationary deputy sheriff is required to take a leave of absence pursuant to §341A.18, The Code 1979, has never

been addressed by the courts of this state or this office. New employees starting in deputy sheriff civil service positions are subject to a probationary period prior to permanent appointment, pursuant to §341A.11, The Code 1979:

The tenure of every deputy sheriff holding an office or position of employment under the provisions of this chapter shall be conditional upon a probationary period of not more than twelve months, and where such deputy sheriff attends the law enforcement academy or a regional training facility certified by the director of the Iowa law enforcement academy, a probationary period of not more than six months, during which time the appointee may be removed or discharged by the sheriff.

Section 341A.11, The Code 1979, restricts only the granting of *tenure* to a deputy sheriff. A probationary deputy sheriff will not attain permanent rank and is not extended protection from summary dismissal, until the condition precedent to permanent appointment, *i.e.*, probation, has been fulfilled. The language of §341.11, The Code 1979, does not exempt probationary deputies from other provisions of ch. 341A. To secure an initial appointment, a prospective employee must meet citizenship and fitness requirements of §341A.10, The Code 1979, and complete the competitive examination process, under §§341A.6(6), 341A.8, The Code 1979. Once appointed, he or she becomes "subject to civil service", except that for a period of time, the employee may be removed or discharged without a disciplinary hearing provided by §341A.12, The Code 1979. A probationary employee would be protected, however, from discharge or discrimination because of political or religious opinions or affiliations or race, sex, age or national origin, pursuant to §341A.18, The Code 1979. We believe that a probationary deputy sheriff would also be subject to the leave requirement of §341A.18, The Code 1979.

Your final question concerns whether a deputy sheriff subject to §341A.18, The Code 1979, may elect to take vacation and receive accumulated vacation pay during the required 30-day candidate's leave of absence. Section 341A.18, The Code 1979, requires a *"leave of absence without pay"*. Generally, a leave of absence connotes a permission to be away from a certain place for a stated time with the supposition of returning thereto. *Gibbons v. City of Sioux City*, 242 Iowa 160, 45 N.W. 2d 842 (1951). We believe there is some ambiguity in the modifying term "without pay" as it is utilized in this section. Compensation due an employee as "wages", *see*, for example, §91A.2(4)(b), The Code 1979, are accrued by an employee while on active duty during regular pay periods, and can include accrual of vacation benefits. We believe "without pay" should be read to prohibit accrual of additional wages by an employee when he or she is no longer in active service.

An employee receiving vacation pay while not on active duty is receiving compensation *already earned*, and it is our opinion that such compensation may be paid while an employee is on a §341A.18 candidate's leave. If the employee were to terminate, accrued vacation pay would generally be paid; the mandatory leave of absence provision should be interpreted similarly, in light of the purpose of §341A.18, The Code 1979. It is unlikely that the Legislature intended this language to work a hardship on an employee wishing to run for partisan office or to prohibit that action. Rather, the Legislature's concern was more likely that public funds not be expended when no service is being returned. The language of

§341A.18 would prohibit an employee subject to the leave requirement from receiving new compensation for work periods when they were not on active duty. But it is not easy to see how payment of accrued vacation pay during an enforced leave, while an employee is statutorily prohibited from performing any official duties, would violate the logical intent of the section.

In conclusion, it is our opinion that §341A.18, The Code 1979, requires a deputy sheriff covered by civil service, including a deputy sheriff on probationary status, who becomes a candidate for a partisan elective office for remuneration, to take a 30-day leave of absence immediately prior to the primary and general elections. Chief deputy sheriffs are not subject to ch. 341A, The Code 1979, and are not required to take such a leave. A deputy sheriff subject to §341A.18, The Code 1979, may elect to take vacation and receive vacation pay already accrued during the required 30-day leave of absence.

July 8, 1980

CIVIL RIGHTS/CONCILIATION/BACK PAY. §§601A.15(3)(d), 601A.15(5), 601A.15(8)(a)(1), The Code 1979; §96.3 as amended by 1979 Session, 68th G.A., chapter 33, §5. Sections 601A.15(3)(d) and 601A.15(5) require that further conciliation efforts cannot be bypassed until the thirtieth day following the initial conciliation meeting, regardless of a respondent's intransigence. §601A.15(3)(a)(1), The Code 1979, requires that a complainant's back pay award be reduced by the total amount of unemployment compensation benefits received during the back pay period. This achieves the object to be attained by §96.3 The Code as its provisions for recovering unemployment compensation benefits from complainants who receive a back pay award pursuant to §601A.15(8)(a)(1), The Code 1979. (Nichols to Reis, Executive Director, Iowa Civil Rights Commission, 7-8-80) #80-7-5(L)

July 10, 1980

COUNTIES, HIGHWAYS: Necessity for speed limit signs: §§321.285, 321.289, 321.290, 321.293, 321.295, 321.482, The Code 1979. The speed limits generally set by §321.285 need not be posted to be enforceable. Failure to post signs regarding speed limits required by §321.289 does not render the speed limit unenforceable. Exceptions to the general speed limits set pursuant to §321.285(7), 321.290, 321.293 or 321.295 must be posted to be in effect and enforceable. (Hayward to Van Maanen, State Representative, 7-10-80) #80-7-6 (L)

July 10, 1980

CIVIL RIGHTS/AGE, HEIGHT, WEIGHT CRITERIA FOR EMPLOYMENT. 29 U.S.C. §631(a), 42 U.S.C. §2000 et seq., Chapters 400 and 601A, §§4.7, 80B.11, 400.17, 411.6, 601A.6(1)(a), 601A.6(2), 601A.18, The Code 1979. Selection criterion imposing a minimum age limitation of 21 years for the positions of police officer and firefighter is clearly violative of Chapters 400 and 601A of the Code of Iowa. The use of a maximum age limitation of 30 years is subject to strict scrutiny and can be upheld only if there can be demonstrated a reasonable relationship between such limitation and the duties of the positions. If it were shown that height and weight requirements disproportionately impact upon a protected class of persons, the employer would be required to prove a manifest relationship between the requirements and performance of the job. (Herring to Norland, State Representative, 7-10-80) #80-7-7

Mr. Lowell E. Norland, State Representative: You have requested an opinion from this Office as to the legality of certain employment criteria

utilized by the City of Mason City Civil Service Commission for the selection and hiring of firefighters and police officers. Specifically, you raise the two following questions:

(a) Whether a minimum age limit of 21 years and a maximum limit of 30 years violates Chapter 601A, Code of Iowa, or any provision of the State Constitution.

(b) Whether a minimum height requirement of five feet eight inches (5'8") "in stocking feet" and minimum weight requirement of 145 lbs. "stripped" violate the same state statute.

In our opinion, the imposition of specified age limitations as employment selection criteria would not only contravene Chapter 601A, but also other provisions of the Code of Iowa (1979). With reference to your inquiry regarding the use of minimum height and weight requirements, Chapter 601A will not automatically bar the use of such criteria. However, federal case law in the area suggests courts will closely scrutinize use of these employee selection criteria to determine if there is the necessary correlation between these requirements and job performance.

I. MINIMUM AND MAXIMUM AGE LIMITATIONS

Contained within the Iowa Civil Rights Act of 1965, Chapter 601A, The Code 1979, is a ban upon discrimination in employment on the basis of age. This prohibition of age discrimination is not applicable to persons under the age of 18 years, unless they are considered by the law to be an adult. §601A.6(2), The Code 1979. However, with respect to all other persons seeking employment, the Legislature has mandated a policy of non-discrimination:

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 the 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(1)(a), The Code 1979 (emphasis supplied).

Clearly, the Iowa Civil Rights Act prohibits the use of age as an employment selection criterion, unless that criterion is related to the nature of the occupation.

It must also be noted that the Act is a statute of general import, "designed to correct a broad pattern of behavior, rather than only affording a procedure to settle a specific dispute." *Estabrook v. Iowa Civil Rights Commission*, 283 N.W.2d 306, 308 (Iowa 1979); *see* §601A.18, The Code 1979. In addition to the broad policy statement of Chapter 601A, the Legislature has reiterated this principle with reference to civil service positions:

A person shall not be appointed, promoted, discharged or demoted to or from a civil service position or in any other way favored or discriminated against in that position because of political or religious opinions or affiliations, race, national origin, sex, or *age*.

§400.17, The Code 1979 (emphasis supplied).

These legislative statements of public policy are, however, subject to specified exceptions likewise fashioned by the Legislature. For this rea-

son, specific Code provisions establishing age requirements for law enforcement officials must be recognized as creating specific exceptions to the general rule of non-discrimination on the basis of age. §4.7, The Code 1979; *Doe v. Ray*, 251 N.W.2d 497, 501 (Iowa 1977).

In light of this legislative scheme generally prohibiting discrimination with specifed exceptions, the use of a minimum age limit of 21 years would clearly violate Code provisions governing the employment of police officers and firefighters. Initially, to require employees to be at least 21 years of age would violate the general prohibition against discrimination on the basis of age. §600A.6(1)(a), The Code 1979. In addition, the Legislature has specifically stated that the minimum age requirement for entrance to approved law enforcement training schools is 18 years of age. §80B.11, The Code 1979. In an opinion issued by this Office in 1973, the author provided the rationale for the legislative change in the minimum age for law enforcement personnel from 21 years to 18 years. 1973 Op. Att'y Gen. 132. That opinion notes that the change in the minimum age requirement correlated with the reduction in the age of majority from 21 years to 18 years of age. Focusing upon legislative intent, the opinion concluded that upon completion of instruction at the Iowa Law Enforcement Academy, a graduate is qualified for employment or placement. To construe the statute to require a minimum age of 21 would leave an 18 year-old graduate suspended in limbo for 3 years. Therefore, the age limitation contained within §80B.11, The Code 1979, was established when the age of majority was changed. This opinion adheres to the rationale and conclusion of that earlier opinion. It is apparent under both the general provisions of the Code and specific provisions relating to police officers and firefighters, that the sole legal minimum age requirement is 18 years of age. Any use of a greater age as the minimum age for employee selection for either police officers or firefighters would be in contravention of the law.

Your inquiry also requests an opinion of the establishment of a maximum age of 30 years for the selection as police officer or firefighter. A prior Attorney General's opinion has discussed the problems inherent in the establishment of a maximum age limitation governing the hiring of persons for law enforcement positions. 1973 Op. Att'y Gen. 116. That opinion concluded that such limitations are permissible only if the nature of the particular position sought by the job applicant required an age limitation. Inasmuch as some positions in law enforcement agencies are essentially civilian in nature and would not require an age qualification, a rule automatically prohibiting older persons from applying for positions would be illegal. If the position cannot justify an age qualification by its very nature, it cannot be subjected to such a qualification without violating §601A.6, The Code 1979.

It should be noted that by its terms, Chapter 601A forbids employment discrimination against all persons once they have reached 18 years of age, without any upper limit. §601A.6(1) and (2), The Code 1979. This differs from the federal Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.*, which creates a limited protected class of persons between 40 years and 70 years of age. 29 U.S.C. §631(a). A specific exception to the Iowa concept of a limitless class was recently created when the Legislature passed H.F. 680 permitting the involuntary retire-

ment of persons who have attained 65 years of age. 1979 Acts (68 G.A.), Chap. 35 §10. As these individuals must also be in a "bona fide executive or high policy-making position" for two years prior to this involuntary retirement, it is doubtful whether this exception would apply to police officers and firefighters, who are the focus of your request for an opinion. However, at the same time the Legislature enacted an amendment to §400.17, The Code 1979, establishing 65 years as the maximum age for firefighters and police officers. 1979 (68th G.A.), Chap. 35, §6. Further, §411.6, The Code 1979, allows police officers and firefighters who have attained 55 years of age to retire if they have served 22 years in their respective departments. Under this statute, it can be inferred that the collection of retirement benefits is dependent upon one's entry into the service at, at most 33 years of age, in order to serve 22 years in the department and retire at the minimum age of 55 years. However, because this provision is not a hard and fast rule and is dependent upon both years of service and years of age, it appears this age delineation would pass muster under challenge.

We adhere to the conclusion reached by the author of the 1973 opinion respecting the establishment of a maximum age for selection for employment. Although the use of a maximum age limitation of 30 years as an employment selection criterion cannot be viewed as *per se* violative of the Iowa Civil Rights Act, we must caution that any establishment of a maximum age for the selection and hiring of firefighters and police officers must bear a reasonable relation to the duties and requirements of the position. The establishment of such a rigid criterion will be subjected to close scrutiny in light of the policy of Chapter 601A and §400.17 forbidding discrimination in employment on the basis of age. Unless this criterion is justifiable as a bona fide occupational qualification or job-related and necessary for the safe and efficient operation of the police or fire department, it will fail to pass muster under the statutes. *See*, §601A.6(1), The Code 1979; *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); *Robinson v. Lorilland Corp.*, 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971).

The Mason City Civil Service Commission's selection criterion imposing a minimum age limitation of 21 years is clearly violative of Chapters 400 and 601A of the Code of Iowa (1979), in light of the specific statute mandating a minimum age of only 18 years of age. The use of a maximum age limitation of 30 years as a device to sift out applicants for police officer and firefighters positions will be subject to close scrutiny. The respective departments will be required to justify the use of that criterion by demonstrating a reasonable relationship exists between such an age limitation and the duties of the position of firefighter or police officer. However, because of the Legislature's inferential determination of an older age (*i.e.*, 33 years) as sufficient to trigger the retention of retirement benefits, it may be argued that the establishment of the lesser age as a selection criterion is in violation of the Legislature's intent.

II. HEIGHT AND WEIGHT REQUIREMENTS

The use of height and weight standards as employee selection criteria for police officers and firefighters is not specifically proscribed by Chapter 601A or any other relevant statute. A portion of Chapter 400

contains a non-discrimination provision which speaks to the selection criteria for civil service applicants, but it does not specifically forbid the use of certain physical standards as such criteria. §400.17, The Code 1979. This issue has arisen in the State of Iowa previously, as it has been addressed in prior Attorney General's opinions. In addition, an instructive source is the federal case law analyzing the imposition of height and weight criteria under both constitutional and Title VII standards.

In other jurisdictions where specific state statutes do not address this issue, height and weight requirements have been challenged as violative of either the Equal Protection provision of the federal and state constitutions or Title VII, Civil Rights Act of 1965, 42 U.S.C. §2000 *et seq.* Even facially neutral employment selection criteria have been found to disproportionately impact upon a protected class of persons and thereby discriminate in effect.

Under both constitutional and statutory challenges, a complainant of discrimination by the use of allegedly neutral selection criteria must establish that these criteria caused his or her disqualification from the applicant pool and demonstrate a disproportionate impact upon the class of persons of which he or she is a member. *Vanguard Justice Society v. Hughes*, 471 F.Supp. 670, 698-703 (D.Md. 1979). Unlike a Title VII challenge, a constitutional challenge further requires a showing of discriminatory intent in order to establish complainant's prima facie case. *Washington v. Davis*, 426 U.S. 229, 238-39 (1976). Under both legal theories, once a prima facie case is established, the burden shifts to the employer to establish the necessary "manifest relationship" between the employment requirements and successful performance upon the job. *See, Vanguard Justice Society*, supra.

A. CONSTITUTIONAL CHALLENGE

Under both the federal and Iowa Constitutions, the government cannot deny a person equal protection of the laws. The 14th Amendment guarantees equal protection of the laws and prevents official conduct which discriminates on the basis of race. *Washington v. Davis*, 426 U.S. 229 (1976). Proof of state actions resulting in the denial of equal protection of the laws guaranteed by the 14th Amendment or proof of actions by state officials depriving a person of this constitutional guarantee would allow a complainant of discrimination to prevail. *Ethridge v. Rhodes*, 268 F.Supp. 83 (S.D. Ohio, 1967). Thus, a state cannot constitutionally create job requirements which unfairly discriminate against a class of persons. Where employee selection criteria such as height and weight requirements are challenged under the Constitution, the resolution of two issues is determinative: (1) Does the requirement discriminate against a class of people, and (2) Is there a rational relationship between the requirement and the performance of the job which would outweigh this discriminatory effect? *See*, 1974 Op. Att'y Gen. 664.

A complainant establishes a prima facie case of employment discrimination by proving that the height and weight selection criteria caused his or her disqualification for employment and the disproportionate impact of this requirement upon a class of persons of which he or she is a member. *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972). In addition, the Supreme Court has held that the intentional or purposeful nature of

the discrimination must be proven in order to establish the unconstitutionality of these employment practices. *Washington v. Davis*, 426 U.S. 229 (1976). In that case, the Court stated:

> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race . . . [However] . . . the basic equal protection principle [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.

Washington, 426 U.S. at 239-40.

It is clear that the required showing of discriminatory impact can be established by a statistical demonstration of a significant discrepancy between the percentage of members of a protected group who qualify for a position and that group's percentage in the relevant labor market. Note, 47 So. Cal. L.Rev. 585, 594-602 (1974). Definite height and weight requirements for employment may be found to have a disproportionate impact on several bases, including race and sex. *Id.* at 588 n.13 and 589 n.16. The standard for reviewing the alleged discrimination in light of constitutional proscriptions may vary depending upon the class which suffers from the disproportionate impact of the rule. *See*, Bice, *Standards of Judicial Review under the Equal Protection and Due Process Clauses*, 50 So. Cal. L.Rev. 689, 693-707 (1977); *Vanguard Justice Society v. Hughes*, 471 F.Supp. 670, 720 n.58 (D.Md. 1979).

An example of a case involving the discriminatory impact of a height requirement on the basis of race is *United States v. City of Buffalo*, 547 F.Supp. 612 (W.D.N.Y. 1978), in which a 5'9" requirement for police patrolmen was found to eliminate 80.6% of Spanish-speaking American males aged 17-26 as compared to only 48.5% of non-Spanish-speaking American males. *City of Buffalo*, 547 F.Supp. at 625. This disparity was sufficient to establish a prima facie case of race discrimination in the imposition of absolute height requirements. Similarly, the use of a facially neutral height requirement has been found to be discriminatory on the basis of sex and unconstitutional. *Vanguard Justice Society*, 471 F.Supp. at 720. Such a minimum requirement has been statistically established as in effect discriminatory, in that it selects out a greater percentage of women applicants from an employment position with law enforcement. 47 So. Cal. L.Rev. at 586-89 and n. 13.

Once a prima facie case of discriminatory impact has been established, the burden shifts to an employer to show that the requirement for the job is rationally related to the performance of the job. If this requirement is shown to bear a rational relationship to a legitimate state objective, it must be sustained. *Smith v. Troyan*, 520 F.2d 492, 495 (6th Cir. 1975). In that case, the court found a 5'8" height requirement was not unconstitutional as there was rational support for it in the nearly universal use of height requirements and in view of the adamant testimony by three police officials of the need for such a height requirement. However, the court found that a weight requirement of at least 145 lbs. was unconstitutional as it disqualified a greater number of female applicants who met the height requirement than male applicants who met that same requirement. Weight in itself was also shown not to be rationally related to physical strength and psychological advantage. 520 F.2d at 497-98; *see also*, 47 So. Cal. L.Rev. at 608-09.

More recently, a district court has ruled that long-held conceptions concerning the sexes have been found to be erroneous and that the 5'9" height requirement of the Baltimore City Police Department was neither rationally related to the position of police officer, nor fairly and substantially related to the performance of the duties of that said position. In *Vanguard Justice Society v. Hughes*, 471 F.Supp. 670 (D.Md. 1979), testing the criterion under a constitutional standard, the district court rejected a contention that the height requirement survived constitutional scrutiny. The court stated:

Defendant's position that physically capable personnel are vital to the functioning of an urban police force is, of course, sound. The fact that the use of force by policemen may be infrequent does not mean the selection criteria relevant to the capacity of a police officer to exert necessary force are invalid. Nonetheless, it would not appear that the height-weight requirement challenged herein bears a "manifest relationship", *see, Griggs v. Duke Power Co.*, [401 U.S. 424, 432 (1971)], to the physical capabilities of a police officer or to other qualifications necessary for successful performance of that position. *Vanguard Justice Society*, 471 F.Supp. at 712-13.

The Mason City Civil Service Commission's height/weight requirement of 5'8" and 145 lbs., if shown to have a discriminatory purpose and to effect a disproportionate impact upon a class of persons, whether by race, sex, or other classification, will require justification by the employer under a rational relationship test such as set forth above. However, in the absence of case law in this area in the State of Iowa, it is impossible to predict that said requirements might be found unconstitutional.

B. TITLE VII CHALLENGE

The Iowa Supreme Court in *Quaker Oats Co. v. Cedar Rapids Human Rights Comm.*, 268 N.W.2d 862 (Iowa 1978), articulated its posture in interpreting the state's civil rights Act. The court indicated that state courts are not bound by federal decisions construing federal statutes, but that such cases would be instructive when similar challenges to employment criteria were raised under Chapter 601A, The Code 1979. *Quaker Oats*, 68 N.W.2d at 865-68.

As indicated above, a prima facie case of discrimination under Title VII is established by a showing of disproportionate impact upon a protected class. The burden of the employer in such a case is to demonstrate by a preponderance of the evidence that the requirement in question has a "manifest relation to the employment in question". *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). If the employer proves that the challenged requirements are job-related, the complainant may then show that other selection devices without a similar discriminatory effect would likewise serve the employer's legitimate interest and must be utilized. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). A person challenging an employment requirement under Chapter 601A or Title VII faces a less onerous burden than a person challenging under the Constitution. *Washington v. Davis*, 426 U.S. 229, 247 (1976). Intent or a purpose to discriminate need not be shown. *Id.; Dothard v. Rawlinson*, 433 U.S. 321, 328-29 (1977).

The United States Supreme Court in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), reviewed a minimum height and weight qualification for

prison guards in light of Title VII and its proscription against sex discrimination. In doing so, the court upheld the lower court's determination that those requirements discriminatorily impacted against women and that they could not be saved by mere assertions of a rational relationship to job performance. *Id.*, 433 U.S. at 331. Actual validation of job selection criteria is required. *Id.*, 433 U.S. at 332; *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), vacated as moot, U.S. ( ); *U.S. v. City of Buffalo*, 457 F.Supp. 612 (W.D.N.Y. 1978); *Vanguard Justice Society, supra.*

In summary, the ultimate validity of the Mason City Civil Service Commission requirements of a 5'8" height and 145 pound weight depends upon questions of fact which may not be resolved in an opinion of the Attorney General. If it were shown that these requirements disproportionately impact upon a protected class of persons, as appears somewhat likely from prior decisions, the Commission would be required to prove a manifest relationship between the requirement and performance of the job. Statistical validation of these criteria would suffice. *Dothard*, 433 U.S. at 332. As a practical matter, we would recommend that the Commission attempt to validate the criteria. If that cannot be done, serious consideration should be given to abandoning the criteria.

July 10, 1980

COUNTIES AND COUNTY OFFICERS: County Compensation Board. Ch. 340A, The Code 1979; §340A.6, The Code 1979. There are no limitations on the revisions that can be made by a county compensation board in the recommended compensation scheduleaf ter the public hearing required by §340A.6, The Code 1979, prior to adoption of a final compensation schedule to be transmitted to the county board of supervisors. There is no requirement that a county compensation board hold any additional public hearings when an increase or reduction is made in the recommended compensation schedule. (Hyde to White, First Assistant Johnson County Attorney, 7-10-80) #80-7-8

J. Patrick White, First Assistant County Attorney, Johnson County:
We have received your request for an opinion from this office concerning the procedure followed by a county compensation board when recommending a compensation schedule for elective county officers to the county board of supervisors, pursuant to ch. 340A, The Code 1979. Specifically, your questions are:

May the final compensation schedule prepared by the Compensation Board exceed the recommended schedule published for public hearing? If not, may a revised recommended schedule be adopted, noticed and hearing held prior to final recommendation? If the recommended schedule may be exceeded by the final recommendation, are there any limitations thereon? What, if any, different answer obtains from the fact that the Compensation Board completes its action in January rather than December? Is, as we assumed, the December date in Section 340A.6 of the Code directory in nature but not mandatory in the sense that no jeopardy attaches to a delay in the Board's recommendation.

What, if any, effect on your opinion is it that the Compensation Board makes only a recommendation to the Board of Supervisors? Since the Compensation Board's recommendation does fix by law certain parameters for elected officer's salaries (cannot exceed/equal percentage reductions), does its public hearing rise to a level which reposes certain rights in the taxpayer?

We believe an analysis of the language contained in ch. 340A, The Code 1979, as interpreted by earlier opinions of this office, provides a response to most of your questions.

The system of setting compensation for elective county officers through recommendations of a county compensation board was established by the General Assembly in the 1975 Session, 66th G.A. Ch. 340A, The Code 1979, creates county compensation boards composed of a representative group of five officers and residents, including a mayor of an incorporated city located within the county and a representative of the general public, both selected by a convention of the mayors of all incorporated cities located within the county, a member of a board of directors of a school district located within the county and a representative of the general public, both selected by a convention of the members of the boards of directors of all school districts located within the county, and an elector of the county representing the general public selected by the members of the county board of supervisors. Section 340A.1, The Code 1979; *see* 1976 Op. Atty. Gen. 394. The county compensation board is directed to annually follow certain procedures resulting in the determination of a recommendation of compensation to the county board of supervisors, pursuant to §340A.6, The Code 1979:

The county compensation board annually shall review the compensation paid for comparable offices in other counties of this state, other states, private enterprise, and the federal government. *The board shall prepare a recommended compensation schedule for the elective county officers. Following completion of the compensation schedule, the board shall publish the compensation schedule in a newspaper having general circulation throughout the county.* If a county officer compensation study has been received from the general assembly within the preceding five years, a comparison of the compensation recommendations of such study and the compensation schedule prepared by the board shall be included in the publication. *The publication shall also include a public notice of the date and location of a hearing to be held by the board not less than one week nor more than three weeks of the date of notice. Upon completion of the public hearing, the county compensation board shall prepare a final compensation schedule recommendation.*

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. In determining the final compensation schedule of the elected county officers which shall not exceed the recommended compehsation 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 comptrolled. The final compensation schedule shall become effective on the first day of July next following its adoption by the board of supervisors. [Emphasis supplied.]

The county compensation board is directed to gather certain data from which it determines a "*recommended* compensation schedule for the elective county officers." The compensation board then conducts a public hearing, offering an opportunity for public comment and input, before preparation of a "*final* compensation schedule recommendation." The use of the words "recommended" and "final" contemplate that alterations in a compensation schedule can and will be made, incorporating additional considerations that may be brought to the county compensation board's attention during the public hearing process. Clearly, the final compensation schedule prepared by the compensation board can propose salaries that exceed or are less than salaries contained in the published recommended schedule. There is no requirement for the compensation

board to hold any additional public hearings when a change is made in the compensation schedule after the first and only public hearing required by §340A.6, The Code 1979. In fact, such a requirement could lead to a never-ending hearing process, clearly not envisioned by the Legislature. Further, the statutory directions contain no limitations on the extent of changes in the compensation schedule which can be adopted by the compensation board, since any revision would generally occur as a result of the submission of data and information during the hearing process. It becomes the responsibility of the county board of supervisors to adopt a final compensation schedule to incorporate into the county budget, although the supervisors are limited to acceptance of the compensation schedule as submitted, or a reduction by an equal percentage for all officers. Section 340A.6, The Code 1979. *See* Op. Atty. Gen. #80-5-8. The requirement that the compensation schedule be transmitted to the board of supervisors during the month of December appears to establish a time frame for the compensation board to initiate its recommendation process, while affording the board of supervisors ample opportunity to incorporate the adopted compensation schedule in the overall county budgetary process. *See* chs. 24 and 344, The Code 1979. Substantial compliance with this transmittal requirement should not affect the validity of the compensation schedule recommended or adopted. *See* 1976 Op. Atty. Gen. 534 (substantial compliance with publication requirement of §340A.6, The Code 1977, is valid).

In conclusion, it is our opinion that there are no limitations on the revisions that can be made by the compensation board in the recommended compensation schedule after the sole public hearing required by §340A.6 prior to adoption of a final compensation schedule to be transmitted to the county board of supervisors. There is no requirement under §340A.6, The Code 1979, that a county compensation board hold any additional public hearings when an increase or reduction is made in the recommended compensation schedule.

July 11, 1980

COUNTIES AND COUNTY OFFICERS: Authority of officers designated by county conservation board. Section 111A.5, The Code 1979. Officers designated by county conservation boards have all of the powers conferred by law on police officers, peace officers, or sheriffs but their bailiwick is limited to the areas under the control of the county conservation board. (Osenbaugh to Fagerland, Acting Director, State Conservation Commission, 7-11-80) #80-7-9 (L)

July 11, 1980

STATE OFFICERS AND DEPARTMENTS, Department of Substance Abuse, Authority of Department to Administer a Treatment Facility: Sections 125.9(1), 125.9(9), 125.12(4), 125.13(1), The Code 1979. Chapter 125 envisions that the Department of Substance Abuse will operate primarily in a developing, coordinating, cooperating and supervising capacity and will contract with treatment facilities to assure that treatment services are provided substance abusers in Iowa. Chapter 125 does not either expressly or impliedly grant to the director of the Department the power to actually administer a treatment facility. (Freeman to Riedmann, Director, Iowa Department of Substance Abuse, 7-11-80) #80-7-10

Mr. Gary P. Riedmann, Director, Iowa Department of Substance Abuse: You have requested an Attorney General's Opinion concerning

the statutory authority of the Iowa Department of Substance Abuse to operate a treatment facility with the director of the department serving as an administrator of that facility. In particular, you posed the following question:

In order that substance abusers and persons suffering from chemical dependency be afforded the opportunity to receive quality treatment and be directed into rehabilitation services which help them resume a socially acceptable and productive role in society, may the Iowa Department of Substance Abuse develop, implement and administer a comprehensive substance abuse program which includes a facility with the director as the administrator to maintain, supervise and control the facility operated by the Department of Substance Abuse, if this is considered the most effective and economical course to follow in the establishment of a comprehensive and coordinated program for the treatment of substance abusers and intoxicated persons?

To arrive at an answer to your question, it is essential to closely scrutinize the statutory language of Chapter 125, The Code 1979, Iowa's comprehensive substance abuse act, and to evaluate this language in light of basic principles of statutory construction and general principles of law.

"Administrative bodies have only such power as is specifically conferred, or is to be necessarily implied, from the statute creating them." *Quaker Oats Co. v. Cedar Rapids Human Rights Commission*, 268 N.W.2d 862, 868 (Iowa 1978). Administrative agencies exercise purely statutory power and must find within the appropriate governing statute warrant for the exercise of any claimed authority. *Id.* Chapter 125 is the governing statute for the Iowa Department of Substance Abuse.

Section 125.3 provides for the establishment of the Iowa Department of Substance Abuse and states, in part, the following:

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 125.43. 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.

§125.3(1), The Code 1979. Section 125.9, The Code, outlines the expressed powers of the director. This section states in pertinent part that the director may:

1. Plan, establish and maintain treatment, intervention and education and prevention programs as necessary or desirable in accordance with the comprehensive substance abuse program.

* * *

9. Do other acts and things necessary or convenient to execute the authority expressly granted to him.

One must initially ask whether these provisions provide the statutory authority for the Department to establish and operate a treatment facility with the director serving as an administrator of that facility.

It is essential to note that the statute states the director may plan, establish and maintain treatment *programs* and does not use the word *facility*. Section 125.2(2) specifically defines "facility" as "a hospital, institution, detoxification center, or installation providing care, maintenance and treatment for substance abusers and licensed by the department under section 125.13." The word "program" is not specifically de-

fined within the statute. Furthermore, in reading the statute as a whole, it does not seem that the word "program" is meant to be used interchangeably with the word "facility." Words not defined by statute are generally given their ordinary meaning unless possessed of a peculiar and appropriate legal meaning. *Pottawattamie County v. Iowa Department of Environmental Quality, Air Quality Commission*, 272 N.W.2d 448 (Iowa 1978). In viewing the word "program" within the context of the statute itself, it appears that while "facility" clearly refers to an actual treatment institution or center, "program" refers to the system of services provided by these particular facilities or required to be provided in treating substance abusers by the director of the Department of Substance Abuse. Consequently, §125.9(1), giving the director the power to plan, establish and maintain treatment programs, cannot be read as specifically granting the department authority to establish and operate a treatment facility.

Nor does §125.9(9) necessarily grant the Department of Substance Abuse the power to operate a treatment facility. The director, pursuant to this provision, has the power to "do other acts and things necessary or convenient to execute the authority expressly granted to him." The director's power pursuant to this provision is limited to actions which are necessary or convenient to the execution of expressly granted authority. The "powers" provision of Chapter 125 does not expressly provide the director with authority to operate a treatment facility. But, one must question whether operation of such a facility by the director is an act necessary to the execution of *other* authority expressly granted to him.

Argument can be made that operation of a treatment facility by the director is necessary to the maintenance of treatment programs planned and established by the director pursuant to authority outlined in §125.9 (1). A treatment program is of negligible value unless a facility is available to put such a program into effect. Nonetheless, it is unclear from the statute itself whether such power on the part of the director was one envisioned by the legislature in its creation of this statute. Certainly one can argue on the other side that if the legislature meant to delegate such serious authority to the Department, it would have expressly done so.

When the terms of a statute are unclear or ambiguous, it is necessary to interpret the statute according to the principles of statutory construction. *Hartman v. Merged Area VI Community College*, 270 N.W.2d 822, 825 (Iowa 1978). The goal in interpreting a statute is to ascertain legislative intent and to give effect to such intent. *Doe v. Ray*, 251 N.W. 2d 496, 501 (Iowa 1977). Legislative intent is determined by construing the statute in its entirety and not from any one particular provision. *City of Des Moines v. Elliott*, 267 N.W.2d 44, 45 (Iowa 1978).

Section 125.1, The Code, provides, in part, that it is the policy of this state:

1. That substance abusers and persons suffering from chemical dependency be afforded the opportunity to receive quality treatment and directed into rehabilitation services which will help them resume a socially acceptable and productive role in society.

The section further provides that it is the policy of the state to encourage education and prevention efforts and to insure that substance abuse programs are operated by individuals qualified in their field. The subject matter of the act is revealed in its full title, as follows:

An Act relating to substance abuse by creating an Iowa department of substance abuse, prescribing the structure, powers and duties of the department, applying the funding formula for alcoholism programs in chapter one hundred twenty-five (125) of the Code to all substance abuse programs, providing for the licensing of treatment facilities by the department, making provisions of chapter one hundred twenty-five (125) of the Code relating to the treatment and commitment of alcoholics, and persons incapacitated by alcohol applicable to persons who abuse any chemical substance.

These provisions evidence a serious concern on the part of the legislature concerning the treatment and rehabilitation of substance abusers in Iowa. Certainly it would be within the policy statement of this Chapter to allow the director of the Department of Substance Abuse to administer a treatment facility, especially if no other treatment program is available and all other alternatives have been explored and rejected for good reason. Nonetheless, policy alone is insufficient to grant authority to an agency to do a particular act. Regardless of how attractive an agency's objectives are and regardless of how compelling the public interest is, public interest is not advanced when an agency acts beyond the scope of its jurisdiction. *Midwest Video Corporation v. Federal Communications Commission*, 571 F.2d 1025, 1045, 1048 (8th Cir. 1978), *aff'd* 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979). It is necessary to show more than just that the policy of the statute would be served if the agency were allowed to act in a certain way. A further examination of the statute as a whole is required.

The Department of Substance Abuse was established to develop and implement a comprehensive substance abuse program; the Commission on Substance Abuse was created to establish policies governing the Department in the discharge of its duties. Section 125.3, The Code 1979. The duties of the director are varied, including preparing and submitting a state plan for the treatment of substance abusers; developing and encouraging regional and local plans; coordinating the efforts of public and private agencies and organizations in conducting and establishing treatment programs; cooperating with other state departments in establishing educational and treatment programs; organizing training programs for people working with substance abusers; developing educational programs; fostering research; utilizing community resources; encouraging general hospitals and other health care facilities to admit substance abusers; and reviewing all state health, welfare, and treatment proposals submitted for federal funding and to advise the governor on provisions to be added relating to substance abuse. Section 125.10, The Code. While the duties of the director are functions which he is required to perform and are separate from the powers granted to him so that he might fulfill those functions, a review of the director's duties provides insight into the exact character of the powers entrusted to him. It is clear from the duties outlined in §125.10 that the legislature intended that the director act primarily in a coordinating, developing, organizing, fostering, and reviewing capacity. The language in that section of the statute in no way evidences an intent on the part of the legislature that the director,

who is responsible for developing programs and coordinating agencies and organizations in the implementation of those programs, should also become involved in the actual operation of a treatment facility. Rather, the stated duties of the director indicate he is to serve in a developing, coordinating, and supervising capacity, not in an actual delivery capacity.

A substantial portion of Chapter 125 provides for the licensing of substance abuse treatment programs by the department. Sections 125.13-125.21, The Code. Section 125.13(1) states:

[A] person may not maintain or conduct any chemical substitutes or antagonists program, residential program or nonresidential outpatient program, the primary purpose of which is the treatment and rehabilitation of substance abusers without having first obtained a written license for the program from the department.

In other words, a primary function of the department is the licensing of programs of treatment facilities. The department is, likewise, responsible for annually inspecting the facilities and reviewing the procedures utilized by each licensed program. Section 125.15, The Code. Again, the Department of Substance Abuse is intimately involved in program development, coordination, and evaluation *through* its licensing function, indicating further that the legislature did not intend for the department to possess the power to operate a treatment facility.

An inherent conflict of interest becomes apparent. If the Department did establish and operate a treatment facility with the director as an administrator of that facility, the body responsible for supervising the operations of treatment facilities would be placed in the position of supervising itself. Language in the licensing portion of Chapter 125 simply does not provide for such a situation. Furthermore, §125.39 states that no program shall be licensed under §125.13 unless it is either a political subdivision, a licensed hospital or community mental health center operating under 230A or is organized under the Iowa nonprofit corporation act. While it would probably be possible for a facility operated by the Department to comply with the latter provision of this section, it seems that if the legislature had intended that certain facilities would be operated by the Department itself, it would have added a proviso to that effect in this particular section. The express mention of one thing by the legislature ordinarily implies the exclusion of others. *In re Estate of Wilson*, 202 N.W.2d 41, 44 (Iowa 1972). The absence of any reference to facilities administered by the director in this particular provision further indicates the legislature did not anticipate departmental administration of a treatment facility.

It can be argued that §125.12(4), The Code, impliedly provides such authority. That particular provision is contained within the section dealing with a comprehensive program for treatment — regional facilities. The proviso states:

The director shall maintain, supervise and control all facilities operated by the director pursuant to this chapter. The administrator of each facility shall make a report of the activities of the facility to the commission in the form and manner the commission specifies.

This is the *only* language throughout the course of Chapter 125 which expressly indicates that the director has the statutory power to operate treatment facilities.

Clearly this provision in and of itself is *not* an *express grant* of statutory authority. The only place in which power is expressly granted to the director is §125.9. Nonetheless, the language of this provision, creating a duty upon the director, indicates an implied power on the part of the director to operate treatment facilities, which power must be derived from §125.9. The question that must be asked, then, is what was the intent of the legislature in enacting §125.12(4)?

Again, certain principles of construction are important. It is presumed that the legislature enacted each portion of a statute for a purpose and intended that each part be given effect. *Iowa Department of Transportation v. Nebraska Iowa Supply Co.*, 272 N.W.2d 6, 7 (Iowa 1978). Nonetheless, all parts of a statute should be considered together and undue importance should not be given to any single or isolated portion. *First National Bank of Ottumwa v. Bair*, 252 N.W.2d 723, 725 (Iowa 1977). Consequently, §125.12(4) must be read *in pari materia* with the remaining sections of Chapter 125 to ascertain its true purpose and effect.

In analyzing this section, two questions should be kept in mind. On the one hand, if the legislature intended the statute to grant the director power to operate a treatment facility, why was not this power included in §125.9 and why is no mention of such a power made in any other section of the statute? On the other hand, if one concludes that the director does not possess the power to operate a facility, is §125.12(4) rendered meaningless, a result clearly not intended by the legislature? *See Millsap v. Cedar Rapids Civil Service Commissioner*, 249 N.W.2d 679, 688 (Iowa 1977). (A statute is to be construed in such a manner that no provision is rendered superfluous.)

Before addressing these particular questions, another statutory section requires exploration. Section 125.9(2) states that the director may:

> Make contracts necessary or incidental to the performance of the duties and the execution of the powers of the director, including contracts with public and private agencies, organizations and individuals to pay them for services rendered or furnished to substance abusers or intoxicated persons.

The contracting power of the director reappears in §125.10(15) and, again, in §125.12(7). The director, in his discretion, determines whether or not the department will contractually fund care and treatment in a particular licensed facility. Op. Att'y Gen. #79-10-12. It is clear that the legislature intended that the director provide treatment to substance abusers by contracting with certain licensed facilities. Insofar as the director licenses facilities and contracts with them for the treatment of substance abusers, the director acts to maintain, supervise and control facilities pursuant to the chapter.

The contracting powers of the director are expressly granted to him. If the legislature had intended that the power to operate a treatment facility be inferred from either §125.9(1) or §125.9(9), then the power to contract with a facility could also have been inferred. And yet the legislature deemed it essential to specifically grant the contracting power. The likely explanation for this express grant of power is that the legislature understood the primary power of the director to be one of coordinating, supervising, and licensing, as well as one of planning and

program development. The legislature did not intend direct participation by the director in the actual operation of a treatment facility, unless otherwise expressly provided for. As such, the legislature expressly granted contracting powers to the director. No such concurrent power was granted pursuant to §125.9, allowing the director to operate a treatment facility.

The fact that §125.9(2) says the director *may* contract with treatment facilities cannot be read to mean that the statute intends for the director to act in any other, non-expressed way in relation to a treatment facility that he may deem necessary or convenient. The word "may" refers *only* to the discretion vested in the director to either contract with a facility or not contract with a facility.

It should be noted in relation to the contracting powers of the director that if the department did have the authority to operate a treatment facility with the director as an administrator, and the director, in his discretion, decided to contract with a facility operated by him, then in essence the director would be contracting with himself. While such an action in and of itself is not necessarily inappropriate, again it seems clear that if the legislature intended such a peculiar situation to occur, it would have expressly provided so.

The director does have the power to contract with facilities and has the duty to license and supervise the treatment programs and operations of these facilities. In examining the statute as a whole, it does not appear the legislature intended for the director to contraact with himself or to license himself. Nonetheless, the clear language of §125.12(4) must be accounted for.

"The director *shall* maintain, supervise and control *all* facilities *operated* by the director *pursuant to this chapter.*" Section 125.12(4) [Emphasis added]. The discussion above clearly shows that no other section of Chapter 125 expressly grants to the director the power to operate a treatment facility, nor does it appear that the legislature intended any section other than §125.12(4) to impliedly authorize the director to operate a facility. Section 125.12(4), on its face, limits the duty of the director to "maintain, supervise and control" to *only* those facilities operated by him pursuant to the chapter. And yet, in no other place does the chapter indicate that the director is to operate a treatment facility.

Consequently, one must question the meaning of the word "operate." Words in a statute are given their ordinary meaning unless a reading of the statute indicates a different meaning was intended. "[T]he manifest intent of the legislature will prevail over the literal import of the words used." *Northern Natural Gas Co. v. Forst*, 205 N.W.2d 692, 695 (Iowa 1973). Generally, "to operate" is "to perform a work or labor"; to "exert power or influence"; to "produce an effect." *Webster's Third New International Dictionary Unabridged* (1967). This general definition in no way mandates the conclusion that "operate" in the statute only means "to run" or "to administer" a facility. Rather, one must look to the definition of operate, which is "to perform a work or labor" and then look to the statute as a whole to determine what "work or labor" is to be performed. Such an approach is supported by the language of §125.12(4) which refers only to *all facilities operated by the director*

pursuant to this chapter. The chapter itself gives force and effect to the general word "operate."

Drawing upon the discussion above concerning the duties and responsibilities of the director and of the department, it is clear the legislature intended the director to operate in a coordinating, cooperating and supervising capacity. In the ambit of this capacity, the department has the expressed duty to develop treatment plans and programs, to implement these programs by requiring — through licensing — that treatment facilities adhere to certain program guidelines, and to assure that treatment is provided for substance abusers by contracting with facilities. It is in these respects that the director *operates* facilities *pursuant* to the chapter.

Furthermore, §125.12(4) refers to *all* facilities operated by the director pursuant to this chapter. "All" does not refer to *any* facility the director *might* decide to operate, i.e., administer. This section places a duty upon the director: "The director *shall* maintain, supervise and control . . . ." The term "all," when read in conjunction with the phrase of "facilities operated pursuant to the chapter" refers to all of those facilities which are licensed by the department and with which the director contracts. Not all facilities are required to be licensed under Chapter 125, §125.13 (2), nor is the director required to contract with all those facilities which are licensed. Sections 125.9(2), 125.44. Thus, the director has the duty to maintain, supervise and control only all of those facilities operated by him pursuant to his contracting and licensing powers and responsibilities as provided for by this chapter.

Consequently, §125.12(4) need not be read as granting an inferred power to the director to administer a treatment facility in order to give it meaning. Rather, the reading of the section which is most consistent with the intent and purposes of the legislature in assigning the department/director coordinating, licensing and contracting powers and responsibilities is that the director shall supervise and maintain all those facilities which he licenses and with which he contracts pursuant to the chapter.

The second sentence of §125.12(4) adds a certain amount of strength to this approach in that it requires the "administrator of each facility" to make a report of the activities of the facility to the commission. It is reasonable to believe that if §125.12(4) meant for the director to actually administer a facility himself, the word "director" would have been used instead of the word "administrator." That particular proviso clearly envisions that persons *other than* the director would administer these particular facilities.

Thus, the import of Chapter 125, when read in its entirety, is that the Department of Substance Abuse is to operate as a developer, coordinator and supervisor in providing treatment services for substance abusers. A primary supervisory function of the director lies in his licensing duties and powers. The department may depart somewhat from its coordinating and monitoring functions to contract with facilities for the care and treatment of substance abusers. But, without a clearer grant of authority from the legislature, the department may not actually administer a treatment facility. This conclusion is buttressed by the fact that if the

director were to act as such an administrator, he would be placed in the peculiar position of contracting with himself and in licensing himself. Furthermore, each time the statute refers to the director and a facility's administrator communicating with each other, the director would, in essence, be communicating with himself. *See e.g.*, §§125.17, 125.25, 125.33, 125.47. The chapter apparently does not envision such a situation.

Other state departments and agencies do enjoy licensing powers while also administering certain facilities, but this latter power is expressly granted by the governing statutes. For instance, the director of the Iowa Beer and Liquor Control Department is given clear authority to establish, maintain or discontinue state liquor stores. Section 123.20(2), The Code. The director of the State Department of Social Services Division of Child and Family Services is to administer programs involving neglected, dependent and delinquent children but also is clearly to administer the Iowa juvenile home, the state training school for boys and girls, and the Iowa soldiers home. Section 217.8, The Code. The director of the Division of Mental Health Resources is particularly required to control and administer several designated institutions. Section 217.11, The Code. These particular provisions lend support to the argument that if the legislature intended for the director of the Department of Substance Abuse to actually administer a treatment facility, it would have clearly provided for this within the ambit of Chapter 125.

In relation to this above point, it should also be noted that Chapter 125 says nothing about the power of the director to lease a building for a treatment facility or to hire personnel; furthermore, departmental appropriations are not itemized in such a way as to provide for the funding of a departmentally-controlled institution. 1979 Session, 68th G.A., ch. 17. On the other hand, the director of the Iowa Beer and Liquor Control Department is granted the express power to rent, lease or equip any building or land, to lease plants and to lease or buy equipment, and to appoint vendors, clerks, agents and other employees as is necessary for carrying out the provisions of the chapter. Section 123.20 (3) (4) (5), The Code. Although no mention is made in the statute itself of the powers of the various divisions of the Department of Social Services to lease buildings and to hire personnel, these divisions administer facilities with already existing buildings and staff; legislative appropriations, however, specifically provide funds for the operation of these named state institutions. *E.g.*, 1979 Session, 68th G.A., ch. 8, §3(1) (for operation of the Eldora training school, Mitchellville training school and state juvenile home); ch. 8, §5(1) (for operation of Fort Madison, Anamosa, Rockwell City, Oakdale, Mount Pleasant, John Bennett Center, Riverdale Release Center); ch. 8, §7(1) (for state hospital-schools at Glenwood and at Woodward). Certainly the legislature is under no responsibility to specifically appropriate funds or to specifically provide for the leasing of buildings and the hiring of personnel, but the fact that the legislature appears to typically specify such matters further indicates that the legislature did not intend for the Department of Substance Abuse to actually administer a treatment facility.

A somewhat tangential point which should be noted is that if the director were to administer a treatment facility, that facility would be a state institution. Employees would be state employees, paid by warrants issued through the comptroller's office. These employees would be

hired by the department. The appropriations chapter allows the Department to hire no more than twenty-six point eight, (26.8) fulltime equivalent positions for the 1980 fiscal year. The Department may be limited by this number in hiring employees for a treatment facility. This fact is further indication of a legislative intent which did not encompass administration of a treatment facility by the Department of Substance Abuse.

Consequently, it is our opinion that the legislature intended for the Department of Substance Abuse to operate in a developing, coordinating, cooperating and supervising capacity. The director may establish and maintain treatment *programs* but this power does not also provide the power to actually administer a treatment *facility*. The Department assures that adequate treatment is provided substance abusers through program development, through program implementation by licensing, by coordination of treatment services, and by training those engaged in the treatment of substance abusers. The director is given the expressed power to advance beyond his primary statutory powers and responsibilities of coordinating and supervising treatment programs and facilities to directly contract with facilities to provide treatment for substance abusers at a cost to the department. A similar power to administer a treatment facility is not expressly granted to the director, nor does §125.12(4) impliedly grant such authority. Without a clearer statement from the legislature, it is our opinion that the statute does not intend the director to enjoy the power to administer a treatment facility.

July 11, 1980

STATE OFFICERS AND DEPARTMENTS: Authority of the Citizens' Aide/Ombudsman to administer a prisoner legal assistance program. Chapter 601G, The Code 1979; 1978 Session, 67th G.A., ch. 1018, §6(e); 1979 Session, 68th G.A., ch. 8, §11; H. F. 2580, 68th G.A., 1980 Session. The Citizens' Aide/Ombudsman's Office has no present statutory authority or responsibility to administer a prisoner legal assistance program. The Office may participate in such program only to the extent permitted by the appropriation made in Chapter 1018, §6(e), of the Acts of the 67th General Assembly, 1978 Session. (Stork to Angrick, Citizens' Aide/Ombudsman, 7-11-80) #80-7-11 (L)

July 17, 1980

COUNTIES AND COUNTY OFFICERS; MUNICIPALITIES; CITY ASSESSOR: Payment for expenses. Ch. 441; §§441.1, 441.2, 441.16, The Code 1979. The County auditor does not have the authority to deny claims submitted by the city assessor for payment nor does the county board of supervisors serve in a supervisory capacity over the assessor. The city assessor is not subject to the same rules and procedures as the rest of the subdivisions of county government, however, the conference board may establish rules and regulations governing expenditures of funds by the city assessor. (Bennett to Davis, Scott County Attorney, 7-17-80) #80-7-12 (L)

July 17, 1980

MENTAL HEALTH: EVIDENCE: Physician-patient privilege. Chapter Chapter 229, §§229.8, 229.12(3), 229.52, 622.10, The Code 1979. The testimonial communications rule establishing physician-patient privilege, as a general concept, applies to ch. 229 involuntary commitment proceedings. The physician-patient privilege has been eliminated where a patient is examined for diagnostic purposes under ch. 229. A court may adhere to but is not bound by the formal rules of evidence in

involuntary commitment proceedings under ch. 229. (Mann to Martens, Emmet County Attorney, 7-17-80) #80-7-13

Mr. John G. Martens, Emmet County Attorney: You have requested an opinion of the Attorney General on the following questions:

1. Is the physician/patient privilege, as a matter of evidentiary law, applicable to proceedings for involuntary commitment for serious mental impairment or involuntary commitment for substance abuse under Chapter 229, Code of Iowa?

2. Can the physician/patient privilege be raised to prevent testimony from a treating physician regarding the alleged mental illness or condition of substance abuse problems associated with the Respondent?

3. Do the formal rules of evidence apply to involuntary commitment proceedings for chemical substance abuse pursuant to Chapter 229, Code of Iowa?

The physician-patient privilege, as a general concept, is a testimonial communications rule which precludes the disclosure of confidential information about a patient by a physician testifying in a civil or criminal action. This rule is codified at §622.10, The Code 1979, and in pertinent part reads as follows:

622.10 Communications in professional confidence—exceptions—application to court. No practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any such person, who obtains such information by reason of his employment, minister of the gospel or priest of any denomination shall be allowed, *in giving testimony*, to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. . . . (emphasis added)

The plain language of §622.10 makes it clear that the physician-patient privilege applies to any situation in which the physician is used, called, or needed "in giving testimony". Testimony is taken in proceedings for involuntary commitments under ch. 229, The Code 1979. Accordingly, the physician-patient privilege applies to ch. 229 proceedings. No proceedings are excepted under §622.10.

The fact that the physician-patient privilege applies to ch. 229 proceedings is not dispositive of the question of whether it may be raised as a bar to a physician's testimony regarding a patient's alleged mental illness or condition of substance abuse. The analysis must go further. At common law, confidential communications to physicians were not privileged, and they are only so made by statute. *Boyles v. Cora*, 232 Iowa 822, 6 N.W.2d 401 (1942); 81 Am.Jur.2d *Witnesses* §230 (1976). In view of the fact that the privilege as to communications between physician and patient is wholly statutory, the legislature may modify it at any time or withdraw it entirely. 81 Am.Jur.2d *Witnesses* §230 (1976).

The legislature has modified the physician-patient privilege for ch. 229 proceedings. Under §229.8, after an application for involuntary commitment of a person alleged to be mentally impaired has been filed, the district court is required to order an examination of the potential patient/committee by one or more licensed physicians, who shall submit a written report on the examination to the court. The same is true where a petition for the involuntary commitment of a substance abuser is filed under §229.52. Physicians, then are required to submit evidence in ch. 229 proceedings and may be called as a witness and be subjected to

cross-examination by either party. It is clear, then, that the legislature has eliminated the physician-patient privilege to the extent that physicians may give testimony regarding diagnostic evaluations performed pursuant to court order under ch. 229. The physician-patient privilege does not arise where, on order of the court, a person is examined to determine his/her mental or physical condition. *In Interest of Hoppe*, 289 N.W.2d 613 (Iowa 1980); *State v. Nowlin*, 244 N.W.2d 596 (Iowa 1976); *State v. Mayhew*, 170 N.W.2d 608 (Iowa 1969), appeal after remand 183 N.W.2d 723 (Iowa 1971); *City of Cherokee v. Aetna Life Insurance Co.*, 215 Iowa 1000, 247 N.W.2d 495 (1933); *In Re Flemming*, 196 Iowa 639, 195 N.W.2d 242 (1923). In the *Mayhew* case cited above, the court quoted from *Wharton's Criminal Evidence* as follows:

. . . "[T]he privilege does not arise where an examination of a person is made to determine the existence of a fact or condition, as distinguished from giving him medical treatment. Thus, the privilege does not arise, and a physician may testify as to the result of an examination made for the sole purpose of seeing whether the condition of the patient indicated the commission of the crime, or whether the defendant was sane."

While the physician-patient privilege has been eliminated where the patient is examined for diagnostic purposes under ch. 229, it has not been eliminated with respect to physician-patient relationships that existed prior to the initiation of involuntary commitment proceedings under ch. 229, and that were established for purposes of medical treatment. In those situations, the physician-patient relationship remains intact, and confidentiality should be and is protected as it is vital to the attainment of the purposes for which the physician-patient relationship exists, i.e., treatment of medical problems. *Triplett v. Board of Social Protection*, 19 Or.App. 408, 528 P.2d 563 (1974). Accordingly, a physician who gains knowledge of a person's condition while treating that person for medical problems should not be permitted to testify to any confidential information, unless there is a waiver of the communications privilege by the patient. *Boyles.*

As to your final question of whether the formal rules of evidence apply to involuntary commitment proceedings for chemical substance abuse pursuant to ch. 229, we conclude that a court may adhere to but is not bound by formal rules of evidence. Chapter 622 contains general rules of evidence that reflects a general legislative intent that they apply to all procedings, civil and criminal, unless excepted by the implied or specified provisions of another chapter. Chapter 229 contains a specific exception to the rules of evidence for involuntary commitment proceedings for the seriously mentally impaired. Section 229.12(3) provides that "the court shall receive all relevant and material evidence which may be offered and need not be bound by the rules of evidence." Although no similar provision is contained in §229.52 governing commitment hearings for substance abusers, the same policy considerations apply to those hearings as apply to commitment hearings for the seriously mentally impaired. The welfare of the potential committee is paramount in both situations. Avoidance of useless embarrassing revelations or revelations that may be injurious to the potential committee are underlying considerations during the hearings. The hearings are intended to be conducted in as informal a manner as may be consistent with orderly procedure. **Since the basic policy considerations are the same in both involuntary commitment proceedings for persons alleged to be seriously mentally**

impaired and alleged substance abusers, the same reasons that justify relaxed rules of evidence in one setting justifies it in the other. We, therefore, conclude that a court may adhere to but is not bound by formal rules of evidence in involuntary commitment proceedings for chemical substance abuse.[1]

In summary, the testimonial communications rule establishing physician-patient privilege, as a general concept, applies to ch. 229 involuntary commitment proceedings. The physician-patient privilege has been eliminated where a patient is examined for diagnostic purposes under ch. 229. A court may adhere to but is not bound by the formal rules of evidence in involuntary commitment proceedings under ch. 229.

July 23, 1980

COURTS, STATUTORY CONSTRUCTION: Effect of H.F. 2598 on §805.9 Court Costs, §§4.8, 602.63, 805.6, 805.9 and 805.11, The Code 1979; H.F. 2598, 68th G.A. (1980). The manifest intent of the General Assembly in tne enactment of H.F. 2598 includes the increase of §805.9 court costs from five to six dollars. (Hayward to Miller, Commissioner of Public Safety, 7-23-80) #80-7-14(L)

July 17, 1980

PUBLIC FUNDS: INTEREST COLLECTED UNDER RETAINAGE STATUTES. Sections 384.57, 452.10, 453.7, 573.12, The Code 1979. A governmental unit may collect interest on funds retained pursuant to a contract for a public improvement. Such interest belongs to the governmental unit in most cases. (Stork to Johnson, State Auditor, 7-17-80) #80-7-15(L)

July 17, 1980

COUNTIES AND COUNTY OFFICERS: County Clerk; Satisfaction of judgments. Sections 624.20 and 624.37, The Code 1979. A clerk of court is not required to, but may refuse to enter a satisfaction of judgment when the judgment debtor has paid the judgment in full but the judgment creditor's whereabouts are unknown and the judgment is not acknowledged. If the clerk of court refuses to enter a memorandum of satisfaction, the judgment debtor may by motion attempt to have the court rendering the original judgment order the clerk to enter such a memorandum. (Swanson to Rush, State Senator, 7-17-80) #80-7-16

Honorable Bob Rush, State Senator: You have requested the opinion of the Attorney General regarding the duty of a clerk of court to enter a satisfaction of judgment when the judgment creditor cannot be located. The specific factual situation as stated by you is as follows:

A judgment debtor in a small claims action has paid the full amount of the judgment, together with the required interest and costs, to the Linn County Clerk of Court. The clerk has refused to enter a memorandum reflecting satisfaction of the judgment because the judgment credi-

[1] We do not mean to suggest that the court may disregard claims of privilege in involuntary commitment proceedings. Although grouped for study and codification with other rules of evidence, privileges are extended to protect relationships to which society attaches special value, rather than as an aid to the truth seeking proceess. *See McCormick on Evidence*, §73 (1972).

tor has not acknowledged the satisfaction and the judgment creditor's whereabouts are unknown. In connection with this factual situation, you have raised two questions:

1) Does the Clerk have the authority or a duty to enter a memorandum showing the judgment to be satisfied?

2) If the Clerk does not have such authority or duty, what recourse is available to the judgment debtor?

It is the opinion of this office that when faced with this situation, a clerk of court does not have an enforceable duty to enter a memorandum of satisfaction. However, the judgment debtor can, by means of Rule 256, Iowa Rules of Civil Procedure, make a motion to the court which rendered the original judgment to direct the clerk to enter a memorandum of satisfaction, and thus obtain the desired result.

As a beginning point, Sections 624.20 and 624.37, The Code 1979, govern a clerk's actions when satisfying a judgment. Those sections provide:

§624.20 *Satisfaction of Judgment.* Where a judgment is set aside or satisfied by execution 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.

When §624.20 is read alone, it would appear that the payment of the judgment in this factual situation *would* require the clerk to enter a memorandum of satisfaction because the judgment has been satisfied by a tender of payment in full (the "or otherwise" language of the statute). Section 624.37, however, seems to require more.

The affect of §624.37 upon §624.20 was discussed in 1977 Op. Att'y. Gen.. 310. That opinion held that a judgment is not *completely* satisfied until the judgment creditor *acknowledges* the satisfaction of the judgment. The language of §624.37 is mandatory, stating that "the person entitled to the proceeds . . . *must* acknowledge satisfaction thereof". (Emphasis supplied). Accordingly, when faced with a situation where the judgment creditor cannot be found, a clerk of court is justified in refusing to enter a memorandum of satisfaction.

It seems clear that the above opinion was grounded upon the fear that clerks who were forced to enter satisfactions without receiving acknowledgments would become liable for keeping track of the funds. Indeed, in certain situations, such fears may be justified. It therefore seems logical to extricate the clerk from such a dilemma by having the satisfaction ordered by the court.

Before discussing the recourse available to the judgment debtor, it should be pointed out that conversations with various clerks around the state have revealed that as a matter of practice, clerks often *do* enter a

memorandum of satisfaction in this situation. The funds collected, but not acknowledged and received, are then turned over to a trust account or to a county account for unclaimed funds and judgments. It appears that Sections 624.20 and 624.37 do not *require* a clerk to follow this procedure, but that numerous clerks do indeed resolve the situation in this manner, and we do not wish to discourage such a common-sense resolution of the issue. The previously cited opinion of the Attorney General indicates only that a judgment is not *completely* satisfied until acknowledged. That opinion offers no guidance as to what should be done when acknowledgment is impossible, nor does it suggest that it is unlawful for a clerk to enter a satisfaction without obtaining an acknowledgment.

Having established that a clerk is authorized, but is not required to enter a memorandum of satisfaction in the situation that you have described, the judgment debtor who has tendered the judgment and attendant costs in full to the clerk does have an interest in having the judgment removed from the docket. It appears that the judgment debtor can request that the court that rendered the judgment direct the clerk of court to enter a memorandum of satisfaction.

Many states have statutory provisions relating to a court order to enter a memorandum of satisfaction. Iowa does not have such a statutory provision, but the Rules of Civil Procedure contemplate such an action. Rule 256 provides:

Judgment discharged on motion. Where matter in discharge of a judgment has arisen since its rendition, the defendant or any interested person may, on motion in a summary way, have the same discharged in whole or in part, according to the circumstances.

This rule provides the judgment debtor with a vehicle for having the memorandum of satisfaction entered. The judgment debtor should prepare a motion and utilize supporting affidavits from the clerk of court showing both the payment in full and that diligent efforts have been made to contact the unavailable judgment creditor. As provided in Rule 256, if the court is satisfied "according to the circumstances" that a memorandum of satisfaction should be entered, the court could direct the clerk to enter the memorandum. The court could also direct the disposition of the unclaimed funds, perhaps utilizing some of the options mentioned above that are currently being used by some of the clerks of court around the state.

Various authorities support the above method as a means of resolving this problem. As a general matter, Freeman on Judgments states:

§1163 *Compelling Satisfaction.* Whenever the defendant is entitled to have a judgment discharged or satisfied of record because of its payment or performance or by reason of other facts entitling him to that relief, he may compel this to be done by an appropriate proceeding, the nature of which depending to some extent upon the facts and the statutes, if any, covering the matter. . . . A party claiming the right to have a judgment satisfied of record may have this alleged right determined upon motion to the court in which the judgment is entered, the authorities quite generally, either by virtue of statute or independent thereof, recognizing the power of a court to control its records in this way or by an equivalent rule or order to show cause.
2 Freeman on Judgments 2403 (5th ed. 1925). *See also* 49 C.J.S. *Judgment* §581 (1947).

Iowa case law lends further support to the above general statement. The power to order the entry of a satisfaction of judgment is a part of a court's inherent power to enforce its own decrees. *Dunton v. McCook*, 120 Iowa 444, 94 N.W.2d 942, 944 (1903). *Dunton* construed previous statutory language almost identical to the present wording of Iowa Rule 256. As a part of this inherent power, a court can render an order against a clerk of court. *Hornish v. Ringen Stove Co.*, 116 Iowa 1, 89 N.W. 95, 97 (1902).

No cases have been found in any jurisdiction where the judgment creditor has failed to claim the proceeds of a judgment that have been paid in full. The situation is similar, however, to one in which the judgment creditor wrongfully refuses to acknowledge a satisfaction of judgment and several cases deciding that issue are analagous to the present situation. In *Rother v. Monahan*, 60 Minn. 186, 62 N.W. 263 (1895), the court stated that while a mere tender of the amount of judgment does not extinguish a judgment lien, if the judgment creditor wrongfully refuses the tender, the judgment debtor can apply to the court to enter a satisfaction of judgment. The Minnesota court referred to a statute quite similar in language to Iowa Rule 256 in *Warren v. Ward*, 91 Minn. 254, 97 N.W. 886 (1904). The court ordered satisfaction of the judgment based upon a motion supported by affidavits showing that ". . . such facts and conditions exist as are tantamount to such payment". 97 N.W. at 887. The same result has been obtained when a claimant against an estate refuses to satisfy his allowed claim. *See In re Mathews Estate*, 134 Neb. 607, 279 N.W. 301 (Neb. 1938).

In conclusion, under the fact situation that you have outlined, Sections 624.20 and 624.37 justify, but do not require, a clerk of court's decision to refuse to enter a memorandum of satisfaction of judgment. A judgment is not completely satisfied until the judgment creditor acknowledges the satisfaction of judgment. In order to have the payment of the judgment duly noted if the clerk is unwilling to do so, the judgment debtor may move to have the memorandum of satisfaction entered on the record. The motion should be made to the court which rendered the original judgment and should be supported by affidavits or other evidence that shows both the payment of the judgment in full and that diligent efforts have been made to locate the judgment creditor. The ultimate disposition of the paid-in funds would be left to the discretion of the court.

July 23, 1980

JAILS: Conversion of county jail to county detention facility — §§332.3 (4), 332.3(13), 356A.1, 356A.7, Code of Iowa, 1979. A board of supervisors may convert a county jail established under the provisions of chapter 356 to a county detention facility as provided by chapter 356A. (Williams to Holien, Marshall County Attorney, 7-23-80) #80-7-17(L)

July 23, 1980

PROFESSIONAL ENGINEERING — ENVIRONMENTAL PROTECTION. Chapter 114, The Code 1979; §§114.2; 114.16; 114.26; §455B.45. The preparation of applications for a public water supply distribution system permit under §455B.45(3), The Code 1979, by a full-time employee of the applicant is not exempt from the requirement that engineering documents submitted to a state agency be certified by a registered engineer. We construe §114.26 as exempting work done for in-house corporate purposes only and not engineering work done to meet design standards and permit application requirements mandated by law

to insure the adequacy of public water supply systems. (Osenbaugh to Jay, State Representative, 7-23-80) #80-7-18

The Honorable Daniel J. Jay, State Representative: You have requested the opinion of this office concerning the proper interpretation of §114.26, The Code 1979, which exempts certain activities from the requirements of chapter 114 governing professional engineers and land surveyors. Your opinion request is whether the following factual situation fits within the exemption of §114.26:

Rathbun Regional Water Association, Inc. of Centerville, Iowa, a rural water association, has on occasion submitted applications for line extensions to the Department of Environmental Quality. In more than one instance, the applications were not prepared by a professional engineer licensed under Chapter 114 of the 1979 Code of Iowa. Because of this, the Department of Environmental Quality has held up review of these applications upon the basis that such applications must be prepared by a licensed professional engineer, citing §114.1 as authority. It is the contention of Rathbun Regional Water Association, Inc. that §114.26 of the 1979 Code exempts the association from being required to have all applications prepared by a licensed professional engineer.

Section 114.26 prohibits state agencies from accepting engineering documents not certified by a registered professional engineer. Section 114.2 defines the terms "engineering documents" and "the practice of professional engineering" as follows:

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. 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, buildings, 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 service requires the application of engineering principles and data.

The mere execution, as a contractor, of work designed by a professional engineer, or the supervision of the construction of such work as a foreman or superintendent shall not be deemed to be active practice in engineering work.

We are advised that the required applications for line extensions require the design of water lines capable of providing adequate pressure and flow to insure public water supply throughout the system at design capacity. We have no doubt that the Department of Environmental Quality could reasonably conclude that such is "designing . . . in connection with . . . projects, wherein the public welfare, or the safeguarding of life, health, or property is or may be concerned or involved" and that this design work requires the application of engineering principles. The legislature has determined that such designs must be submitted for governmental review to insure that the goals of the Safe Drinking Water Act, P.L. 93-523, 42 U.S.C. 300f et seq., are met. See especially §§455B.33, 455B.36(2), The Code 1979. Preparation of the applications for line extensions for a public water supply is therefore the practice of professional engineering subject to the requirements of chapter 114. The Department of Environmental Quality therefore must require that these

applications be certified by a registered professional engineer unless the exemption provided by §114.26 applies.

That exemption provides in relevant part:

This chapter shall not apply to any full-time employee of any corporation while doing work for that corporation, except in the case of corporations offering their services to the public as professional engineers or land surveyors.

Corporations engaged in designing buildings or works for public or private interests not their own shall be deemed to practice professional engineering within the meaning of this chapter. With respect to such corporations all principal designing or constructing engineers shall hold certificates of registration hereunder. This chapter shall not apply to corporations engaged solely in constructing buildings and works.

It is clear that the applications for the line extensions were prepared by a full-time employee of the rural water association. The applicability of Chapter 114 therefore depends on whether the employee is "doing work for that corporation" within the meaning of §114.26. In construing an ambiguous statute, one may consider the purpose of the statute, the consequences of a particular construction, and its administrative construction. §4.6, The Code 1979. The purpose of chapter 114 is to insure that works affecting the public welfare be designed by qualified engineers. Section 114.26 is apparently intended to allow corporations to have in-house engineering done by full-time employees of their choice. To construe that to allow anyone employed by a water association to design a public water supply system could thwart the legislative intent that rigorous design standards must be met to insure safe drinking water. §455B.45(3), The Code 1979. This conclusion is bolstered by the fact that the legislature specifically conditioned delegation of permit review to local government upon employment of a qualified, registered engineer to review the plans and specifications. §455B.45(3). We therefore believe it is reasonable for Department of Environmental Quality staff to construe §114.26 as not allowing these applications to be signed by a water association employee who is not a registered engineer. While the corporation pays the employee and directs his work, the work is not being done for the corporation but for the public under §455B.45(3), The Code 1979.

We would also note that §114.26 merely exempts certain activities from the requirements of chapter 114. An agency such as the Department of Environmental Quality could independently require certification by a registered engineer for activities exempt under §114.26 so long as the agency was acting within its statutory authority and had a reasonable basis for requiring that the work be done by a registered professional engineer. 1978 Op. Att'y Gen. 555.

In conclusion, we construe §114.26 as exempting only full-time employees doing engineering work for the internal purposes of a corporation but not as exempting full-time corporate employees who prepare applications for line extension permits under §455B.45(3).

July 23, 1980

STATE BUILDING CODE: Accessibility by the physically handicapped to buildings and facilities used by the general public. Sections 104A.1, 104A.2, 104A.3, 104A.4, 104A.6, 601A.8, The Code 1979. The provisions of Chapter 104A should be read in *para materia* with those contained in §601A.8 to ensure that buildings and facilities, including housing accommodations, used by the general public are generally accessible to the physically handicapped. The State Building Code Commissioner may not prescribe rules that limit the accessibility of the physically handicapped to the buildings and facilities governed by Chapter 104A. Additionally, the Building Code Commissioner must adhere to the provisions of §104A.2, which contains exclusive compliance standards concerning the specific occupancies and extent of accessibility to individual dwelling units within apartment buildings. (Stork to Appell, State Building Code Commissioner, 7-23-80) #80-7-19

Donald Appell, Commissioner, State Building Code: You have requested an opinion of the Attorney General as to whether the State Building Code requirements for accessibility and use of buildings, structures, and facilities by physically handicapped and elderly persons are in compliance with Chapter 601A, The Code 1979. Specifically, you question whether certain building code requirements developed pursuant to §104A.2, The Code 1979, for accessibility and use of multiple-dwelling unit buildings by handicapped persons are in compliance with §601A.8. The intent of Chapter 104A is expressed in §104A.1:

It is the intent of this chapter that standards and specifications are followed in the construction of public and private buildings and facilities which are intended for use by the general public to ensure that these buildings and facilities are accessible to and functional for the physically handicapped.

In accordance with this intent, §104A.2 provides:

The standards and specifications set forth in this chapter shall apply to all public and private buildings and facilities, temporary and permanent, used by the general public. The specific occupancies and extent of accessibility shall be in accordance with the conforming standards set forth in section 104A.6. Notwithstanding the standards set forth in section 104A.6, in every multiple-dwelling-unit building containing twelve or more individual dwelling units the requirements of this chapter which apply to apartments shall be met by at least one dwelling unit or by at least ten percent of the dwelling units, whichever is the greatest number, on each of the floor levels in the building which are accessible to the physically handicapped. Any fraction five-tenths or below shall be rounded to the next lower whole unit.

Section 104A.6 authorizes the establishment of conforming standards by the State Building Code Commissioner:

In addition to complying with the standards and specifications set forth in sections 104A.3 and 104A.4, the authority responsible for the construction of any building or facility covered by section 104A.2 shall conform with rules promulgated by the state building code commissioner as provided in section 103A.7.

In conjunction with the standards and specifications contained in §§104A.3 and 104A.4, the rules promulgated under §103A.7 constitute the technical provisions for ensuring that all buildings and site facilities "used by the general public" are accessible to and functional for use by handicapped persons. *See* 630 I.A.C. §§5.700-06.

You note that from 1975 until January 1978, §104A.2 provided that the accessibility requirements within a multiple-dwelling unit building

applied only to those buildings containing five or more dwelling units. Accordingly, the State Building Code Commissioner and the Building Code Advisory Council, pursuant to their authority under §103A.7, promulgated rules concerning accessibility within a unit only for those multiple-dwelling unit buildings containing five or more units. In light of the amendment to §104A.2 adopted by the General Assembly in 1978, the Commissioner and the Council are considering an amendment to the state building code that would require only multiple-dwelling unit buildings with twelve or more dwelling units to be accessible to the handicapped. You question the validity of such a rule in light of §601A.8, which provides:

It shall be an unfair or discriminatory practice for any owner, or person acting for an owner, of rights to housing or real property, with or without compensation, including but not limited to persons licensed as real estate brokers or salesmen, attorneys, auctioneers, agents or representative by power of attorney or appointment, or any person acting under court order, deed of trust, or will:

1. To refuse to sell, rent, lease, assign or sublease any real property or housing accommodation or part, portion or interest therein, to any person because of race, color, creed, sex, religion, national origin or disability of such person.

2. To discriminate against any person because of his race, color, creed, sex, religion, national origin or disability, in the terms, conditions or privileges of the sale, rental, lease assignment or sublease of any real property or housing accommodation or any part, portion or interest therein.

3. To directly or indirectly advertise, or in any other manner indicate or publicize that the purchase, rental, lease, assignment, or sublease of any real property or housing accommodation or any part, portion or interest therein, by persons of any particular race, color, creed, sex, religion, national origin or disability is unwelcome, objectionable, not acceptable or not solicited.

4. To discriminate against the lessee or purchaser of any real property or housing accommodation or part, portion or interest of the real property or housing accommodation, or against any prospective lessee or purchaser of the property or accommodation, because of the race, color, creed, religion, sex, disability, age or national origin of persons who may from time to time be present in or on the lessee's or owner's premises for lawful purposes at the invitation of the lessee or owner as friends, guests, visitors, relatives or in any similar capacity.

The anti-discriminatory provisions in §601A.8 were formerly contained in Chapter 105A of the Code and were transferred to Chapter 601A in 1973. Chapter 601A establishes the Civil Rights Commission and sets forth procedures to enforce prohibitions against discriminatory practices. Section 601A.8 enumerates basic housing practices that may be considered discriminatory.

No case authority concerning the interrelationship of Chapters 601A and 104A is extant. An earlier opinion of the Attorney General, however, considered the question of whether a failure to follow the guidelines of Chapter 104A would constitute a violation of Chapter 105A (present Chapter 601A). At that time, Chapter 104A applied only to the construction of public facilities with public monies. The opinion concluded:

[T]he failure of the State of Iowa, or any of its political subdivisions, to follow the guidelines of Chapter 104A, Code of Iowa, 1971, "Building Entrance for Handicapped Persons", when constructing public facilities

with public monies, does constitute a prima facie violation of Chapter 105A and is therefore subject to the enforcement provisions of Chapter 105A.9, Code of Iowa, 1971.

1972 Op. Atty. Gen. 660.

The Iowa General Assembly significantly amended Chapter 104A in 1974. Accordingly, the intent of the chapter was expanded to include both public and private buildings and facilities intended for use by the general public and all standards and specifications set forth in the chapter were specifically made applicable to such buildings and facilities, whether permanent or temporary, used by the general public. §§104A.1 and 104A.2. The effect of these changes was explained in an opinion of the Attorney General issued on March 12, 1976. The following statements from that opinion, which discussed in detail the meaning of the term "general public" within the intent of Chapter 104A, are instructive:

From the above definitions it is obvious that the term "general public" as used in Chapter 104A refers to a vast number of persons. There can be no doubt that a department store which opens up its doors to anyone who wishes to enter falls within "public and private buildings and facilities intended for use by the general public". Similarly, an apartment building or complex that makes its facilities (units) available to those desiring to rent falls within that phrase. The argument that those facilities are intended for use only by a select group (e.g. the tenants) and not by the general public is illogical and unpersuasive. As stated above in *People v. Powell*, tenants are a part of the public. These facilities are available to guests of the tenants, some of whom may be handicapped, and to the body of persons at large when a vacancy occurs, some of whom may also be handicapped. The purpose of this Chapter is to have facilities that will not bar the handicapped. To state that apartments, which do cater to the public at large, are not within this Chapter would defeat a large portion of that purpose. In addition, apartments are specifically mentioned in §104A.2.

Accordingly, we are of the opinion that the term "general public" means the public as a whole and is not limited to a particular group. Apartments fall within the purview of Chapter 104A. [Emphasis in original.]

1976 Op. Atty. Gen. 504.

Chapter 104A and 601A.8 both attempt to ensure that physically handicapped persons have access to buildings and facilities available for use by the general public. The statutes each have distinct applicability: Chapter 104A contains provisions pertaining to new construction whereas §601A.8 applies generally to real property and housing practices and accommodations. Chapter 104A and §601A.8 serve a common purpose, however, in preventing discrimination against the physically handicapped. Hence, a failure to follow the guidelines of Chapter 104A may constitute a prima facie violation of the broad anti-discrimination provisions set forth in §601A.8. 1972 Op. Atty. Gen. 660. When statutes relate to the same subject matter or to closely allied subjects, they are said to be *pari materia* and must be construed, considered, and examined in light of their common purpose and intent so as to produce a harmonious system or body of legislation. *Rush v. Sioux City*, 240 N.W.2d 531, 445 (Iowa 1976). Accordingly, given the common purpose and intent of Chapter 104A and §601A.8, the specific standards set forth in §104A.2 should be construed as implementing §601A.8 to the extent that newly-constructed multiple-dwelling-unit buildings are concerned. Insofar that any conflict between the statutes may exist with respect to such buildings, the more specific standards of §104A.2 would control. §4.7, The Code 1979.'

Section 104A.2 defines the applicability of Chapter 104A. Pursuant to this section, the standards and specifications of the chapter apply to "all public and private buildings and facilities, temporary and permanent, used by the general public." Section 104A.3, for example, requires that all such buildings and facilities are constructed with entrances which permit accessibility by handicapped persons. Generally, standards for "the specific occupancies and extent of accessibility: within these buildings and facilities are established by rule under §104A.6. One important exception is provided:

> Notwithstanding the standards set forth in section 104A.6, in every multiple-dwelling-unit building containing twelve or more individual dwelling units the requirements of this chapter which apply to apartments shall be met by at least one dwelling unit or by at least ten percent of the dwelling units, whichever is the greater number, on each of the floor levels in the building which are accessible to the physically handicapped. Any fraction five-tenths or below shall be rounded to the next lower whole unit.

The language of this exception can perhaps best be understood through application of familiar rules of statutory construction. The intent of the Legislature should be ascertained and given effect, the objects sought to be accomplished by the language should be considered, each part of a statute is presumed to have a purpose and a statute should be reasonably construed in its entirety to effect its purpose or purposes. *Iowa Dept. of Transportation v. Nebraska-Iowa Supply Co.*, 272 N.W.2d 6, 11 (Iowa 1978); *State ex rel. State Highway Commission v. City of Davenport*, 219 N.W.2d 503, 507 (Iowa 1974). Accordingly, the language of the exception appears to implement the legislative intent of establishing a separate and independent standard of compliance for apartment buildings. To comply with Chapter 104A, each such building having 12 or more individual dwelling units must contain, on each floor level that is accessible to the physically handicapped, either ten percent of the dwelling units on that floor or a minimum of one dwelling unit for use by the handicapped. Since the exception specifically applies only to apartments having 12 or more individual dwelling units, it appears that the Legislature did not intend to establish a minimum standard of compliance concerning "the specific occupancies and extent of accessibility" for those apartments having less than 12 individual dwelling units. Rather, the object and purpose of the exception is in the nature of a compromise. Individual living units in a newly-constructed apartment building should be accessible to the handicapped but only if the building contains 12 or more individual units, thus exempting smaller apartment buildings from the economic costs that would be incurred to provide such accessibility. Consequently, the State Building Code Commission may not establish requirements for the specific occupancies and extent of accessibility within apartment buildings that would be more stringent, and therefore in conflict, with the standards set forth in §104A.2.

The foregoing analysis of Chapter 104A and §601A.8 yields the following conclusions. First, the provisions of Chapter 104A should be read in *para materia* with those contained in §601A.8 to ensure that buildings and facilities, including housing accommodations, used by the general public are generally accessible to the physically handicapped. Noncomplinance with the standards and specifications set forth in Chapter 104A may constitute a prima facie violation of a discriminatory practice

under §601A.8. Second, Chapter 104A has broad applicability in that its provisions govern all buildings and facilities intended for use by the general public. Private as well as public structures, permanent or temporary, must be made accessible to physically handicapped persons if such structures are to be used by the general public. Hence, the State Building Code may not establish rules that would limit the accessibility of the physically handicapped to the buildings and facilities governed by Chapter 104A. Third, §104A.2 contains exclusive compliance standards concerning the specific occupancies and extent of accessibility with apartment buildings. The State Building Code may not therefore establish more onerous standards concerning access to individual dwelling units within such buildings.

July 23, 1980

PUBLIC BONDS: SCHOOLS. 1980 Sess., 68th G.A., S.F. 500; 1980 Sess., 68th G.A., S.F. 2282; 1970 Sess., 63rd G.A., ch. 1120; 1969 Sess., 63rd G.A., ch. 192; §§3.7, 75.12, 256.1, 258.22, The Code 1979. School bonds for projects of five million dollars or less issued subsequent to April 12, 1980, the effective date of S.F. 500 may bear an interest rate not to exceed ten per cent. School bonds for projects exceeding five million dollars issued subsequent to April 12, 1980, may bear an interest rate to be determined by a school district board of directors. School bonds issued subsequent to June 11, 1980, the effective date of S.F. 2282, may bear an interest rate to be determined by a school district board of directors. (Schantz to Tieden, State Senator, 7-23-80) #80-7-20(L)

July 25, 1980

USURY: INTEREST CHARGES: Chapters 535 and 537 as amended by H.F. 2492. Wholesale and retail agri-business companies may charge any rate of interest agreeable to the parties on an extension of credit for unpaid balances of money owed so long as there is a bilateral written agreement as required by §2 of H.F. 2492 at (1)(e) and (2). Charges not made pursuant to a bilateral written agreement may be violations of §535.4 and subject to penalty provisions set forth in §535.5 and §535.6 of the Iowa Code. (Ormiston to Harbor, Speaker, House of Representatives, 7-25-80) #80-7-21

Honorable William H. Harbor, Speaker of the House: You have requested an official opinion of the Attorney General regarding the following questions:

1. Can wholesale farm supply firms located in Iowa charge a 2% per month finance charge on the unpaid balance for products supplied to retail agri-business proprietorships and corporations when there is no bilateral written agreement?

2. Can the retail agri-business firms located in Iowa charge a 2% per month finance charge no the unpaid balance for agricultural products supplied to farm customers?

3. If the practices are illegal, what action may be taken?

The answer to your first two questions may be found in H.F. 2492 which amends, *inter alia*, Chapters 535, better known as the Iowa Usury Statute, and Chapter 537, better known as the Iowa Consumer Credit Code, 1979 Code of Iowa. Section 2 of H.F. 2492, entitled "Temporary Exemptions" appears to control in the situation posited in your inquiry.

1. The following persons may agree in writing to pay any rate of interest, and a person so agreeing in writing shall not plead or interpose the claim or defense of usury in any action or proceeding, and the person

agreeing to receive such rate of interest shall not be subject to any penalty or forfeiture for agreeing to receive or receiving such interest:

* * *

e. A person borrowing money or obtaining credit for business or agricultural purposes, or a person borrowing money or obtaining credit in an amount which exceeds thirty-five thousand dollars for personal, family or household purposes. As used in this paragraph, "agricultural purpose" means and includes any of the purposes referred to in section five hundred thirty-seven point one thousand three hundred one (537.1301), subsection four (4) of the Code, but regardless of whether or not the activities described in that subsection are undertaken by a natural person or other entity.

2. The provisions of subsection one (1) of this section apply only to written agreements which are executed on or after the effective date of this Act and with respect to those agreements, the provisions of this Act supersede any interest rate or finance charge limitations contained in the Code, . . .

H.F. 2492, §2(1)(e) and (2).

Under the language of subsection (e) of section 1, a natural person or other entity borrowing money for business purposes may agree to pay any rate of interest on money borrowed or credit extended. However, the statute specifically sets forth the requirement that such an agreement must be in writing in order to qualify for the rate of interest prescribed by your question. Under certain circumstances set forth at §7 of H.F. 2492, interest may be charged on retail accounts receivable without the necessity of a written agreement. However, in order that the higher rate of interest be obtained, it must be established in a bilateral written agreement. As a consequence, the present utilization of a "notice" procedure would not be sufficient under the law.

Although contract law provides some precedent for the proposition that a combination of notice and implied consent may lead to a binding agreement between the parties, it is contrary to the clear language of the statute.

Historically, under Iowa law the interpretation, construction and validity of a contract is determined by the law in force at the time, and in the place where it is made. *Boyd v. Ellis*, 11 Iowa 97 (Iowa 1860). Under common rules of construction, it is necessary to give effect to the intention of the legislature and for the purpose the law was enacted. *Davenport Water Co. v. Iowa State Commerce Comm.*, 190 N.W.2d 583, 594-595 (Iowa 1971); *Janson v. Fulton*, 162 N.W.2d 438, 442-443 (Iowa 1968). Further, it is a well established general rule that an agreement which violates a constitutional statute is illegal. *Keith Furnace v. MacVicar*, 225 Iowa 246, 280 N.W. 496 (1938).

Quite clearly, it is the intent of the legislature to pre-empt the common law in this area of credit contract with the passage of H.F. 2492 and its amendments. It augments and revises current statutes which specifically control the conditions under which contracts on the extension of credit may be drawn, and therefore, common law practices are subjugated to the requirements established by H.F. 2492, its amendments and the underlying credit statutes.

As a consequence, a wholesale farm supply firm may charge a 2% per month finance charge on the unpaid balance for products supplied

to retail agri-business proprietorships or corporations when there is a bilateral written agreement. Absent a bilateral written agreement, only 5% per year may be assessed pursuant to §535.2. As of July, 1980, retail agri-business firms may charge a 2% per month finance charge for outstanding balances for agricultural products supplied to farm customers when it is manifest in a bilateral written agreement. In the absence of a written agreement, 1¾% per month may be assessed on accounts receivable if it is a closed-end transaction pursuant to §7 of H.F. 2492. Similarly, if it is an open-end transaction on accounts receivable, a rate of 1½% per month may be charged on amounts less than $500 and 1¼% on amounts over $500 provided that disclosure is properly made.

In answer to the third section of your inquiry, if there is an intentional violation of the statute and 2% per month is charged not pursuant to a written agreement on an amount less than $500, it would appear to be subject to §535.4, wherein the lender would be assessing a usurious rate of interest and could be penalized under §535.5. If the 2% per month is charged without a written bilateral agreement on an amount which exceeds $500, then the lender would appear to be in potential violation of §535.6 which may be deemed a serious misdemeanor.

August 1, 1980

CHILD ABUSE: Chapter 232, Sections 232.27, 232.1, 232.67, 232.68 232.68(1), 232.69, 232.70, 232.71, 232.72, 232.73, 232.74, 232.75, 232.76, 232.77, The Code, 1979. The mandatory reporting and investigation provisions contained in Chapter 232, Division III, Part 2, to suspected abuse of human fetuses. (Hoyt to Reagen, Commissioner of Social Services, 8-1-80) #80-8-1 (L)

August 1, 1980

COUNTIES: Title to Vacated Streets in Unincorporated Areas—Art. III, §39A, Const. of Ia., §§306.10-206.17, 332.3, The Code 1979. Fee title to streets in unincorporated villages ordinarily remains with the abutting landowner, subject to an easement for the street. Upon vacation of the street, operation of law terminates the interest of a county in the land covered by the street. (Willits to Hulse, State Senator, 8-1-80) #80-8-2 (L)

August 1, 1980

CRIMINAL LAW: Uniform Citation and Complaint—Chapter 805, sections 4.7, 801.4(11), 804.1, 804.22, The Code 1979; Rules 35 and 38, Iowa Rules of Criminal Procedure. Simple misdemeanor offenses charged by general police citations under sections 805.1 through 805.5, The Code 1979, must adhere to the filing requirements of Iowa Rule of Criminal Procedure 35. Traffic and scheduled violations charged by uniform citations and complaints under sections 805.6 through 805.15, The Code 1979, need not be subscribed and sworn to before a magistrate pursuant to Iowa Rule of Criminal Procedure 35. (Richards to Heintz, Chickasaw County Attorney, 8-1-80) #80-8-3

Mr. William A. Heintz, Chickasaw County Attorney: You have requested an opinion regarding the relationship between police citations under chapter 805, The Code 1979, and Rule 35 of the Iowa Rules of Criminal Procedure. Specifically you have inquired:

May the procedure in 805.4, 805.6(4) be followed with traffic offenses only? Or should Rule 35 govern in every instance? Must the actual

filing be done physically before the Magistrate or clerk or deputy clerk of court?

This office has previously opined that "the uniform traffic citation and complaint need not be sworn to before a magistrate as it is specifically exempted therefrom by §754.1 [The Code 1973]." 1974 Op. Att'y Gen. 232. However, the relationship must be re-examined under the new criminal code since section 801.4(11), The Code 1979, which has replaced section 754.1, The Code 1973, does not specifically exempt police citations from the definition of "complaint."

Iowa Rule of Criminal Procedure 35 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." *See* §804.1, The Code 1979 ("A proceeding may be commenced by the filing of a complaint before a magistrate.") Immediately upon its filing, a warrant of arrest or citation may issue. Iowa R.Crim.P. 38; *and see* §804.1, The Code 1979 ("Whenever the complaint charges a simple misdemeanor, the magistrate may issue a citation instead of a warrant of arrest.").

The nature, procedures and distinctions of chapter 805 were thoroughly discussed in a recent opinion of this office. Op. Att'y Gen. #80-4-11. The general police citation provisions (sections 805.1-805.5, The Code 1979) are applicable to all public offenses and "(w)henever it would be lawful for a peace officer to arrest a person without a warrant." The procedure by which prosecutions of cited persons are commenced is specified in section 805.4, The Code 1979: "The law enforcement officer issuing the citation shall cause to be filed a complaint in the court in which the cited person is required to appear, as soon as practicable, charging the crime stated in said notice." *Cf.*, §804.22, The Code 1979 ("When an arrest is made without a warrant, . . . the grounds on which the arrest was made shall be stated to the magistrate by complaint, subscribed and sworn to by the complainant, or supported by the complainant's affirmation . . . . "). Upon review, it is our opinion that simple misdemeanors charged according to sections 805.1 through 805.5, *i.e.*, by general police citations, must adhere to the filing requirements of Rule 35. However, we reach a different result for traffic and scheduled violations charged under the uniform citation and complaint provisions of sections 805.6 through 805.15, The Code 1979.

A peace officer may issue an uniform citation and complaint "for charging all traffic violations . . . and . . . all other violations which are designated by section 805.8 to be scheduled violations." Section 805.6 (1)(a), The Code 1979. The procedure by which complaints charging scheduled violations are verified is contained in section 805.6(4), The Code 1979: "The uniform citation and complaint shall contain a place for the verification of the officer issuing the complaint. The complaint may be verified before the chief officer of the law enforcement agency, or his or her designee, and the chief officer of each law enforcement agency of the state is authorized to designate specific individuals to administer oaths and certify verifications." Following the rule of statutory construction of section 4.7, The Code 1979, it is our opinion that the special provision of section 805.6(4) prevails as an exception to the general provisions of section 805.4 and Rule 35. Thus, law enforcement officers charging traffic and scheduled violations by uniform citations

and complaints need not appear before a magistrate to file "a subscribed and sworn to complaint."

August 1, 1980

MUNICIPALITIES: Use of Funds from Rental and Sale of City property — §§76.2, 76.4, 384.2, 384.24 and 384.25, The Code 1979. Monies derived by a municipality from the rental and sale of city property can generally be used for any government purpose. The monies need not be used to pay off general obligation bonds issued to acquire the property. (Blumberg to Lura, State Representative, 8-1-80) #80-8-4 (L)

August 1, 1980

TAXATION: Designation of an urban revitalization area for property tax exemption. 1979 Session, 68th G.A., ch. 84 (H.F. 81). The governing body of a city may, by ordinance, designate an area of a city as a revitalization area eligible for property tax exemption when the buildings, improvements, or structures of the area can no longer be put to a suitable use if said area meets all the other criteria set forth in H.F. 81. Furthermore, a single building or structure cannot be designated as a revitalization area. (Kuehn to Ned L. Chiodo, State Representative, 8-1-80) #80-8-5 (L)

August 1, 1980

MORTGAGES; LOAN PROCESSING FEES; 1980 Session, 68th General Assembly, H.F. 2492; Chapter 535, The Code 1979. Loan processing fees are limited to two percent of the principal amount of a loan. A fee in excess of this amount may not be collected by a lender, regardless of who pays the fee. (Norby to Carr, State Senator, 8-1-80) #80-8-6 (L)

August 6, 1980

STATE OFFICERS: Compensation of legislators serving on the state functional classification review board. Sections 2.10, 306.6, 312.2, The Code 1979; H. F. 2168, 68th G.A., 1980 Session. Under §306.6, as amended by House File 2168, state legislators serving on the state functional classification review board may not receive compensation for per diem and expenses incurred in the performance of their official duties as members of the board. (Stork to Spear, State Representative, 8-6-80) #80-8-7 (L)

August 11, 1980

CONSTITUTIONAL LAW; GOVERNOR; GENERAL ASSEMBLY; APPROPRIATIONS; STATUTES. Iowa Const., art. III, §§1, 16, 24; art. IV, §9; §§8.3, 8.30, 8.31, 8.32, 8.33, The Code 1979; H.F. 2595, 68th G.A., 1980 Session. Governor does not have constitutional authority to impound or otherwise to prevent the expenditure of a legislative appropriation. He does, however, have authority to make a reasonable judgment that a legislative objective can be accomplished by spending less than the sum appropriated for that objective. Under §8.31, The Code 1979, Governor has authority to limit spending of appropriated funds only in a manner that is both uniform and proportionate among all state departments and agencies based upon their respective appropriations. Section 8.31 is a constitutional delegation of legislative authority. Accordingly, the opinion of the Attorney General found at 1958 Op. Atty. Gen. 58 is hereby overruled. (Miller and Stork to Rush, State Senator, 8-11-80) #80-8-8

Honorable Bob Rush, State Senator: You have requested an opinion of the Attorney General concerning the item veto of House File 2595, providing appropriations for capital projects.

The 1980 Session of the 68th General Assembly passed House File 2595, which in part reduced certain capital appropriations made during the 1979 legislative session. Section 5 of the bill provided:

Acts of the Sixty-eighth General Assembly, 1979 Session, chapter fourteen (14), section fifteen (15), subsection one (1), paragraph a, subparagraph one (1), is amended to read as follows:

(1) For the renovation, and remodeling of the Robert Lucas building . . . . . [$3,000,000]

2,000,000

The department of general services may expend not exceeding two hundred sixty-seven thousand two hundred (267,200) dollars for architectural fees for the renovation and remodeling authorized by this subparagraph. The appropriation made in this subparagraph is conditional upon the employees located in the east side of the corridor in the office of the auditor of state being moved to the Robert Lucas building and that space being assigned to the legislative fiscal bureau.

Acting within the scope of his constitutional veto authority, Governor Ray did veto both the appropriation and the condition contained in §5 of House File 2595. Letter from Robert D. Ray, Governor, to Melvin D. Synhorst, Secretary of State, May 22, 1980. The disapproval makes an additional $1 million available for the renovation and remodeling of the Robert Lucas Building, in accordance with the original $3 million appropriation made during the 1979 legislative session. 1979 Session, 68th G.A., ch. 14, §15. In his veto message dated May 22, 1980, however, the Governor indicates that the overriding purpose for his disapproval was the condition rather than the reduced appropriation. The condition required a portion of the State Auditor's Office to be moved to the Lucas Building with reassignment of the vacated space to the Legislative Fiscal Bureau. In his veto message, the Governor further indicates that he had instructed the Director of the Department of General Services to proceed with the renovation project as if only $2 million were available rather than the $3 million that in fact became available as a result of the veto. According to the Governor, this instruction would accomplish the legislative purpose of reducing funds for the project without forcing the Auditor to move his offices. Based upon this factual situation, you have requested opinions on the following questions.

1) Does the Governor have authority to impound or otherwise prevent an expenditure which has been made by the legislature?

2) What difference, if any, is the kind of appropriation, capital or operating, relevant to your answer above?

3) Under Sec. 8.31 does the Governor have authority to limit spending to a specific agency or must a reduction be across the board?

I.

Does the Governor have authority to impound or otherwise prevent an expenditure which has been made by the Legislature?

This question raises a basic and important issue concerning the relationship between the executive and legislative branches of government under the Iowa Constitution. The separation of governmental powers is established in Article III, §1, of the Constitution:

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.

Article III of the Constitution generally sets forth the functions of the legislative branch whereas Article IV describes functions of the executive branch. Legislative authority is vested in the General Assembly under Article III, §1 and the "supreme executive power of the state" is vested in the Governor under Article IV, §1.

The General Assembly and the Governor each has a distinct constitutional role in the appropriations process. Article III, §24 states that no money may be drawn from the treasury but in consequence of appropriations made by law. Accordingly, the Iowa Supreme Court has observed that the power to appropriate money is essentially a legislative function. *Welden v. Ray*, 229 N.W.2d 706, 709 (Iowa 1975). Inherent in this power is the authority to specify how the money shall be spent. *Id.* at 710. Pursuant to Article III, §16, as amended by the 27th Amendment to the Iowa Constitution, the Governor possesses a "qualified negative check" upon this legislative power through the "defensive tool" of the item veto. *Redmond v. Ray*, 268 N.W.2d 849, 852 (Iowa 1978). Since the item veto is strictly a negative power, it may not be used to alter, enlarge, or increase the effect of legislation not vetoed. 229 N.W.2d at 711. Thus, if the Governor desires to veto a legislatively-imposed qualification upon an appropriation, he must veto the accompanying appropriation as well. *Id.* at 713. The Constitution does not grant the Governor any express constitutional authority either to reduce the amount of an appropriation or to prevent the expenditure of an appropriation by impoundment of the funds appropriated.

The Iowa Supreme Court has not directly considered the question of whether the Governor may have the implied constitutional authority to reduce an appropriation or otherwise to prevent its expenditure. Such authority would be founded upon either the Governor's item veto power under Article III, §16, or his duty to "take care that the laws are faithfully executed" under Article IV, §9.

Under Article III, §16, as amended by the 27th Amendment, the Governor possesses only a "qualified negative check" upon the legislative power to appropriate money and to specify how the money shall be spent. *Redmond v. Ray*, 268 N.W.2d 849, 852 (Iowa 1978). In *Welden v. Ray*, 229 N.W.2d 706 (Iowa 1975), the Iowa Supreme Court, citing leading decisions from several other jurisdictions, emphasized that the item veto power does not include the power to alter the effect of legislation remaining after a veto. *Id.* at 710-13. He may not use the item veto to distort or frustrate a legislative purpose and permit a related appropriation to stand. *Id.* at 712. This would constitute creative or affirmative legislation without the concurrence of the Legislature. *Id.*

Courts in other jurisdictions have also considered the issue of whether a Governor, in the absence of express constitutional authority, may utilize the item veto power to reduce the amount of an appropriation. The majority of these courts have held that the Governor has no such power. 63 Am.Jur.2d, *Public Funds* §55 (1972). "Constitutional authority in the governor to approve or disapprove of any item or items in appropriation bills does not empower him to reduce the amount provided by an item so that it shall be valid for a smaller amount than named by the Legislature." *Id.* This pronouncement comports with the Iowa Supreme Court's

own view that, with respect to the appropriations process, the Governor may not exercise any creative legislative power whatsoever. *See Welden v. Ray*, 229 N.W.2d 706, 712 (Iowa 1975).

The Governor's item veto of §5, together with his instruction to the Director of General Services, plainly has the effect of vetoing the condition of an appropriation, while permitting the appropriation to stand. Such action constitutes an indirect method of using the item veto power to disapprove only the condition of an appropriation and therefore is not a proper exercise of the power as interpreted by either the Iowa Supreme Court or courts in other jurisdictions. Based upon prevailing judicial interpretation, we conclude that the Governor does not have implied authority under Article III, §16 to alter the original $3 million appropriation for the Lucas Building renovation by instructing the Director of General Services not to spend the funds.

The Iowa Supreme Court has not considered whether, or to what extent, the expenditures of an appropriation may be modified through the Governor's duty under Article IV, §9 to execute faithfully the laws of this state. This precise question was, however, recently discussed by the Supreme Judicial Court of Massachusetts. In *Opinion of the Justices to the Senate*, 376 N.E.2d 1217 (Mass. 1978), the Massachusetts State Senate submitted questions to the Massachusetts Supreme Judicial Court concerning certain issues raised by a bill then under consideration by the Senate. The bill, entitled "An Act controlling executive impoundment of appropriated funds" had resulted from "a growing practice for officers, employees, departments and agencies of the executive branch of the government of the commonwealth to refuse to expend or to expend only in part monies appropriated by the General Court for the purposes, objectives and programs enacted by the General Court, thereby obstructing, hindering or preventing the accomplishment of said purposes, objectives and programs." *Id.* at 1218. The various sections of the bill strictly controlled executive discretion in expending appropriated funds. Section 1(a), for example, required that "all sums appropriated in any item of any act of appropriation shall be expended in full" by the officers and employees responsible for the expenditures. Expenditure of sums less than the appropriated amounts was to be allowed only pursuant to legislative consent and in accordance with procedures established in other sections of the bill.

The Court first examined the issue of whether the Governor or other representatives of the executive branch had the constitutional authority, whether by impoundment, allotment or otherwise, to expend sums less than the amounts appropriated by the Legislature. In conjunction with this issue, the Court considered whether the Legislature could enact legislation to require the full expenditure of appropriations. The Court's analysis of these issues is instructive and directly related to the question you have presented:

> The crucial determination to be made is whether, and to what extent, the act of expending appropriated funds, or refusing to spend the full amount of appropriated funds, may be characterized as the exercise of the Governor's constitutional prerogative to execute the laws. This determination may be faciiltated by first stating certain relevant and undisputed principles.

The most important such principle is that it is for the Legislature, and not the executive branch, to determine finally which social objectives or programs are worthy of pursuit. It is not within the Governor's official competence to decide that the objectives of any validly enacted law are unwise and ,therefore, that no effort will be made to accomplish such objectives. To the contrary, the Governor is bound to apply his full energy and resources, in the exercise of his best judgment and ability, to ensure that the intended goals of legislation are effectuated.

This decidedly is not to say that the Governor does not have a role to play in determining social goals and priorities. He may propose legislation, and the budget prepared by the Governor forms the basis for the general appropriation bill. Art. 63, §3, of the Amendments. The Constitution provides that the Governor may veto any bill or resolve presented to him for his signature, and return it to the Legislature with his written objections or with recommended amendments. The Governor may exercise the veto power because he feels that the proposed legislation is unwise, or for another reason, and a vote of two-thirds of both houses of the General Court will be required to enact the bill notwithstanding the Governor's objections. Part II, c. 1, §1, art. 2. Art. 56, of the Amendments. With regard to appropriation bills, the Governor may disapprove or reduce items or parts of items, and thus exercise a selective veto power. Art. 63, §5, of the Amendments.

Once a bill has been duly enacted, however, the Governor is obliged to execute the law as it has emerged from the legislative process. He is not free to circumvent that process by withholding funds or otherwise failing to execute the law on the basis of his views regarding the social utility or wisdom of the law. As will be discussed more fully below, such a refusal to expend funds for the purpose of amending or defeating legislative objectives is to be distinguished from the exercise of executive judgment that the full legislative objectives can be accomplished by a lesser expenditure of funds than appropriated.

Id. at 1221-22.[1] The Court further emphasized that the Governor was not obliged to spend money foolishly or needlessly and concluded that he did have the basic discretionary authority to spend less than the full amount of an appropriation. *Id.* at 1223. In further explaining its holding, the Court stated:

A blanket requirement of full expenditure would be invalid because it would not distinguish between the situations where, on the one hand, the Governor attempts to substitute his judgment of the merits of a program for that of the Legislature by reducing or eliminating expenditures, and, on the other hand, the Governor makes a reasonable determination that the full legislative purpose can be accomplished by spending less than the legislative forecast or estimate represented by an appropriation.

Id. The above distinction underscores the limited nature of the Governor's authority to accomplish a legislative objective without spending the full sum appropriated for that objective. For instance, an executive decision that the full expenditure of an appropriation is unnecessary must be based upon a reasonable determination that such spending would, under the circumstances, be wasteful because the legislative objective can be

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[1] Unlike the Iowa Constitution, the Massachusetts Constitution allows the Governor to exercise the item veto power in order to reduce an appropriated sum. The issue in Massachusetts was, however, like that presented here, i.e., whether the Governor could constitutionally reduce or otherwise limit the expenditure of an appropriation that had been duly enacted and signed into law.

fully accomplished by spending less. The Governor may not, however, use such discretion to compromise the achievement of an underlying legislative purpose or goal.

American Law Reports, Federal contains a timely annotation of the federal court cases that have considered whether and to what extent the executive branch of the federal government may impound funds appropriated by Congress. *See* 27 A.L.R. Fed. 214 (1976). With respect to these cases, the term impoundment refers generally to a refusal by the President or executive official, for whatever reason, to spend funds made available by Congress. *Id.* at 217. Justification for impoundment of federal funds normally has depended upon two arguments: 1) the particular statute at issue was discretionary in nature, and/or 2) the executive power clause of Article II of the Constitution encompassed administration of the federal budget and gave the President inherent authority to decline to spend available funds in order to avoid excessive spending that would contribute to inflation or necessitate a tax increase.[2] *Id.* at 224. Opponents of impoundment practices have, however, maintained that executive impoundments have been both contrary to specific statutory provisions at issue and constituted an unconstitutional encroachment on the congressional authority to control federal moneys. *Id.* at 225.

The question of whether federal funds may properly be impounded has been presented in a wide variety of cases, involving distinct federal statutes and factual situations. Decisions in these cases offer no consistent view as to the propriety of executive impoundment but rather vary according to the nature of the funds involved and the precise language of the applicable appropriation statute. *Id.* at 225, 227; *see also Note, The Likely Law of Executive Impoundment*, 59 Iowa L.Rev. 50 (1973). The judicial response has been to treat each case on its own merits. 27 A.L.R. Fed. at 225. Often, the crucial issue will involve a determination as to whether the language of an appropriations statute mandates the expenditure of appropriated funds or delegates discretion to the executive to spend the funds. *Id.; see also* 77 Am.Jur.2d, *United States* §45 (1972).

A leading example of the judicial response to the federal impoundment question is the decision by the Eighth Circuit Court of Appeals in *State Highway Comm'n. v. Volpe*, 479 F.2d 1099, 27 A.L.R. Fed. 183 (8th Cir. 1973). The case involved the withholding by the executive branch of federal funds apportioned to the states by Congress under the Federal-Aid Highway Act, 23 U.S.C. §101 *et seq.* (1970). The reason for impounding the funds was "the status of the economy and the need to control inflationary pressures." 479 F.2d at 1103. After resolving the jurisdictional aspects of the case, the Court rejected the following arguments presented by the Secretary of Transportation to support his authority to withhold the funds:

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[2] Congress has attempted to clarify and control executive discretion with respect to the expenditure of appropriated sums by enactment of the Congressional Budget and Impoundment Control Act of 1974. 31 U.S.C. §§1400 *et seq.* The procedures for the executive branch to follow to comply with the Act are set forth in 27 A.L.R. Fed., *Executive Impoundment of Funds* at 218-23.

(1) that appropriation acts are permissive in nature and do not provide a specific mandate that the funds authorized to be apportioned must be expended; (2) that there exists no vested right by the states in the appropriated funds until such time that the Secretary gives his approval; and (3) that the language of Section 101(c) is precatory and although expressing Congress' "desire" and "policy" that highway funds not be impounded, the terms of the statute are not mandatory.

Id. at 1108-09. With respect to the first argument, the Court observed that "although a general appropriation act may be viewed as not providing a specific mandate to expend *all* of the funds appropriated, this does not *a fortiori* endow the Secretary with the authority to use unfettered discretion as to when and how the monies may be used." *Id.* at 1109. After analyzing the statute in detail with respect to the latitude of discretion permitted, the Court concluded that the Act did not expressly or implicitly authorize executive branch officials to withhold the appropriated funds. *Id.* at 1118; *accord, State of Iowa ex rel. State Highway Comm'n. v. Brinegar*, 512 F.2d 722 (8th Cir. 1975).

In Iowa, the question of what type of executive action constitutes an impoundment of appropriated funds has not been precisely identified as a matter of law. Based upon the generally accepted federal definition, however, an executive impoundment of funds occurs when an official of the executive branch refuses, for whatever reason, to spend funds appropriated in accordance with any legislative directive. In light of this definition, the veto message concerning House File 2595 does indicate the Governor's refusal to spend funds and thereby does appear to constitute an executive impoundment. The Governor does state in his message that his action will serve the legislative purpose of reducing funding for the Lucas Building project; such reasoning does not, however, affect the question of whether an impoundment was made.

Pursuant to Article IV, §9, the Governor is directed to execute faithfully the laws of this state. As applied to the question of spending appropriated funds, this directive requires the Governor to execute the law as it emerges from the legislative process. 376 N.E.2d at 1221. He is not, therefore, free to circumvent that process by withholding funds or otherwise failing to execute the law on the basis of his views regarding the social utility or wisdom of the law. *Id.* A refusal to expend funds for the purpose of amending or defeating legislative objectives must, nevertheless, be distinguished from the exercise of executive judgment that the legislative objectives can be accomplished by an expenditure of funds less than the amount appropriated. *Id.* Based upon the Governor's veto message, there is no indication of an attempt by the Governor to execute the renovation project pursuant to the $3 million appropriation which, subsequent to the item veto, properly constitutes the standard by which the legislative objective must be measured. Rather, the Governor appears to have promulgated a blanket requirement to reduce the funds available for the renovation project. The prevailing judicial response to such action, at both the federal and state levels, yields a consistent view that the Governor does not have the constitutional authority, under his duty to execute the laws, to reduce or impound appropriated funds in this manner.

II.

What difference, if any, is the kind of appropriation, capital or operating, relevant to the answer above?

We have found no authority which suggests that the kind of appropriation, whether capital or operating, would change the constitutional nature of the Governor's power or duty to expend the appropriation in accordance with legislative directives. Consequently, the consideration does not affect our answer to your first question.

We note, however, that appropriations for operating expenses are treated differently than those for capital expenses with respect to their reversion to the state treasury at the end of a fiscal term. Under §8.33 capital expenditures "for the purchase of land or the erection of the buildings or new construction" continue in force until attainment of the object or completion of the work for which the appropriation was made, unless otherwise provided in the appropriation bill. Section 20 of H. F. 2595 contains such a provision:

Unobligated or unencumbered funds appropriated for the fiscal year beginning July 1, 1981 and ending June 30, 1982 by this Act remaining on June 30, 1985, shall revert to the general fund on September 30, 1985, however if after completion of the project for which the funds were appropriated and before the June 30, 1985 date, there remain unobligated or unencumbered funds, such funds shall revert on September thirtieth following the end of the fiscal year in which the project is completed.

House File 2595 aptly demonstrates that funds appropriated for a capital expenditure are subject to reduction by the Legislature if they have not previously been obligated or otherwise encumbered. With respect to the Lucas Building renovation project, we have been advised by the Director of the Department of General Services that, of the $3 million appropriated for the project, approximately $2 million has now been obligated. Accordingly, if the additional $1 million is not obligated before the next legislative session, the Governor may properly obtain a further reduction in the appropriation through legislative action.

III.

Under §8.31, The Code 1979, does the Governor have authority to limit spending to a specific agency or must a reduction be across the board?

Sections 8.30 through 8.45 appear under the heading "Execution of the Budget" and relate to procedures concerning expenditures of funds appropriated by the Legislature. Section 8.31 provides:

Quarterly requisitions—exceptions—modifications. Before an appropriation for administration, operation and maintenance of any department or establishment shall become available, there shall be submitted to the governor, not less than twenty days before the beginning of each quarter of each fiscal year, a requisition for an allotment of the amount estimated to be necessary to carry on its work during the ensuing quarter. Such requisition shall contain such details of proposed expenditures as may be required by the governor.

The governor shall approve such allotments, unless he finds that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, in which event he may modify such allotments to the extent he may deem necessary in order that there shall be no overdraft or deficit in the several funds of the state at the end of such fiscal year, and shall submit copies of the allotments thus approved or modified to the head of the department or establishment concerned, and to the state comptroller, hereinabove provided for, who shall set up such allotments on his books and be governed accordingly in his control of expenditures.

Allotments of appropriations made for equipment, land, permanent improvements, and other capital projects may, however, be allotted in one amount by major classes or projects for which they are expendable without regard to quarterly periods.

Allotments thus made may be subsequently modified by the governor either upon the written request of the head of the department or establishment concerned, or in the event the governor finds that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, upon his own initiative to the extent he may deem necessary in order that there shall be no overdraft or deficit in the several funds of the state at the end of such fiscal year; and the head of the department or establishment and the state comptroller, hereinabove provided for, shall be given notice of such modification in the same way as in the case of original allotments.

Provided, however, that the allotment requests of all departments and establishments collecting governmental fees and other revenue which supplement a state appropriation shall attach to the summary of requests a statement showing how much of the proposed allotments are to be financed from (1) state appropriations, (2) stores, and (3) repayment receipts.

The procedure to be employed in controlling the expenditures and receipts of the state fair board and the institutions under the state board of regents, whose collections are not deposited in the state treasury, will be that outlined in section 8.6, subsection 7.

The finding by the governor that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, as provided herein, shall be subject to the concurrence in such finding by the executive council before reductions in allotment shall be made, and in the event any reductions in allotment be made, such reductions shall be uniform and prorated between all departments, agencies and establishments upon the basis of their respective appropriations.

Under this section, the amount provided by an appropriation does not become available to an executive department until it is allotted the money in accordance with certain requisition procedures. The Governor must approve allotments unless he finds that estimated budget resources in a fiscal year are insufficient to pay all appropriations in full. The limited nature of this discretionary authority is evident from the language of §8.30:

Availability of appropriations. The appropriations made shall not be available for expenditure until allotted as provided for in section 8.31. All appropriations now or hereafter made are hereby declared to be maximum and proportionate appropriations, the purpose being to make the appropriations payable in full in the amounts named in the event that the estimated budget resources during each fiscal year of the biennium for which such appropriations are made, are sufficient to pay all of the appropriations in full. *The governor shall restrict allotments only to prevent an overdraft or deficit in any fiscal year for which appropriations are made.* [Emphasis supplied.]

If the Governor finds that there will be an overdraft or deficit in the funds of the State at the end of a fiscal year, he may, under §8.31, modify allotments of appropriations to the extent necessary to prevent such overdraft or deficit. In the event that any reductions in allotment are to be made, such reductions "shall be uniform and prorated between all departments, agencies and establishments upon the basis of their respective appropriations." Under this provision, the Governor clearly may not selectively reduce allotments to a specific agency or agencies. Rather a reduction must be made "across the board," in the sense that each department, agency and establishment must uniformly

share a proportionate part of the reduction. The Governor would not, therefore, have authority to utilize §8.31 in order to reduce selectively the $3 million appropriation to the Department of General Services for renovation and remodeling of the Robert Lucas Building.

We observe that an earlier opinion of the Attorney General, dated May 20, 1957, examined the powers conferred by §8.31 and concluded that their exercise would violate Article III, §24 of the Iowa Constitution and would unconstitutionally tie the hands of future legislatures. 1958 Op. Atty. Gen. 58.

Our review of an earlier Attorney General's opinion is governed by a "clearly erroneous" standard. Under this standard, a prior opinion will be reversed only where an unmistakable misapplication of law has been made. Letter from Thomas J. Miller, Attorney General, to Robert M. L. Johnson and John Pelton, State Representatives (March 21, 1979).

With the clearly erroneous standard in mind, we have reviewed the previous opinion of the Attorney General concerning the validity of §8.31. We conclude that this opinion is clearly erroneous under present law and should be overruled for the following reasons. We note initially that the question of whether §8.31 unconstitutionally authorizes the executive to exercise a legislative function must be considered in light of Article III, §1 as well as Article III, §24. The former defines the nature of the constitutional powers granted to each branch of state government, whereas the latter sets forth one type of legislative authority, i.e., the appropriation of money by law from the state treasury. The question of whether §8.31 is an unconstitutional delegation of power should therefore be analyzed primarily in light of Article III, §1, which both establishes the governmental separation of powers doctrine and provides that legislative authority shall be vested in the General Assembly.

The law concerning delegation of legislative authority has changed significantly since the previous opinion was rendered in 1958. *See Note, Safeguards, Standards, and Necessity: Permissible Parameters for Legislative Delegations in Iowa*, 58 Iowa L.Rev. 974 (1973). Since 1958, the Iowa Supreme Court has specifically recognized the modern tendency toward greater liberality in permitting legislative grants of discretion to administrative officials as the complexity of governmental and economic conditions increases. *Grant v. Fritz*, 201 N.W.2d 188 (Iowa 1972). The constitutional prohibition against delegation of legislative powers is therefore to be given a liberal interpretation in favor of the constitutionality of the legislation. *Id.* at 193. In any event, a delegation must be accompanied by adequate guidelines. *Warren County v. Judges of Fifth Jud. Dist.*, 243 N.W.2d 894, 898 (Iowa 1976). In *Warren*, the Supreme Court discussed the development of the delegation of authority doctrine and enumerated the following general principles to evaluate a claim of an unconstitutional delegation of legislative power:

Standards may be found in statutes *in pari materia* with the one under challenge. Standards may be general or specific. Where they are specific a statute is less subject to challenge.

Safeguards are an important factor and may suffice even in the absence of detailed standards. But standards remain important. They may themselves constitute a safeguard. It is desirable, but not essential, to have both safeguards and standards; in some cases either will suffice. Standards are of more importance where the safeguards are in some way lacking.

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 conclude that §8.31, considered in accordance with these interrelated principles, is not an unconstitutional delegation of legislative power. The purpose of the delegation, to reduce allotments of funds in order to prevent overdrafts or deficits, is well defined and reflects a reasonable legislative judgment that the executive branch of government is best suited to accomplish this purpose. Together with the procedural standards for making allotments established by §§8.30 and 8.32, §8.31 delegates quite limited authority to the Governor with respect to the expenditure of appropriated funds. The sections also contain at least one significant safeguard, i.e., concurrence by the executive council before reductions in allotment may be made. Importantly, §§8.30 through 8.32 do not contain any blanket authorization for the Governor to alter or reduce the amount of an appropriation. The sections delegate to the Governor a limited authority to make technical decisions concerning accountability for appropriated funds rather than a general authority to make policy decisions regarding the wisdom or desirability of spending the amounts appropriated.

The second basis for the earlier opinion was that §8.31, together with §8.30, unconstitutionally bound future legislatures. 58 Op. Atty. Gen. at 64. It is well settled that each legislature is an independent body, entitled to exercise all legislative power under the Constitution, and that no legislature may, by law, bind the authority of a subsequent legislature. *Green v. City of Cascade*, 231 N.W.2d 882 (Iowa 1975); *State ex rel. Fletcher v. Executive Council of State*, 207 Iowa 923, 223 N.W. 737 (1929). In the latter case, the Supreme Court explains the significance of each legislature's independent authority:

> In the absence of any constitutional provision to such effect, no General Assembly has power to render its enactment irrevocable and unrepealable by a future General Assembly. No General Assembly can guarantee the span of life of its legislation beyond the period of its biennium. The power and responsibility of legislation is always upon the existing General Assembly. One General Assembly may not lay its mandate upon a future one. Only the Constitution can do that. It speaks as an oracle and stands as a monitor over every General Assembly. The funds resulting from license fees and gasoline taxes are within the legislative power, and are necessarily subject to the control of the existing General Assembly. Its enactment in relation thereto will continue in force until repealed. The power of a subsequent General Assembly either to acquiesce or to repeal is always existent.

207 Iowa at 931; 223 N.W. at 740. We do not consider that the system for making allotments under §§8.30 and 8.31 created a situation in which one legislature has bound the authority of a subsequent legislature. These sections only establish a procedure for the executive, not the legislative, branch to follow in the expenditure of appropriated funds. The 45th General Assembly, which enacted the sections, did not in any way mandate that the allotment system could not be modified or repealed by a subsequent General Assembly. Additionally, the sections do not infringe upon the ability of a subsequent legislature either to appropriate money or to stipulate how, when, and for what purposes such money may be spent.

We observe that the nature of the Governor's authority concerning the expenditure of appropriated funds is also affected by the provisions of §8.3, The Code 1979:

The governor of the state shall have:

1. Direct and effective financial supervision over all departments and establishments, and every state agency by whatever name now or hereafter called, including the same power and supervision over such private corporations, persons and organizations that may receive, pursuant to statute, any funds, either appropriated by, or collected for, the state, or any of its departments, boards, commissions, institutions, divisions and agencies.

2. The efficient and economical administration of all departments and establishments of the government.

3. The initiation and preparation of a balanced budget of any and all revenues and expenditures for each regular session of the legislature.

This section imposes a duty upon the Governor to prevent waste and thereby provides him with certain administrative and technical authority to accomplish this end. The Governor is, for example, authorized to make inquiries regarding the receipts, custody, and application of state funds as well as the existing organization, activities, and methods of business of administrative departments, divisions and agencies. *Ryan v. Wilson*, 231 Iowa 33, 300 N.W. 707 (1941). With respect to expenditures of appropriations, §8.3 therefore provides the Governor with statutory authority to exercise reasonable judgment in deciding that the objective of an appropriation can be achieved without necessarily spending the full amount of the appropriation. The section does not, however, provide the Governor with general discretion to reduce, alter, or eliminate the expenditure of appropriated funds by simply instructing an administrative official that they shall not be spent. The exercise of such discretion is clearly a legislative function.

SUMMARY

In summary response to the issues raised by your opinion request, we conclude the following:

1. The Iowa Constitution does not expressly authorize the Governor to impound or otherwise to prevent the expenditure of a legislative appropriation.

2. When the Governor vetoes a legislatively-imposed condition upon an appropriation, he must veto the accompanying appropriation as well. Accordingly, he may not use the item veto power either directly or indirectly to disapprove only the condition.

3. The Governor has implied constitutional authority under Article IV, §9, to make a reasonable judgment that a legislative objective can be accomplished by spending less than the sum appropriated for that objective. Any executive action beyond this limited discretionary authority is constitutionally impermissible. The Governor therefore has no authority either to issue a directive that appropriated funds may not be spent or otherwise to refuse to spend the funds.

4. Under §8.31, The Code 1979, the Governor has authority to limit spending of appropriated funds only in a manner that is both uniform

and proportionate among all departments and agencies based upon their respective appropriations.

5. Section 8.31 is a constitutional delegation of legislative power and does not unconstitutionally bind future legislatures. Consequently, the earlier opinion of the Attorney General on this matter (1958 Op. Atty. Gen. 58) is hereby overruled.

August 12, 1980

TAXATION: Tax Exempt Status of Property of Cemeteries. §§427.1(7), The Code 1979, as amended by 1980 Session, 68th G.A., Senate File 2369, and 427.1(10), The Code 1979. Section 427.1(7), as amended by Senate File 2369, exempts from property tax the burial grounds, mausoleums, buildings and equipment which are owned and operated by all cemeteries, whether profit-making or nonprofit, provided such properties are used exclusively to maintain and care for cemeteries devoted to interment of human bodies and human remains, and are not used for the practice of mortuary science. Personal property of cemeteries is exempt pursuant to §427.1(10), The Code 1979. This tax exemption inures to the benefit of all profit-making or nonprofit cemeteries, regardless of the nature of their ownership. (Griger to Representatives Smalley and Senator Palmer, 8-12-80) #80-8-9 (L)

August 20, 1980

MUNICIPALITIES: Social Security Coverage—Ch. 97C and 410, The Code 1979; 1971 Session, 64th G.A., Ch. 108, §3. The failure of a city covered by Chapter 410 in 1953, to establish that chapter's retirement system does not affect the applicability of that retirement system. Such a city is exempt from social security coverage. (Blumberg to Hall, State Representative, 8-20-80) #80-8-10 (L)

August 20, 1980

COUNTIES: AUDITOR — §§558.8, 558.57, 558.61, 558.62, 558.63, 441.29, The Code 1979. County Auditor performs ministerial task in entering deeds on plat book. The Auditor has no authority to refuse to certify ownership for tax purposes where an affidavit establishes chain of title through an unprobated estate. The Auditor may not compel the grantee to seek judicial determination of title in order to be certified for taxation. (Adams to Carr, Assistant Clay County Attorney, 8-20-80) #80-8-11

Mr. Patrick M. Carr, Office of the County Attorney, Clay County, Iowa: You have requested an opinion of the Attorney General relating to the duty of the Auditor to make entries in the County's Plat Book maintained in the Office of the Auditor. Specifically you inquire about the situation arising from the following set of facts:

"More than five years ago an individual died domiciled in the State of California, owning two lots in Clay County, Iowa. The estate was never probated in California or in Iowa. The individual was survived by only one heir, a brother. The deceased never conveyed the property to anyone else. The surviving brother, however, conveyed the lots to "Y", by quit claim deed, with an affidavit attached thereto. "Y" has subsequently conveyed the lots to "Z", also by quit claim deed."

Upon receiving each of the two quit claim deeds, the Clay County Auditor entered the same in the index book required by §558.62, The Code 1979, and in the transfer book required by §558.61, The Code 1979. However, the Auditor has refused to enter the name of "Z" on the plat book required by §558.63, The Code. The Auditor has also refused, in making up the tax list from the plat book as required by §441.29, The Code 1979, to certify to the Treasurer that the property in question

should be taxed in the name of the quit claim grantee "Z". Specifically, you ask the following question:

"Where there has been no probate of a decedent's estate in Iowa, and more than five years have elapsed since the decedent's death, and the information as required by Iowa Land Title Examination Standards Fifth Edition, Standard 9.8 appear in the record either through deed or affidavit, regardless of whether the deed or affidavit was filed less than five years after the death of the decedent, may the Auditor properly require before changing the plat book a deed of unconditional conveyance of real estate from the record titleholder, or a change of title issued by a court arising out of a probate proceeding, partition proceeding, or other court action."

Because Iowa law does not require either estate administration or judicial decree to vest property in the heirs of intestate decedent, *Reichard v. Chicago, B. & Q.R.Co.*, 231 Iowa 563, 578-582, 1 N.W.2d 721, 730-731 (1942), the issue may often arise as to the degree of proof necessary to determine that an heir does have merchantable title to real property. The Iowa Supreme Court has taken judicial notice of a prior version of Iowa Land Title Examination Standard 9.8 as "perhaps the best index to the mental processes of purchasers of real estate as reasonably prudent men." *Siedel v. Snider*, 241 Iowa 1227, 1231, 44 N.W.2d 687, 689 (1950). That standard presently states:

"Iowa Code, §633.413 bars claims after five years from the date of death. In the absence of special circumstances putting the examiner on notice, marketable title should be accepted as being established in such cases where it is shown by affidavit that: (1) the decedent died intestate at least five years prior; (2) that the estate of said decedent had not been administered upon; (3) that the decedent was survived by the persons named in the affidavit, specifying their relationship to said decedent; and (4) such statement of the assets of the decedent's estate to enable the title examiner to determine what further showing, if any, to require as to inheritance and estate taxes.

Where such affidavit is filed after July 1, 1971, a clearance of inheritance tax (CIT) pursuant to Iowa Code, §450.22 is necessary unless the death occurred more than 20 years prior."

The affidavit of the decedent's surviving brother was filed in May 1975, one year after the death of the decedent, and four years before the expiration of the statutory limitation period referred to in Standard 9.8.

Under the authority of *Siedel v. Snider*, 241 Iowa 1227, 1230-1231, 44 N.W.2d 687, 689 (1950), an affidavit is not sufficient to establish merchantable title where the five-year statute of limitations for claims against intestate decedents has not expired. The affidavit does, however, create a conclusive presumption three years after filing that the facts stated therein are true. §558.8, The Code. Thus the affidavit does explain the defect in the chain of title by asserting that the surviving brother was the only heir of the original record titleholder. A subsequent purchaser or title examiner might question whether the prematurely filed affidavit establishes that there are no competing claims filed against the estate. We do not believe, however, that the Auditor may refuse to enter a grantee's name for taxation purposes solely because of a possible defect in title or the potential existence of a competing claim against the property. The statute prescribing the Auditor's duties as they pertain to maintaining plat books is clear. Section 558.63, The Code, provides in part:

"The auditor shall keep the book of plats so as to show the number of lot and block, or township and range, divided into sections and subdivisions as occasion may require, and mark in pencil the name of the owner thereon. . . ."

Section 441.29, The Code, requiring the county auditor to furnish a plat book to the county assessor for assessment purposes is equally clear.

This Office has previously held that the Auditor has no discretion to reject a deed with an erroneous description but must enter the same upon the transfer records, 1932 Op. Att'y Gen. 181; that the Auditor must change the name of the owner on the plat books when a quit claim deed is received, 1938 Op. Att'y Gen. 177; and that the Auditor may not refuse to enter in the transfer books a deed signed by a surviving joint owner of property held in joint ownership and may not even require an affidavit of the prior death of the other tenant, 1962 Op. Att'y Gen. 104. These opinions indicate that the function of the Auditor in entering conveyances upon the transfer books and in changing the designation on the plat books is purely ministerial. Where the affidavit explains the gap in the chain of title and there are no conflicting unconditional conveyances of the same property and no administration of the estate from which a change of title certificate could issue, we see no basis by which the Auditor may require greater proof to determine the taxable owner.

We would also note that the Auditor here has already entered the deeds in the index books under §558.62, The Code, and in the transfer book under §558.57, The Code. By signing the statutory endorsement required by §558.57, the Auditor has already certified that the deed has been not only entered upon the transfer books but also "for taxation." Since such endorsement is a prerequisite for recording and, by recording, to give notice of the conveyance, we do not believe the legislature intended the Auditor to have the authority to question the validity of conveyances in order to determine ownership for taxation purposes.

In conclusion, it is our opinion that the Auditor must record the name of the quit claim grantee in the plat book.

August 20, 1980

PUBLIC EMPLOYEES: IPERS — §97B.43, The Code 1979; 1979 Session, 68th G.A., Ch. 34, §6. A member of IPERS who wishes to receive credit for years of prior service under the abolished system must redeposit in the system all withdrawn contributions plus interest. (Blumberg to Shimanek, State Representative, 8-20-80) #80-8-12

The Honorable Nancy J. Shimanek, State Representative: We have your opinion request of July 3, 1980, on the buy back of prior service pursuant to Chapter 97B, The Code 1979. The individual of which you speak has been continuously employed within the IPERS system since 1954. When the system was abolished on July 1, 1953, he applied for and received a refund of his contributions to that date. Since July 4, 1953, he has contributed to the system. He wishes to buy back only three or four of the eight years prior to July 1, 1953. You ask if this is permissible or if he must buy back the entire amount of his prior service.

Section 97B.43, as amended by 1979 Session, 68th G.A., Ch. 34, §6, provides, in pertinent part, that an individual, as of July 1, 1978, who was an active member and who made application for and received a refund of contributions made under the abolished system shall be entitled to credit for years of prior service by filing a written election and by "*redepositing any withdrawn contributions*" under the abolished system with interest. Of importance is the above-emphasized portion.

There is nothing in that section which specifically indicates whether the buy back for prior service must be for the entire amount of that prior service. Nor can we find anything on this in any other section of the Chapter. The key to your question is with the word "any", as used in §97B.43.

The word "any" has been consistently defined by the Iowa Court to mean "every" and "all". *See State v. Prybil*, 211 N.W.2d 308, 312 (Iowa 1973); *State v. Steenhlek*, 182 N.W.2d 377, 379 (Iowa 1970); *State v. Bishop*, 257 Iowa 336, 132 N.W.2d 455, 458 (1965); *Herman v. Meeks*, 256 Iowa 38, 41, 126 N.W.2d 400, 402 (1964); *Iowa-Illinois Gas & Elec. Co. v. City of Bettendorf*, 241 Iowa 358, 363-364, 41 N.W.2d 1, 4 (1950). Thus, the appropriate portion of §97B.43 really reads that the member redeposits *all* withdrawn contributions.

Accordingly, we are of the opinion that in order for a member of IPERS to buy back prior years under the abolished system, all withdrawn contributions, together with interest, must be repaid.

August 22, 1980

COUNTIES: Bonds. §§174.1, 174.2, 174.9, 174.13, 174.15, 174.17, 174.18, 345.1, The Code 1979. County bonds, as provided for in ch. 345, may not be used to finance construction of a building which will be under the control of a county fair board. (Norby to Robbins, Boone County Attorney, 8-22-80) #80-8-13 (L)

August 22, 1980

MOTOR VEHICLES — Definition of electrically motorized bicycles and tricycles within Chapter 321 of the Iowa Code. §§4.2, 4.4(3), 4.6(5), 321.1(1), 321.1(2), 321.1(3)(a), 321.1(3)(b), 321.382, The Code 1979. Bicycles and tricycles, when electrically operated without pedal assistance, are "motor vehicles" as defined by §321.1(2). They are further designated as §321.1(3)(b) "motorized bicycles" or "motor bicycles". (Dundis to Ritsema, State Representative, 8-22-80) #80-8-14 (L)

August 22, 1980

COUNTIES: Benefited Fire Districts. §357B.5, The Code 1979. The total number of signatures on the petition necessary to dissolve a benefited fire district must equal at least a number calculated as 35% of the total number of persons who pay taxes on property located in the district, whether or not those taxpayers are also residents of the district. (Hyde to Corey, State Representative, 8-22-80) #80-8-15 (L)

August 28, 1980

COUNTIES AND COUNTY OFFICERS: SHERIFFS — WEAPONS PERMITS: U.S. CONST. amend. II; Sections 724.9, 724.11, The Code 1979. Sheriffs have implied authority to require weapons permit applicants to satisfactorily complete written and firing tests which are reasonably designed to measure the applicant's ability to use firearms safely. Requiring applicants to take such tests does not violate either the Iowa or United States Constitution. (Staskal to Rush, State Senator, 8-28-80) #80-8-16 (L)

September 2, 1980

COOPERATIVES: Corporate, partnership, and trust membership. §4.1 (13) and Chapters 497, 498, and 499, The Code 1979. Corporations, partnerships and trusts are eligible for membership in cooperatives organized under Chapters 497, 498, and 499, The Code 1979. (Willits to Hansen, State Representative, 9-2-80) #80-9-1

The Honorable Ingwer L. Hansen, State Representative: You have requested an opinion of the Attorney General on the following question:

Is a corporation, partnership, or trust eligible to be a member of an Iowa cooperative under each of the cooperative laws, i.e., Chapters 497, 498 and 499 of the 1979 Code of Iowa?

Chapters 497 and 498, The Code 1979, apply only to cooperatives organized prior to July 4, 1935, and will be treated here separately from Chapter 499, The Code 1979.

Section 497.1, The Code 1979, states:

Any number of *persons*, not less than five, may associate themselves as a cooperative association, society, company or exchange, for the purpose of conducting any agricultural, dairy, mercantile, mining, manufacturing or mechanical business on the cooperative plan. For the purposes of this chapter, the words 'association', 'company', 'corporation', 'exchange', 'society', or 'union', shall be construed to mean the same. [Emphasis supplied].

Section 498.2, The Code 1979, provides:

Any number of *persons*, not less than five, may associate themselves as a co-operative association, without capital stock, for the purpose of conducting any agricultural, livestock, horticultural, dairy, mercantile, mining, manufacturing, or mechanical business, or the constructing and operating of telephone and high tension electric transmission lines on the co-operative plan and of acting as a co-operative selling agency. Co-operative livestock shipping associations organized under this chapter shall do business with members only. [Emphasis supplied].

Section 498.10, The Code 1979, states:

Under the terms and conditions prescribed in its bylaws, an association may admit as members *persons* engaged in the production of the products, or in the use or consumption of the supplies, to be handled by or through the association, including the lessors and landlords of lands used for the production of such products, who receive as rent part of the crop raised on the lease premises. [Emphasis supplied].

In the cited sections, the key word is "persons". This word describes those who may form a cooperative and be its members under Chapters 497 and 498.

Section 4.1(13) 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.

There is nothing in Chapters 497 or 498, The Code 1979, to provide any change in this definition as it relates to those chapters. Thus, since the statutory definition of "person" includes a corporation, trust, or partnership, those entities, and any others in the definition, may be members of cooperatives organized under Chapters 497 or 498, The Code 1979. They, of course, must meet the other criteria for membership provided by statute and/or the Articles of Incorporation of a cooperative.

A more difficult question arises under Chapter 499, The Code 1979. Chapter 499, The Code 1979, applies to any cooperative organized after

July 4, 1935, or to any cooperative existing before that date which has elected and provisions of Chapter 499, pursuant to Section 499.43, The Code 1979. We would note that most cooperatives are now organized under Chapter 499, The Code 1979.

A 1945 opinion of the Attorney General held that neither ordinary corporations for profit nor partnerships are eligible for membership in cooperatives under what is now Chapter 499 (1946 Op. Att'y Gen. 20). We believe that opinion is erroneous and specifically overrule it in this opinion.

Pertinent sections of Chapter 499, The Code 1979, include the following:

499.2

A 'co-operative association' is one which, in serving some purpose enumerated in section 499.6, deals with or functions for its members at least to the extent required by section 499.3, and which distributes its net earnings among its members in proportion to their dealings with it, except for limited dividends or other items permitted in this chapter; and in which each voting member has one vote and no more.

* * *

'Member' refers not only to members of nonstock associations but also to common stockholders of stock associations, unless the context of a particular provision otherwise indicates.

§499.5. Five or more individuals, or two or more associations, may organize an association. All individual incorporators of agricultural associations must be engaged in producing agricultural products, which term shall include landlords and tenants as specified in section 499.13.

§499.13. No membership or share of common stock shall ever be issued to, or held by, any party not eligible to membership in the association under its articles. Individuals may be made eligible only if they are engaged in producing products marketed by the association, or if they customarily consume or use the supplies or commodities it handles, or use the services it renders. Farm tenants, and landlords who receive a share of agricultural products as rent, may be made eligible to membership in agricultural associations as producers. Other associations engaged in any directly or indirectly related activity may be made eligible membership. Federated associations may be formed whose membership is restricted to co-operative associations.

§499.14. Membership in associations without capital stock may be acquired by eligible parties in the manner provided in the articles, which shall specify the rights of members, the issuing price of memberships, and what, if any, fixed dividends accrue thereon. If the articles so provide, membership shall be of two classes, voting and nonvoting. Voting members shall be agricultural producers, and all other members shall be nonvoting members. Nonvoting members shall have all the rights of membership except the right to vote.

Interestingly, Chapter 499 contains no clear statutory limitation or statement on who may and may not be members, such as Section 498.10, The Code 1979, provides for cooperatives organized under Chapter 498. The definition of "member", set forth above, simply makes clear that "member" includes both members of nonstock associations and common stockholders of stock associations.

Section 499.5, The Code 1979, does limit organizers to individuals or associations, which are defined in §499.2 as cooperatives formed under Ch. 499. The word 'individual' is not a statutorily defined term, so must

be given its ordinary and commonly understood meaning. *City of Fort Dodge vs. Iowa Public Employment Relations Board*, 275 N.W.2d 393 (Iowa 1979). *Black's Law Dictionary* states that the word "individual" is very commonly used to distinguish a natural person from a partnership, corporation or association, but, in proper cases, it can include artificial persons.

We do not believe the term "individuals" in §499.5, The Code 1979, includes artificial persons. The Iowa statutory definition of "person", set forth above, includes ". . . individual, corporation, . . . trust, partnership . . .". The fact that individual is listed separately from corporations, trusts, partnerships and other artificial entities would indicate it does not include those entities. Thus, organizers of cooperatives must be five or more natural persons or two or more cooperatives.

While it is difficult to ascertain, since the reasoning is, at best, incomplete, the 1945 opinion on this subject seems to be in error in that it assumed that if organizers must be natural persons or two other cooperatives, members must be natural persons or other cooperatives, and corporations or partnerships cannot be members. Organizers and members should be distinguished.

We find no restrictions in Chapter 499, The Code 1979, which prohibit corporations, partnerships, or trusts from becoming members of cooperatives, once the cooperative is formed. The statutory membership limitations occur at §§499.13 and 499.14, The Code 1979, set out above. Nowhere in those sections are any limitations on corporate, partnership, or trust membership in a cooperative. Such restrictions are in the discretion of each cooperative in its articles.

It should be noted that in 1945, the corporation was not a common method of organizing the farm business. Thus, it is not surprising that the opinion did not focus on this question more clearly. Today the family farm corporation, as defined in Chapter 172C, The Code 1979, is a common method of organizing the farm business, both for estate and business planning and tax reasons.

In conclusion, for the reasons stated, it is our opinion that there is no statutory impediment to corporate, partnership, or trust membership in cooperatives organized under Chapter 499, The Code 1979.

September 3, 1980

COUNTIES: Article III [Sec. 39A] of the Iowa Constitution, Sections 17A.2(1), 17A.19, 170A.2(5), 170A.3, 170A.4, 358A.12, The Code 1979, 5 USC §551. The Black Hawk County Health Department does not act as an agent of the Iowa Department of Agriculture when the former assumes the enforcement of Chapter 170A, The Code 1979, pursuant to an agreement with the Department. Black Hawk County is not bound by the procedural provisions of Chapter 17A in its enforcement of the Iowa Food Service Sanitation Code through its Health Department. The County's enforcement of Chapter 170A must still be based upon procedural guidelines found in due process and the federal food and drug administration food service sanitation ordinance. In those instances where no procedure is apparent a Court may turn to Chapter 17A and employ the equivalent of one of its provisions in that situation. (Benton to Burk, Assistant Black Hawk County Attorney, 9-3-80) #80-9-2 (L)

September 8, 1980

GOVERNOR; APPROPRIATIONS; STATUTES. Sections 8.30, 8.31, 8.32, The Code 1979. Section 8.31 contemplates that, in making uniform and prorated reductions in quarterly allotments of appropriations to prevent an overdraft or deficit in the budget during a fiscal year, the Governor will make such reductions on a line item rather than on a department-by-department basis. (Miller and Stork to Ray, Governor, 9-8-80) #80-9-3

Honorable Robert D. Ray, Governor of Iowa: You have requested an opinion of the Attorney General concerning the implementation of §8.31, The Code 1979, which authorizes the Governor to make uniform and prorated reductions in quarterly allotments of state appropriations in the event that estimated budget resources during a fiscal year are determined to be insufficient to pay all appropriations in full. Specifically, you inquire whether the Governor has the flexibility under §8.31 to make such reductions either on a line item approach or on a department-by-department approach. The former approach would require each specific item of appropriation made by the General Assembly to be reduced by a uniform percentage whereas the latter approach would require uniform reductions on the basis of the total amounts appropriated to each department, establishment or agency. The line item approach is less flexible than the department-by-department approach because the former precludes an administrative official from exercising discretion to determine how the reduction will be made within a particular department, establishment or agency. The latter approach, for instance, would permit an administrative official to have discretion in deciding that certain programs or appropriations within a department or agency would receive a more substantial funding cut than others to achieve the reduction required of that department or agency.

This office recently issued another opinion which, in part, considered the nature of the authority granted under §8.31. Op. Atty. Gen. #80-8-8. The opinion concluded that, first, §8.31 was a constitutional delegation of legislative authority and second, it authorized the Governor to reduce allotments of appropriated funds only in a manner which is both uniform and proportionate. The prior opinion did not, however, consider the question of precisely how a required reduction may be made under §8.31. The statute itself contains language that appears to support a reduction on the basis of either the line item or the departmental approach. The last paragraph of §8.31 provides that, in the event any reductions in allotment are made, "such reductions shall be uniform and prorated between all departments, agencies and establishments upon the basis of their respective appropriations." This language initially appears to contemplate a departmental approach but concludes with language that suggests a line item approach. Other language in the statute further complicates the question. For example, the first paragraph requires the submission of quarterly requisitions to the Governor "[b]efore an appropriation for administration, operation and maintenance of any department or establishment shall become available . . .". Such language seems to indicate that a department-by-department approach should be used in making reductions. On the other hand, the basis for utilization of §8.31 is a finding by the Governor that "estimated budget resources during the fiscal year are insufficient to pay all appropriations in full", which suggests that a line item approach should be used in making the necessary reduction. The line item approach is also suggested by the fourth

paragraph of §8.31, which refers to "allotments in appropriations" for capital projects. We have previously addressed the issue of whether §8.31 is a constitutional delegation of legislative authority. Op. Atty. Gen. #80-8-8. The precise issue raised by your inquiry is whether §8.31 permits the Governor to select an approach, line item or department-by-department, to implement the reductions necessary to prevent an overdraft or deficit or, rather, requires the utilization of a particular approach. The apparent ambiguity of §8.31 with respect to this issue essentially involves a matter of statutory construction.

In construing a statute, the polestar is unquestionably legislative intent. *Iowa Department of Revenue v. Iowa Merit Employment Commission*, 243 N.W.2d 610, 614 (Iowa 1976). To determine the intention of the Legislature with respect to an ambiguous statute, the following matters may be considered:

1. The object sought to be attained.
2. The circumstances under which the statute was enacted.
3. The legislative history.
4. The common law or former statutory provisions, including laws upon the same or similar subjects.
5. The consequence of a particular construction.
6. The administrative construction of the statute.
7. The preamble or statement of policy.

§4.6, The Code 1979. Accordingly, the Iowa Supreme Court has stressed that, in searching for legislative intent, one should consider "the objects sought to be accomplished as well as the language used and place a reasonable construction on the statute which will best effect its purpose." *State ex rel. State Highway Comm. v. City of Davenport*, 219 N.W.2d 503, 507 (Iowa 1974). "[W]hen statutes relate to the same subject matter or to closely allied subjects, they are said to be *pari materia* and must be construed, considered, and examined in light of their common purpose and intent so as to produce a harmonious system or body of legislation." *Rush v. Sioux City*, 240 N.W.2d 431, 445 (Iowa 1976). Consequently, §8.31 must be construed, considered, and examined in light of other statutes in Chapter 8, particularly §§8.30 and 8.32. With the aforementioned principles of statutory construction in mind, the alternative approaches for implementation of §8.31 may be analyzed.

Section 8.30 sets forth a statement of policy for execution of the budget under Chapter 8:

Availability of appropriations. The appropriations made shall not be available for expenditure until alloted as provided for in section 8.31. All appropriations now or hereafter made are hereby declared to be maximum and proportionate appropriations, the purpose being to make the appropriations payable in full in the amounts named in the event that the estimated budget resources during each fiscal year of the biennium for which such appropriations are made, are sufficient to pay all of the appropriations in full. The governor shall restrict allotments only to prevent an overdraft or deficit in any fiscal year for which appropriations are made.

This language also identifies the object sought to be attained under §8.31, *i.e.* payment of all appropriations in full provided the estimated budget resources during a fiscal year are sufficient to support such payment. Both the line item and department-by-department approaches for making reductions under §8.31 would accomplish the object of preventing an overdraft or deficit in state funds for a fiscal year. We have

found no legislative history nor any administrative construction pertaining to the intended implementation of §8.31.[1] Consequently, we must turn to other considerations to evaluate which approach more closely reflects the procedure by which the Legislature intended to accomplish the object of preventing an overdraft or deficit.

First, we observe that, pursuant to §8.30, all appropriations made by the Legislature become available for spending according to the quarterly allotment system established by §8.31; under this system, requisitions are made and allotments are paid on the basis of each line appropriation. This is significant evidence that the reductions contemplated in §8.31, tied as they are to the allotment process, also were intended to be made on an appropriation-by-appropriation (line item) basis.

Second, in examining the consequences of each approach, we note significant differences between them that, on balance, favor the line item approach interpretation. Either approach appears to be effective in achieving the primary objective of reducing expenditures in order to prevent an overdraft or a deficit. The line item approach, however, produces a higher degree of uniformity, which is an *express* constraint upon the authority of the executive to modify a legislative appropriation. On the other hand, it could be argued that the greater flexibility inherent in the department-by-department approach prompted the Legislature to adopt that approach. Indeed, we are not unmindful that the Legislature could have thought that the greater flexibility permitted by the department-by-department approach would permit the executive branch to approximate more closely the decisions the Legislature would itself make in determining the cutbacks necessary to prevent a budgetary overdraft or deficit. Experience as recent as this past spring suggests that the Legislature would not necessarily make needed reductions in expenditures on a line item basis. However, unlike the uniformity constraint, the value of flexibility is, at best, only implicit in the §8.31 scheme. Moreover, we note that the selectivity afforded by the department-by-department approach could, in an extreme instance, result in the total elimination of a particular line item appropriation. We think it sufficiently unlikely that a Legislature would intentionally delegate this type of potential authority that we are unable to give weight to the value of flexibility solely on the basis of implication. In any event, an argument for the department-by-department approach based upon the desirability of flexibility is substantially undercut by the authority afforded the Governor, in the event the line item approach proves impracticably rigid, to call the Legislature into special session.

Finally, the context in which §8.31 was enacted into law strongly supports the line item approach interpretation. Sections 8.30 through 8.32 were enacted by the 45th General Assembly in 1933 and first appeared in the Code of Iowa in 1935. At this time, quarterly allotments of state appropriations were made under what is now §3.13, which provides:

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[1] An opinion by the Attorney General in 1957 did conclude that §8.31 involved an unconstitutional delegation of legislative authority. Perhaps in part due to this opinion, the statute has not, to our knowledge, been used until now. That opinion was overruled by a recent opinion of this office. Op. Atty. Gen. #80-8-8.

Pro rata disbursement of appropriations. Annual appropriations shall be disbursed in accordance with the provisions of the Acts granting the same pro rata from the time such Acts shall take effect up to the first day of the succeeding quarter as provided in section 3.12.

See 1958 Op. Atty. Gen. 58. The Legislature, however, met biennially rather than annually in 1933 and therefore would not have been in session when most allotments were paid. If, between sessions, budget estimates indicated that payment of appropriations in full would cause an overdraft or deficit, a special session would have been required to address the situation. The nation, of course, was afflicted with a serious economic depression which increased both the likelihood of a budget overdraft or deficit and the burden of individual legislators in meeting for a special session. The Legislature, cognizant of the constitutional debt limitation contained in Article VII, §2 of the Iowa Constitution, could therefore have reasonably concluded that the Governor had the practical ability to prevent an overdraft or deficit in the budget and should also have limited authority toward this end. Delegations of legislative authority were not, however, considered favorably by the Iowa Supreme Court in the early 1930's. Note, *Safeguards, Standards and Necessity: Permissible Parameters for Legislative Delegations in Iowa*, 58 Iowa L.Rev. 974, 977-82 (1973). The Court had consistently construed the Constitution narrowly to invalidate delegations of authority made by the General Assembly. *Id.* Section 8.31 was therefore enacted during a time when the nature of authority granted therein received close judicial scrutiny and was normally upheld only to the extent that the authority delegated involved the exercise of very limited discretion by administrative officials. *Id.* at 979. We must presume that the Legislature intended §8.31 to be both constitutional and effective. §4.4, The Code 1979. Given the state of the law in 1933 concerning delegations of authority, the Legislature therefore must have intended to provide the Governor with very limited discretionary authority under §8.31. Such authority would involve a technical decision that, based upon budget estimates, all appropriations must be reduced in a uniform and prorated manner in order to prevent an overdraft or a deficit. The Legislature would not, however, have intended to provide the Governor with the discretion to make any type of a selective reduction. Accordingly, the circumstances under which §8.31 was enacted, in conjunction with the common law on the subject of legislative delegation at the time, suggest that the Legislature intended the Governor to utilize the less fexible, *i.e.* the line item, approach to prevent an overdraft or deficit.

In summary, we conclude that §8.31 authorizes the Governor to make reductions in allotments of appropriations on a line item, rather than on a department-by-department, approach.

September 8, 1980

PUBLIC EMPLOYEES: PUBLIC CONTRACTS: COMPETITIVE BIDDING: Section 68B.3, The Code 1979. "Public notice" within the contemplation of §68B.3 must be notice of a nature which is reasonably calculated to apprise potential bidders of the contract in question. Compliance with a requirement of "competitive bidding" assumes three elements: first, there should be an offering, or notice, extended to the public; second, an opportunity for competition; and third, a basis for an exact comparison of bids. Where a state employee is in fact the "sole source" for desired goods, the procurement of such goods is impliedly excepted from the requirements of §68B.3. The existence of

a bona fide emergency will excuse a state agency from compliance with public notice and competitive bidding. (Fortney to Richard D. Johnson, CPA, 9-8-80) #80-9-4

Mr. Richard D. Johnson, CPA, Auditor of State: You have submitted a series of questions regarding §68B.3, The Code 1979. This section, which regulates the circumstances under which a state employee may sell goods to a state agency reads as follows:

No official, employee, member of the general assembly, or legislative employee shall sell any goods having a value in excess of five hundred dollars to any state agency unless pursuant to an award or contract let after public notice and competitive bidding. This section shall not apply to the publication of resolutions, advertisements, or other legal propositions or notices in newspapers designated pursuant to law for such purpose and for which the rates are fixed pursuant to law.

The Iowa Supreme Court has not had occasion to interpret the language of §68B.3. There have been a number of opinions issued by the Attorney General relative to this section, however, none are applicable to the issues you raise.[1] We therefore turn to decisions from sister states and treatises in order to address the questions you raise.

I.

You have first inquired as to the meaning of the term "public notice" as used in §68B.3, as well as the methods by which a state agency satisfies this requirement. It is a general rule that where contracts for public works or improvements, or contracts for supplies for governmental units, official boards, and the like, are to be let upon competitive bidding, an advertisement or invitation for bids addressed by the public authorities to intending contractors is ordinarily required as a preliminary step in the securing of competitive bids. 64 Am. Jur.2d *Public Works and Contracts* §53.

Section 68B.3 does not specify the manner in which public notice is to be given, nor does it define the period of time which must elapse between the first notice and the awarding of the contract. In this absence we believe a court would apply a standard of reasonableness in reviewing the procedures employed by a state agency in the giving of public notice. The evaluation of the reasonableness of the subject procedures could be expected to include consideration of factors such as the total value of the contract to be awarded, the urgency with which an award must be made, the market in which the notice may be expected to circulate, and the number of prospective contractors who might reasonably be expected to be apprised of the public notice. The content of the advertisement or invitation should be such as to reasonably inform the reader as to the nature and scope of the contract, the time for submission of bids, and the means by which an interested party might obtain more complete information. If the solicitation for bids followed passage of a resolution authorizing the proposed contract, it is not necessary that the public notice include a complete recitation of the resolution. *Gay v. Engebretsen*, 109 P. 876, 158 Cal. 21 (1910).

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[1] For example: 1972 Op. Att'y Gen. 468 (adoption of §68B.1 et seq. did not result in a repeal of §314.2); 1970 Op. Att'y Gen. 6 (a nursing home primarily furnishes *services*, not *goods* within §68B.3); and 1968 Op. Att'y Gen. 989 (a county is not a state agency within §68B.3).

The type of public notice and the means employed will, of necessity, vary with the exigencies of a particular purchase. A notice which will generate competition in one case may in another case prove to be a formality which does not result in competitive bidding. Both state and federal regulations recognize variability in the manner in which notice is given to potential vendors. *See* 41 C.F.R. §§1-2.101(b), 1-2.203, 1-2.205; 450 I.A.C. §2.3. These regulations contemplate giving of notice to potential vendors by employing such means as posting in locations frequented by vendors (so called "vendors' rooms"), use of paid advertisements, establishment of bidders mailing lists, etc. Both formal and informal methods are contemplated. However, the underlying goal is to select a method which is both appropriate to the circumstances and reasonably calculated to result in the giving of notice to those vendors who potentially would be prepared to respond.

II.

The second issue you have raised relates to the meaning of the term "competitive bidding" as used in §68B.3, as well as the methods by which a state agency satisfies this requirement.

In order to better understand the meaning of "competitive bidding", we believe it is helpful to first review the policy objectives which are sought to be effectuated through enactment of statutes such as §68B.3. These policy considerations, though distinct, will be seen to be complementary.

The purposes of such provisions, requiring that contracts with public authorities be let only after competitive bidding, are to secure economy in the construction of public works and the expenditure of public funds for materials and supplies needed by public bodies; to protect the public from collusive contracts; to prevent favoritism, fraud, extravagance, and improvidence in the procurement of these things for the use of the state; and to promote actual, honest, and effective competition to the end that each proposal or bid received and considered for the construction of a public improvement, the supplying of materials for public use, etc., may be in competition with all other bids upon the same basis, so that all such public contracts may be secured at the lowest cost to taxpayers. 64 Am.Jur.2d *Public Works and Contracts* §§30, 37. Given the significance of these policy objectives and the weight that would normally be assigned them, it is imperative that prohibitions such as found in §68B.3 be given meaningful enforcement and effect in the absence of other overriding considerations.

In order to achieve the policy objectives of competitive bidding, there are three basic principles to which a public body should adhere: first, there should be an offering, or notice, extended to the public; second, an opportunity for competition; and third, a basis for an exact comparison of bids. *See Iowa Electric Light and Power Co. v. Incorporated Town of Grand Junction*, 250 N.W. 136, 216 Iowa 1301 (1933); *Hannan v. Board of Education*, 107 P. 646, 25 Okla. 372 (1909). The first element was discussed in the first section of this opinion and need not be repeated here. An opportunity for competition is assured as an outgrowth of an adequate public notice, coupled with an absence of unreasonable restrictions on bidding procedures. A basis for comparing bids exists in the use of plans, specifications, estimates of cost, profiles, drawings, and bills of material, as these are relevant to the project in question. Such materials

should be prepared in advance for the information of potential bidders. By adhering to these three concerns, a public agency will satisfy §68B.3's requirement for competitive bidding.

III.

The third and fourth questions you pose are closely related and will therefore be addressed in conjunction. You have inquired whether a violation of §68B.3 would be deemed to have occurred in the context of a situation wherein a state agency solicits a single bid from a state employee vendor when this employee is known to be the "sole source" of the desired goods. As a further issue you have inquired how the agency can establish the employee's status as a "sole source".

It is a generally accepted rule that an implied exception exists to requirements of compliance with competitive bidding statutes where compliance would be a mere formality. *Los Angeles Dredging Company v. City of Long Beach*, 291 P. 839, 210 Cal. 348 (1930); 64 Am.Jur.2d *Public Works and Contracts* §39.[2] The reasoning supporting the implied exception is founded on the policy objectives of the competitive bidding statutes. As discussed in Division II, these statutes exist to prevent favoritism; to secure the lowest available price; to protect the public from collusive contacts; and to promote honest competition. In the context of the "sole source" vendor, compliance with the processes of competitive bidding will, in no way, promote the underlying objectives of the statute. Consequently, if an employee was in fact the "sole source" for desired goods, the procurement of said goods would fall within the implied exception to the statutory requirements. As was stated in *Los Angeles Dredging Company*:

> where competitve proposals work an incongruity and are unavailing as affecting the final result, or where they do not produce any advantage, . . . or it is practically impossible to obtain what is required and observe such forms, a statute requiring competitive bidding does not apply.
>
> 291 P. 839, 842.

While the law recognizes an implied exception from competitive bidding in the "sole source" situation, the practical benefit of such an exception may be minimal. While the courts are willing to recognize such an exception and to uphold the validity of a contract which falls within the purview of the exception, they will not enforce a contract made in reliance on the exception if such contract is later determined to be outside the scope of the exception. Consequently, should it later be determined that a vendor is *not* the "sole source" of desired goods, the contract will be considered void even though the contracting public officers in good faith believe the vendor to be the "sole source". *See Tobin v. Sundance*, 17 P.2d 666, 45 Wyo. 219, 84 A.L.R. 902 (1933). In such a situation, the public body would be able to deny liability under the contract. *Id.*

As a result of the always present possibility that a "sole source" contract may be later held invalid, it is impossible in the context of an

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[2] It should be noted that the legislature has recognized the "sole source" exception to competitive bidding requirements. *See* §18.6(1), The Code 1979.

opinion to provide you with suggested procedures which the contracting agency can follow to establish a vendor as a "sole source". There exists no procedures which, if followed, will guarantee a binding contract. Even if the procedures are followed, a "sole source" contract is invalid if the vendor is not the "sole source". Consequently, the "sole source" determination is a business decision subject to generally recognized practices and procedures for procurement in the accounting or purchasing professions, and not a legal question resolveable within the context of an opinion. The most we can do is to caution, strenuously, as to the potential consequences of bypassing competitive bidding procedures in reliance on the "sole source" exception.

IV.

The fifth question you have raised seeks guidance for state agencies when it is discovered that a potential vendor-contractor is a state employee and the discovery is made after the commencement of the competitive bidding process. For example, what course of action is advisable when an agency solicits bids from a pre-existing list of potential vendors (such list being used in lieu of solicitation by way of public notice) and it is then discovered that one of those bidding is a state employee covered by §68B.3.

At the outset, it should be pointed out that a contract cannot be awarded the state employee in the absence of compliance with the public notice and competitive bidding requirements of §63B.3 except in circumstances justifying an exemption from the requirements of the statute.[3] This result ensues even though the state employee may be the lowest responsible bidder. A contract with the employee is prohibited. Given this prohibition, it may be advisable for state agencies to remove employee-vendors from vendors lists in that no award can properly be made to the employee, absent compliance with §68B.3 or the existence of an exemption from the statute.

This narrows the inquiry to the question of whether the state agency may proceed to make an award to a non-employee vendor despite the fact that an employee-vendor also submitted a bid. In other words, does the participation of the employee-vendor "taint" the entire process? We do not believe that such is the case. S?ection 68B.3 only prohibits the *award* and *sale* of goods by a state employee without public notice and competitive bidding. It would require an expansion of the scope of the section's prohibitions to interpret it as prohibiting the state employee from participating in the bidding process itself. We are reluctant to give such an expansive reading to the section. We are here dealing with a penal statute. As such, it is axiomatic that the statute's prohibition is to be narrowly construed. Therefore, even though an agency later discovers that one of the bidders is a state employee, the agency may proceed with the award of the contract so long as the award is not made to the employee. Should the employee be the lowest responsible bidder, §68B.3 requires the agency to reject the bid and award the contract to the next lowest bidder.

[3] E.g., the existence of a bona fide emergency as discussed in Division V, or the "sole source" situation discussed in Division III.

V.

The final question you have posed raises the problem of purchasing in the context of an emergency situation. You have inquired as to whether alternative procedures to those required by §68B.3 may be employed if such an emergency arises. It is our opinion that the existence of a bona fide emergency will excuse a state agency from compliance with competitive bidding and public notice.

Statutes requiring competitive bidding should not be given such construction as to impede the usual and regular progress of public business. When contingencies arise and materials are needed immediately and competitive offers would be impossible, the statutes do not apply, because application could not have been intended under these circumstances. 64 Am. Jur.2d *Public Works and Contracts* §39.

While many provisions requiring competitive bidding for public contracts and the letting of such contracts to low bidders contain express exemptions where an emergency requires speedy action or prompt performance,[4] courts have been willing to find an implied exemption for bona fide emergencies. Id. The more difficult question is to determine what constitutes an "emergency". According to the decision in *Los Angeles Dredging Company v. City of Long Beach*, 291 P. 839, 210 Cal. 348 (1930), one must look to the special circumstances of each case, however it is recognized that the term implies a sudden or unexpected necessity requiring speedy action. *In re Tone's Estates*, 39 N.W.2d 401, 240 Iowa 1315 (1949). In *Los Angeles Dredging Co.*, the court found an emergency to exist where dredged materials were polluting the water at a public bathing place. The court also referred to other decisions in which the necessity to secure street lighting was found to be an emergency, as was the threat from the immediate possibility of frost when it was necessary to construct a greenhouse. While it is admittedly difficult to read more specific guidance into the concept of "emergency" we would note that the determination of which exigencies require immediate delivery or performance rests in the exercise of the contracting officials' sound discretion. When such officials determine an emergency to exist, they may dispense with the provisions of §68B.3, if compliance with its provisions would unduly impede efforts to address the emergency.

In conclusion, "public notice" within the contemplation of §68B.3 must be notice of a nature which is reasonably calculated to apprise potential bidders of the contract in question. Compliance with a requirement of "competitive bidding" assumes three elements: first, there should be an offering, or notice, extended to the public; second, an opportunity for competition; and third, a basis for an exact comparison of bids. Where a state employee is in fact the "sole source" for desired goods, the procurement of such goods is impliedly excepted from the requirements of §68B.3. The existence of a bona fide emergency will excuse a state agency from compliance with public notice and competitive bidding.

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[4] *E.g.*, §18.6(2), The Code 1979, authorizes such emergency purchases by the General Services Department.

September 12, 1980

MUNICIPALITIES: Urban Renewal — Iowa Const. art. 3, §38A; §§364.1, 364.2(3), 403.2, 403.3, 403.4, 403.5, 403.6 and 403.12, The Code 1979. A city cannot use Community Block Grant funds for the rehabilitation of property in slum and blighted areas without meeting the requirements of Chapter 403. (Blumberg to O'Kane, State Representative, 9-12-80) #80-9-5 (L)

September 12, 1980

COUNTIES: COUNTY EMPLOYEES: REIMBURSEMENT FOR MILEAGE EXPENSE. Sections 317.3, 331.22, 332.3, The Code 1979. A county weed commissioner is not entitled to reimbursement for mileage expense incurred while commuting between residence and the county courthouse. (Stork to Richards, Story County Attorney, 9-12-80) #80-9-6 (L)

September 12, 1980

DEPARTMENT OF PUBLIC SAFETY, PUBLIC EMPLOYEES; Legality of minimum activity work standards for Iowa State Troopers on road duty: §§17A.2(7)(a), 20.7, 80.4, 80.5, 80.9, 321.2, The Code (1979). The minimum activity work standards for Iowa State Troopers set by .the Iowa Department of Public Safety are legal and proper. Such standards are within the authority of a public employer to direct, regulate and discipline public employees and to maintain the efficiency of government operations. The standards as set do not create a hierarchy of offenses and need not result in a lack of assistance of motorists in need of help or in unequal and unfair law enforcement. Such work standards are not rules for purposes of the Iowa Administrative Procedure Act. (Hayward to Gallagher, State Senator and Welsh, State Representative, 9-12-80) #80-9-7 (L)

September 12, 1980

MOTOR VEHICLES; CRIMINAL LAW: Lack-of-knowledge defense in a §321.220 prosecution. §321.220, The Code 1979. Knowledge that a driver is not licensed to operate a motor vehicle is not a necessary element of a section 321.220 offense. Persons may be convicted of authorizing an unlicensed driver to operate a motor vehicle owned by them or under their control without having knowledge that the driver is unlicensed. (Huber to Green, O'Brien County Attorney, 9-12-80) #80-9-8 (L)

September 12, 1980

COUNTIES AND COUNTY OFFICERS: Clerk of the District Court. §633.31(2)(k), The Code 1979. The Clerk of District Court must assess conservatorships the costs required by §633.31(2)(k) when he or she performs statutory duties under §633.31, except where actions are brought by or against the administrator, guardian, trustee, or person acting in a representative capacity. (Donahue to Cady, Franklin County Attorney, 9-12-80) #80-9-9 (L)

September 12, 1980

JUVENILE LAW: A juvenile's right to counsel pursuant to implied consent proceedings under Chapter 321B. Chapter 232.11, 232.11(1), 232.11(1)(9), 232.11(2), The Code, 1979, Chapter 321B, §321B.3, The Code, 1979, Chapter 804, §804.20, The Code, 1979. A peace officer taking a juvenile into custody for an alleged OMVUI should inform the juvenile of his right to counsel and contact his parents before requesting the juvenile to consent to a chemical test. Thereafter, the juvenile may exercise his right to counsel within a period of time which will still permit the test to be taken. (Hoyt to Miller, Commissioner of Public Safety, 9-12-80) #80-9-10

William G. Miller, Commissioner, Iowa Department of Public Safety:
You have requested an Attorney General's Opinion regarding the rela-

tionship between the implied consent provisions set forth in Chapter 321B and the right to counsel for juveniles provided in Chapter 232. Specifically, you have asked whether a peace officer taking a juvenile into custody pursuant to an alleged OMVUI can request the juvenile to consent to a chemical test without first affording him the right to counsel.

The answer is no. The juvenile's right to counsel attaches when he is taken into custody. The peace officer has an affirmative duty to inform the juvenile of his right to counsel and to contact the juvenile's parents before requesting him to consent to a chemical test. The juvenile's right to counsel, however, is limited. It must be exercised within a period which will still permit a chemical test to be taken. If counsel is not available within that time, the right is lost.

In reaching this determination, we are guided by familiar principles of statutory construction and recent decisions of the Iowa Supreme Court.

In interpreting a statute we must look at the object to be accomplished, the evils sought to be remedied and the purpose to be served and place a liberal construction on the statute which will best serve the purpose rather than defeat it. *Severson v. Sueppel*, 152 N.W.2d 281 (Iowa 1967). A statute should be given a sensible, practical, workable and logical construction and a construction resulting in unreasonableness will be avoided. *Krueger v. Fulton*, 169 N.W.2d 875 (Iowa 1969). Finally, in construing a statute we must be mindful of the state of the law when it was enacted and seek to harmonize it with other statutes. *Doe v. Ray*, 251 N.W.2d 496 (Iowa 1977).

In enacting the new Juvenile Code, Chapter 232, the Iowa Legislature exempted most traffic-related offenses from the provisions of the Chapter. Section 232.8, The Code 1979. The legislature did not, however, exempt OMVUI violations, which are proscribed by Section 321.281. In the present case, we have been asked to consider the relationship between the provisions of Sections 321B.3 and 232.11, The Code, 1979.

Section 321B.3 provides the following:

"Implied consent to test. Any person who operates a motor vehicle in this state upon a public highway, under such circumstances as to give reasonable grounds to believe the person to have been operating a motor vehicle while under the influence of an alcoholic beverage, shall be deemed to have given consent to the withdrawal from his body of specimens of his blood, breath, saliva, or urine, and to a chemical test or tests thereof, for the purpose of determining the alcoholic content of his blood, subject to the provisions hereinafter set out. The withdrawal of such body substances, and the test or tests thereof, shall be administered at the written request of a peace officer having reasonable grounds to believe the person to have been operating a motor vehicle upon a public highway of this state while under the influence of an alcoholic beverage, and only after the peace officer has placed such person under arrest for the offense of operating a motor vehicle while under the influence of an alcoholic beverage. The peace officer shall determine which of the four substances, breath, blood, saliva, or urine, shall be tested. Refusal to submit to a chemical test of urine, saliva or breath shall be deemed a refusal to submit, and the provisions of section 321B.7 shall apply. A refusal to submit to a chemical test of blood shall not be deemed a refusal to submit, but in that case, the peace officer shall then determine which one of the other three substances shall be tested, and shall offer such test.

If such peace officer fails to provide a test within two hours after such arrest, no test shall be required, and there shall be no revocation under the provisions of section 321B.7."

Section 232.11(1)(a) provides the following:

"Right to assistance of counsel.

1. A child shall have the right to be represented by counsel at the following stages of the proceedings within the jurisdiction of the juvenile court under division II:

a. From the time the child is taken into custody for any alleged delinquent act that constitutes a serious or aggravated misdemeanor or felony under the Iowa criminal code, and during any questioning thereafter by a peace officer or probation officer.

Section 232.11(2) provides as follows:

2. The child's right to be represented by counsel under subsection 1, paragraphs "b" to "f" of this section shall not be waived by a child of any age. The child's right to be represented by counsel under subsection 1, paragraph "a" shall not be waived by the child without the written consent of the child's parent, guardian or custodian.

The underlying purpose of section 321B.3 is to prevent disaster on the highways by protecting the public from irresponsible drivers.

The underlying purpose of section 232.11 is to protect juveniles coming within the system by granting them broader rights to counsel when they are taken into custody. It is presumed that juveniles are less likely than adults to make informed, intelligent decisions regarding the waiver of constitutional rights due to their general immaturity and their lack of exposure to the legal system. Thus, the provision that juveniles should not be allowed to waive their right to counsel without the advice of an adult.

The aforementioned principles of statutory construction dictate that we harmonize the provisions of sections 321B.3 and 232.11 so as to effect the intent of both. Recent decisions in the Iowa Supreme Court serve as a guide.

The relationship between the procedures of 321.B and the right to counsel outlined in section 804.20 (previously 755.17) has been a consistent dilemma for the Iowa Supreme Court.

Historically, the Court took the view that federal and state constitutional provisions providing a right to counsel were not applicable to implied consent proceedings. *Gottschalk v. Sueppel*, 140 N.W.2d 866 (Iowa 1966), *Swenumson v. Iowa Department of Public Safety*, 210 N.W.2d 660 (Iowa 1973). The rationale supporting these decisions was that constitutional provisions only apply to "criminal proceedings" and not "administrative proceedings" such as implied consent. The problem with that rationale, however, is that when a chemical test is requested, the peace officer and the arrestee know the result will be vital in a subsequent criminal proceeding. Thus, the decision to consent may ultimately subject the arrestee to a fine or imprisonment.

Support for the Court's historical position regarding the right to counsel began to erode in *Hoffman v. Iowa Department of Transportation*, 257 N.W.2d 22 (Iowa 1977). In a special concurrence, Justice Mason announced his view that a person required to decide whether to submit to a chemical test has a limited statutory right to counsel before choosing to make that decision.

Shortly thereafter, the Court decided *State v. Vietor*, 261 N.W.2d 828 (Iowa 1978). In attempting to reconcile Sections 321B.3 and 755.17 (now 804.20), the Court held there is a limited statutory right to counsel before making the important decision to take or refuse a chemical test under implied consent proceedings. The Court stated:

"This right is not absolute. It must be balanced against the practical considerations that a chemical test is to be administered within two hours of the time of arrest or not at all. An arrested person should not be allowed to sabotage the purpose of 321B by delay. His right to consult a lawyer must be exercised within a period which will still permit the test to be taken. If counsel is not available within that time, the right is lost.

Thus, the Iowa Supreme Court harmonized the provisions of Sections 321B.3 and 804.20 in a manner which effects the intent of both. The same can be done with regard to Section 232.11.

Section 321B.3 requires a chemical test be taken within two hours of an arrest. Section 232.11(1)(a) requires a right to counsel from the time a juvenile is taken into custody for an alleged serious misdemeanor, aggravated misdemeanor or felony. Driving under the influence of alcohol or drugs is a serious misdemeanor. Section 321.281, Section 232.11(2) provides that a juvenile's right to counsel may not be waived without the consent of the juvenile's parent, guardian or custodian.

These sections dictate that a peace officer taking a juvenile into custody for an alleged OMVUI should promptly inform the juvenile of his right to counsel and contact his parents before requesting him to consent to a chemical test. Thereafter, the juvenile's right to counsel is governed by the principles set forth in *State v. Vietor*. The right to counsel must be exercised within a period which will permit a valid test to be taken. If counsel is not available within that time, the right is lost.[1]

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[1] A number of situations may confront the peace officer after taking the juvenile into custody for an alleged OMVUI.

If the juvenile cannot contact his parents or a lawyer within the two-hour limit, he must decide whether or not to consent to a chemical test. His decision, however, should be made as close to the expiration of the two-hour limit as possible.

If the juvenile contacts a lawyer and they agree that the juvenile should consent to a test, then the test should be administered.

If the juvenile contacts a lawyer and they agree that the juvenile should not consent to the test, his refusal should be well-documented.

If the juvenile contacts a lawyer and they disagree as to whether the juvenile should consent to a test, the ultimate decision rests with the juvenile.

Section 232.11 is aimed at securing the juvenile the right to counsel. Once that right has been exercised, the intent of Section 232.11 has been effected. The provisions of Chapter 321B must then be adhered to. Chapter 321B requires the alleged offender to decide whether or not to consent to a test after he has been taken into custody. The language of Section 321B.3 does not differentiate between juveniles and adult offenders in the requirements it sets forth. Nor does the language of Section 321B.7 which governs the refusal to consent. The statute makes no provision for special treatment of juveniles with regard to the decision to consent to a chemical test. It simply dictates that the alleged offender make the decision.

If the juvenile's right to counsel were to extend beyond the two-hour limit, the legislature's goal in enacting 321B.3 could not be realized.

It is logical to assume that the Iowa Legislature did not intend to nullify the provisions of 321B with regard to juveniles when it enacted 232.11. It seems more likely that the Iowa Legislature intended the provisions of the two statutes be harmonized so as to give effect to both.

To summarize, if a peace officer takes a juvenile into custody for an alleged OMVUI, he should inform the juvenile of his right to counsel and contact his parents before requesting the juvenile to consent to a chemical test. Thereafter, the juvenile may exercise his right to counsel within a period of time which will still permit the test to be taken.

September 15, 1980

PUBLIC RECORDS: JUVENILE RECORDS: §232.147(2), The Code 1979. The inspection and publication of official juvenile court records is permitted from the date of filing. (Morgan to Jay, State Representative, 9-15-80) #80-9-11 (L)

September 22, 1980

MOTOR VEHICLES — MOTORIZED BICYCLES: Any vehicle that falls within the legislature's definition is a "motorized bicycle" whether or not the vehicle is equipped with additional features. Section 321.1(3)(b), The Code. (Ferree to Bruner, State Representative, 9-22-80) #80-9-12 (L)

September 26, 1980

TAXATION: Sections 113.3, 113.4, 113.6, 445.16, 445.36, 446.7, The Code 1979. Unpaid fence viewing fees assessed pursuant to Section 113.6, The Code 1979, are to be collected, ". . . as other taxes.", and therefore should be collected pursuant to the provisions of Chapters 445 and 446. The Jones County Treasurer may, in her discretion, accept the payment of the actual real estate taxes without payment of the fence viewing fees as assessed. (Benton to Knuth, Jones County Attorney, 9-26-80) #80-9-13

Mr. Adrian T. Knuth, Jones County Attorney: This is written in response to your letters of August 4 and August 21, 1980, concerning the procedure to be followed by county treasurers in the event fence viewers' fees are not paid as required by Section 113.6, The Code 1979. According to your first letter, an individual did not pay certain fence viewing fees within the time specified in Section 113.6. The Jones County Auditor then, pursuant to Section 113.6, placed these fees upon the tax list. The individual against whom the fence viewing fees had been

(Footnote Cont'd)

In short, Section 232.11 dictates that when a juvenile is taken into custody for an alleged OMVUI, he must be afforded an opportunity to consult with an attorney or parent prior to making his decision whether or not to consent to a chemical test. After that opportunity has been granted, however, he must then make the final decision with regard to the test pursuant to the requirements of Section 321B.3.

The same rationale applies to the situation in which the juvenile contacts his parents and they disagree with him on the decision whether or not to consent to a test. Again, the final decision rests with the juvenile pursuant to the requirements set forth in Chapter 321B.

assessed paid the actual real estate taxes on his property but refused to pay the fence viewing fees taxed against him. Your first letter concluded by asking whether or not the Jones County Treasurer may list that individual's taxes as delinquent and commence the proceedings necessary for a tax sale pursuant to Chapters 445 and 446? In a subsequent letter to this office you ask, based upon the same facts, whether or not the treasurer may accept payment of the actual real estate taxes without payment of the fence viewing fees as assessed?

Chapter 113 of the Code concerns generally the allocation of responsibilities between adjoining landowners for the erection and maintenance of partition fences. If adjoining landowners are unabel to agree as to the duties of each in regard the partition fence, Chapter 113 provides a procedure for the resolution of the dispute. For example, Section 113.3, The Code 1979, provides in pertinent part that:

The fence viewers shall have power to determine any controversy arising under this chapter, upon giving five days' notice in writing to the opposite party or parties, prescribing the time and place of meeting to hear and determine the matter named in said notice.

Having met and viewed the land, the fence viewers are empowered to:

. . . determine by written order the obligations, rights, and duties of the respective parties in such matter, and assign to each owner the part which he shall erect, maintain, rebuild, trim or cut back, or pay for, and fix the value thereof, and prescribe the time within which the same shall be completed or paid for, and, in case of repair, may specify the kind of repairs to be made. Section 113.4, The Code 1979.

In the event the fence is not erected, rebuilt, or repaired within the time prescribed in the order, the fence viewers shall require the complaining landowner to deposit a sum with them sufficient to pay for the erecting, rebuilding, repairing, trimming, or cutting back of the fence together with the fees of the fence viewers and costs. Section 113.4. Significantly, the complaining landowner is to be reimbursed as soon as the taxes are collected as provided in Section 113.6.

Section 113.6 addresses situations in which a party defaults upon a duty required by the fence viewers' order. This section provides:

If the erecting, rebuilding, or repairing of such fence be not completed within thirty days from and after the time fixed therefor in such order, the board of township trustees acting as fence viewers shall cause the fence to be erected, rebuilt and repaired, and the value thereof may be fixed by the fence viewers, and unless the sum so fixed, together with all fees of the fence viewers caused by such default, as taxed by them, is paid to the county treasurer, within ten days after the same is so ascertained; or when ordered to pay for an existing fence, and the value thereof is fixed by the fence viewers, and said sum, together with the fees of the fence viewers, as taxed by them, remains unpaid by the party in default for ten days, *the fence viewers shall certify to the county auditor the full amount due from the party or parties in default, including all fees and costs taxed, together with a description of the real estate owned by the party or parties in default along or upon which the said fence exists, and the county auditor shall enter the same upon the tax list and the amount shall be collected as other taxes.* [Emphasis supplied]

According to the facts as described in your letter, the landowner involved in Jones County has defaulted upon the payment of fence viewing fees and this amount has been entered upon the tax list by the auditor as required by this section. The plain and unambiguous language

of Section 113.6 states that when fence viewer fees are not paid as taxed by the fence viewers, that delinquent amount is to be, ". . . collected as other taxes.". There is no need to resort to rules of statutory construction when the language of a statute is free from ambiguity; rather, if the language of a statute when given its plain and rational meaning is precise and free from ambiguity no more is necessary than to apply to the words under consideration their ordinary sense in connection with the subject considered. *Hartman v. Merged VI Community College*, 270 N.W.2d 822, 825 (Iowa 1978); *Heins v. City of Cedar Rapids*, 231 N.W.2d 16, 18 (Iowa 1975); *McKillip v. Zimmerman*, 191 N.W.2d 706, 709 (Iowa 1971); *Maguire v. Fulton*, 179 N.W.2d 508, 510 (Iowa 1970).

Chapters 445 and 446 govern the procedure for the collection of taxes and tax sales for delinquent taxes. There are no provisions within either chapter which would restrain the treasurer from collecting the unpaid fence viewer fees as other taxes. On the contrary, Section 446.7, The Code 1979, concerning tax sales for delinquent taxes states in pertinent part:

Annually, on the third Monday in June the treasurer shall offer at his office at public sale all lands, city lots, or other real property *on which taxes of any description for the preceding fiscal year or years are delinquent*, which sale shall be made for the total amount of taxes, interest, and costs due and unpaid thereon, including all prior suspended taxes, provided, however, that no property, against which the county holds a tax sale certificate, shall be offered or sold. [Emphasis supplied]

We would conclude that unpaid fence viewing fees are to be collected, ". . . as other taxes.", and that therefore they are to be collected pursuant to the provisions of Chapters 445 and 446.

Your second letter concerning this situation asks whether the Jones County Treasurer may accept payment of the regular real estate taxes, which the individual involved here was willing to pay, without payment of the fence viewing fees. Given our conclusion that the unpaid fence viewer fees are to be considered unpaid taxes, and collected as other unpaid taxes, your second question might be paraphrased to ask whether the treasurer may accept partial payment of all taxes due by this landowner?

At the outset we note that there are no statutory provisions within either Chapters 445 or 446 which either prohibit or require the treasurer to accept partial payment of those amounts due from a taxpayer. Section 445.26, The Code 1979, permits taxpayers to pay their taxes due in full or in installments by certain dates, but this provision does not authorize the treasurer to accept an amount less than the full amount of taxes due at a particular time. It is also clear that only the board of supervisors and not the county treasurer may compromise delinquent taxes due against a parcel of property. *See* Section 445.16, The Code 1979.

Our office in 1940 Op. Att'y Gen. 318, considered a question similar to yours concerning the partial payment of taxes. In that opinion we were asked to consider whether a receipt should be issued to a taxpayer before the full amount of his taxes has been paid, and if the receipt was issued, what type of receipt should be used? These questions arose because in certain situations taxpayers with delinquent taxes had requested that they be permitted to pay these taxes by installments, that is through

partial payments. In other situations the board of supervisors had compromised taxes and the compromise agreement had provided that the taxpayer could make his payments in periodic installments. Our office stated that:

We find no prohibition in the statutes prohibiting the treasurer from accepting a partial payment of a delinquent personal property tax obligation, and we are therefore of the opinion that it would be in the province of the treasurer, in the exercise of his own sound discretion, to accept the partial payment for application upon the delinquent personal property tax obligation. 1940 Op. Att'y. Gen. at 319.

This conclusion that absent a statute prohibiting a county treasurer from accepting partial payment of taxes it is within his discretion to do so is consistent with the great weight of authority on this question. For example, 72 Am.Jur.2d, *State and Local Taxation*, §845 at 149 provides in pertinent part:

In many jurisdictions the statutes provide for the payment of taxes in installments at the option of the taxpayer; but unless so directed by statute, a tax collector is under no duty to accept a part payment of a given tax or to accept an amount less than the entire tax due. In the absence of a statutory declaration to the contrary, the general rule is that taxes must be paid in full at one time and the taxpayer cannot tender a portion of the tax and demand a receipt therefore. *The tax collector may, however, in his discretion, unless prohibited by statute, accept part payment of a tax and credit it upon the tax assessed.* It has been ruled that the state cannot object to such a practice on the ground that it may disarrange the bookkeeping system of the tax collector's office or impose additional costs by reason of the number of entries required to be made; if such practice imposes undue burden in this respect the collector may discontinue it at anytime, but his conduct in accepting partial payments will not be subject to criticism if it is free from partiality and if all taxpayers are treated in substantially the same manner. [Emphasis supplied]

Additional authority for this view is found in 84 C.J.S. *Taxation* §624 at 1245-1246.

In *State v. Evans*, 79 Utah 370, 6 P.2d 161 (Utah 1931), the Utah Supreme Court considered the propriety of a county treasurer accepting payments on account of general taxes levied by the county in amounts less than the full amount owed by a particular taxpayer. The Utah Court held that:

Our conclusion therefore is that while no taxpayer has the right to require or compel a county treasurer to accept less than the whole of the tax levied against a separate parcel of property, except as provided by section 6093, yet the county treasurer may in his discretion accept part payment and credit the same upon the tax assessed, and, when that is done, if any part of the tax remains unpaid on the delinquent date, the treasurer must proceed, as provided by law, to sell the property for such unpaid tax, and the penalty provided by law must be computed upon the amount of the tax remaining unpaid and delinquent, and interest after sale must be computed upon the amount for which the property was sold.

The pertinent rule governing your second question then, is that a tax collector may, in his discretion, accept partial payment of taxes due, unless a statute prohibits that practice. Therefore, it is our conclusion that the Jones County Treasurer may, in her discretion, accept the payment of the actual real estate taxes without payment of the fence viewing fees as assessed. However, such acceptance by the County Treasurer will not preclude a tax sale in accordance with Ch. 446 for collection of unpaid and delinquent fence viewing fees.

September 26, 1980

COUNTIES AND COUNTY OFFICERS. Purchase of real estate at tax sales. Section 446.27, The Code 1979. Section 446.27 prohibits a county treasurer, auditor, deputy treasurer, deputy auditor, and the spouses or any other members of the immediate families of the aforementioned officials from purchasing real estate sold for nonpayment of taxes under Chapter 446. Such prohibition does not apply to an employee or clerk employed in the office of a treasurer or auditor. (Stork to Correll, Black Hawk County Attorney and Shirley, Dallas County Attorney, 9-26-80) #80-9-14

David H. Correll, Black Hawk County Attorney; Alan Shirley, Dallas County Attorney: You have both requested opinions of the Attorney General concerning the application of §446.27, The Code 1979. Specifically, you raise the following questions:

1. Does §446.27 prohibit a county treasurer or auditor from purchasing, at a tax sale, any real estate in which that individual has an interest of record. For example, may a county auditor, who has sold real estate on contract, purchase that real estate at a tax sale when the contract purchaser fails to pay the taxes?

2. Does §446.27 apply to both the spouse or other member of the immediate family of a deputy treasurer or auditor?

3. Does §446.27 apply to the nondeputy employees (clerks) who work in the offices of the treasurer and auditor?

Section 446.27 provides:

Fraud of officers. If any treasurer or auditor shall be directly or indirectly concerned in the purchase of any real estate sold for the nonpayment of taxes, the treasurer, or auditor and his or her sureties shall be liable on his or her official bond for all damages sustained by the owner of such property, and all such sales shall be void. In addition thereto, the officer so offending shall be guilty of a fraudulent practice.

In *Kirk v. St. Thomas Church*, 70 Iowa 287, 30 N.W. 569 (1886), the Supreme Court summarized the purpose of the prohibition contained in §446.27:

The object of the legislature in enacting the statute [then §885] undoubtedly was to secure perfect fairness in the conduct of the sale. The public officers who are charged with the duty of conducting or aiding in the sale are not only prohibited from acquiring any interest in the property sold, but are forbidden to be in any manner concerned in the purchase of such property. That an officer may be concerned in the purchase, without himself acquiring any interest in the property sold, is very clear.

70 Iowa at 290, 30 N.W. at 570-71. The public purpose served by such a statute is well established in other jurisdictions. One federal district court, for example, cited the *Kirk* decision among other cases that have analyzed who may purchase property at a tax sale:

Cases are legion holding that a public officer having duties connected with the sale of property may not purchase at such sale, and according to the great weight of authority, such purchases are absolutely void, either under statutory or common law or both. *Okanogan Power & Irrigation Co. v. Quackenbush*, 107 Wash. 651, 182 P. 618, 5 A.L.R. 966 (1919); *Kitsap County v. Bubar*, 14 Wash. 2d 379, 128 P.2d 483 (1942); *Barker v. Jackson*, 90 Miss. 621, 44 So. 34 (1907); *Kirk v. St. Thomas' Church*, 70 Iowa 287, 30 N.W. 569 (1886); *Shrewsbury v. Horse Creek Coal Land Co.*, 78 W.Va. 182, 88 S.E. 1052 (1916); *Cole v. Moore*, 34 Ark. 582 (1879); *Spicer v. Rowland*, 39 Kan. 740, 18 P. 908 (1888); see also,

51 Am.Jur. Taxation, Section 1059; 85 C.J.S. Taxation §809(i); 5 A.L.R. 969.

United States v. 329.22 Acres of Land, 307 F.Supp. 34, 50 (M.D. Fla. 1968), *aff'd.*, (5th Cir. 1968).

Section 446.27 expressly prohibits a treasurer or auditor from being "directly or indirectly" concerned in the purchase of property sold at a tax sale. The statute thereby protects the fairness of a tax sale by precluding such individuals from occupying, in any manner, the inconsistent positions of purchaser and seller in such a sale. *See Ellis v. Peck*, 45 Iowa 112 (1876). The Iowa Supreme Court has, on several occasions, discussed and defined the specific applicability of the prohibition contained in §446.27. The Court has held that a treasurer or auditor may not act as an agent for another in the purchase of land sold at a tax sale, *Corbin v. Beebee*, 36 Iowa 336 (1873); that the prohibition applies to a deputy treasurer, *Ellis v. Peck*, 45 Iowa 112 (1876); and that a deputy treasurer may not use a third person to purchase property subject to a tax sale in order to transfer such property to the deputy's minor son, *Kirk v. St. Thomas Church*, 70 Iowa 287, 30 N.W. 569 (1886).

The extent of the general applicability of §446.27 is apparent from the express prohibition in the statute and the Supreme Court's application of that prohibition to specific cases. Since the object of the state is "to secure perfect fairness in the conduct of [a tax] sale", the public officials charged with the responsibility of conducting or aiding in the sale may neither acquire "any interest" in the property sold nor be "in any manner" concerned in the purchase of the property. 70 Iowa at 290, 30 N.W. at 570-71. Accordingly, the prohibitions have a very broad objective, which seeks to prevent an individual responsible for conducting a tax sale from having even a remote personal interest which might prejudice the fairness of the sale. The Supreme Court clearly has determined that the prohibitions apply to a deputy official and preclude the minor son of such an official from purchasing, through a third person, property sold at a tax sale. Based upon the express language of §446.27 and the Supreme Court's interpretation of such language, we answer your first two questions in the affirmative. First, §446.27 prohibits a county treasurer or auditor from purchasing any real estate sold in the county for nonpayment of taxes under Chapter 446. This prohibition would, for example, preclude a county auditor, who has sold real estate on contract, from purchasing that real estate at a tax sale after the original purchaser has failed to pay the taxes. Second, neither a spouse nor any member of the immediate family of a treasurer, an auditor, or their deputies, may purchase real estate sold for nonpayment of taxes pursuant to Chapter 446, The Code 1979.

With respect to non-deputy employees, or clerks, in the offices of the treasurer or auditor, the general rule is that such employees are not disqualified from purchasing the property sold at a tax sale. 85 C.J.S., *Taxation*, §809 (1954). In *Lorain v. Smith*, 37 Iowa 67 (1873), the Iowa Supreme Court did address this issue and concluded that a tax sale was not invalidated by the involvement of an employee of the treasurer's office. The employee, referred to as the treasurer's clerk, had bid on the land in question on behalf of the ultimate purchaser of the land. About three months after the sale, the employee acquired half interest in the

title to the land; the evidence presented in th case did not, however, establish that this purchase was made pursuant to any agreement or understanding between the parties at the time of the tax sale. The Court explained as follows:

The sale is not invalid because of the connection of the defendant, H. A. Rooney, therewith. From the evidence it appears that he was a mere employee in the treasurer's office. He was not deputy treasurer. He had nothing to do with the sales for delinquent taxes. He could have no control or influence over the treasurer's action, nor could he, in virtue of his employment, prevent competition at the sales. His duties were purely of a mechanical nature. And all that he had to do with the purchase was simply to present the bid of the defendant Smith.

He furnished none of the purchase-money. He had no interest in the purchase at the time of the sale, and he did not acquire any interest until three months thereafter. Under the circumstances the sale is no more affected by the fact that he presented the bid, than it would have been if he had been employed simply to tear the tax receipts from the stubs, to carry in wood and water, or to sweep out the room.

This decision comports with the purpose of §446.27 to ensure fairness in the conduct of a tax sale by precluding the officials who administer the sale from being involved in the purchase of the land subject to the sale. Since the interests and duties of a buyer are inherently incompatible with those of a seller, an official responsible for administering any aspect of a tax sale may not be even indirectly involved with the purchase of the land to be sold. *See* 72 Am.Jur.2d, *State and Local Taxation* §946 (1974). An employee, or clerk, in the office of treasurer or auditor, however, has no authority or discretion to perform the official duties assigned to the treasurer or auditor under ch. 446. Accordingly, an employee, or clerk, employed in the offices of county treasurer or auditor does not come within the prohibition of §446.27 and therefore may purchase real estate sold for nonpayment of taxes under ch. 446.

In summary, we conclude that the prohibition contained in §446.27 has the following applications:

1. A county treasurer or auditor may not purchase real estate sold in the county for nonpayment of taxes under Chapter 446. This prohibition, for example, precludes a county auditor, who has previously sold real estate on contract, from purchasing that real estate at a tax sale after the purchaser has failed to pay the taxes.

2. Neither a spouse nor any member of the immediate family of a treasurer, an auditor, or their deputies, may purchase real estate sold for nonpayment of taxes under Chapter 446.

3. An employee or clerk employed in the offices of a county treasurer or auditor is not subject to §446.27 and therefore may purchase real estate sold for nonpayment of taxes under Chapter 446.

September 26, 1980

SHERIFF: A sheriff may not be paid a fixed fee per meal for feeding prisoners. Sections 338.1, 338.2, The Code 1979. A sheriff may not be compensated based upon a flat fee per meal for providing provisions for prisoners. A sheriff may only be reimbursed for actual expenses incurred which are documented to the satisfaction of the board of supervisors for these expenses. (Williams to Johnson, Auditor of State, 9-26-80) #80-9-15(L)

September 29, 1980

CRIMINAL LAW, SELLING BEER OR ALCOHOLIC LIQUOR TO MINOR: Sections 123.47, 123.49(2)(h), 123.50, 123.90, The Code 1979. Violation of §123.47 prohibiting the sale of beer or alcoholic liquor to minor is a serious misdemeanor provided defendant is over the legal age. (Cleland to George, Magistrate, 9-29-80) #80-9-16(L)

September 29, 1980

PUBLIC RECORDS: §§17A.2, 17A.3, 68A.1, 68A.2, 68A.7, 68A.9, 692.1, 692.18. A police department operation manual is a "public record" within the meaning of §68A.1, The Code 1979, and is subject to inspection by the public. (Fortney to Kirkenslager, State Representative, 9-29-80) #80-9-17(L)

September 30, 1980

ANTITRUST: MONOPOLIES. Chapters 52 and 553, The Code 1979. The mechanical specifications for an electronic voting system set out in §52.26(7), The Code 1979, does not create a monopoly in violation of §§553.4 and 553.5, The Code 1979, even though only one company produces a machine meeting those specifications. (Perkins to Carr, State Senator, 9-30-80) #80-9-18

The Honorable Robert M. Carr, State Senator: In your letter dated July 7, 1980, you request the opinion of the Attorney General as to the constitutionality of §52.26(7), The Code 1979. That section specifies mechanical criteria an electronic voting system must meet for approval by the State Board of Examiners. According to your information, only one company manufactures a machine that can meet the criteria. Your question is whether §52.26(7), The Code 1979, creates a monopoly for that company which violates §§553.4 and 553.5, The Code 1979, (the Iowa Competition Law) which sections generally prohibit monopolies.

Taking your statement as true that only one company is able to meet the criteria of §52.26(7), The Code 1979, the threshold question is whether the state has, in fact, given that company a monopoly.

The state has not specified that only this particular company may sell voting machines in Iowa. In this sense it has not set up a monopoly, as it has done with respect to utilities or liquor sales. What the state has done is to establish a criteria that any manufacturer wishing to sell this type of voting machine in Iowa must meet. It may well be that not only presently, but also in the future, this company will be the only one which manufactures such a machine, whether by virtue of a patent, because it possesses superior technological capabilities, or simply because no other voting machine manufacturer chooses to manufacture such a machine.

Whatever the reason, the company has not been given monopoly power which is violative of the Iowa Competition Law.

The state has made a decision that it wants a voting machine which performs in a certain manner. The fact only one company manufactures such a machine does not place §52.26(7), The Code 1979, in conflict with §§553.4 and 553.5, The Code 1979.

September 30, 1980

PUBLIC RECORDS: Confidentiality of library circulation records. Ch. 68A, §§68A.1, 68A.2, 68A.7, The Code 1979; 1980 Session, 68th G.A., H. F. 2240. A court, the lawful custodian or another person duly author-

ized to release information is empowered to release at their discretion library circulation records required to be kept confidential by §68A.7, The Code 1979. The "lawful custodian" of library circulation records is the person entrusted to compile and maintain such records, or generally the head or chief librarian, unless otherwise specified by the Code or rules promulgated by the library governing body pursuant to statutory authority. The lawful custodian may designate some other person as "another person duly authorized to release information." (Hyde to Porter, State Librarian, 9-30-80) #80-9-19(L)

October 2, 1980

CHILD ABUSE: §232.68(6), The Code 1979. A "babysitter" falls within the definition of "person responsible for the care of the child" and reports of child abuse made with regard to babysitters should be initially investigated by the Department of Social Services. (Morgan to Reagen, Commissioner, Department of Social Services, 10-2-80) #80-10-1(L)

October 2, 1980

COUNTIES: COUNTY OFFICERS AND EMPLOYEES; MILEAGE EXPENSE. Sections 79.9, 79.10, 332.3, 332.35, The Code 1979. A contract established pursuant to §§332.3(18) and 332.35 may provide for payment of compensation to a sheriff or deputy in addition to the mileage expense reimbursement for actual and necessary travel paid under §79.9. Such contract's payment of a monthly sum to the sheriff or deputy in consideration of that individual's agreement to furnish a private vehicle in performance of official duties is not violative of §79.10 as a payment of mileage and expenses for the same transaction. (Stork to Salvo, Shelby County Attorney, 10-2-80) #80-10-2

J. C. Salvo, Shelby County Attorney: You have requested an opinion of the Attorney General regarding the apparent conflict between §§79.9 and 79.10, The Code 1979, and §§332.3(18) and 332.35. You pose the following factual situation and questions.

Shelby County, Iowa, is presently under a contract with its Sheriff for the use of the Sheriff's vehicle in the performance of his duties as Shelby County Sheriff. The contract in part provides that, in consideration of the agreement of the Sheriff to furnish his automobile in the performance of his official duties, the County agrees to pay the Sheriff "the sum of eighteen cents per mile for official use for the use of the above-named private vehicles and the sum of one hundred twenty-five dollars per month for vehicle for the maintenance of said vehicle." The term of this contract was from July 1, 1979, to June 30, 1980. A similar contract was entered into for the three years immediately preceding this contract.

Following a state audit of Shelby County, it was brought to the attention of your office that although §§332.35 and 332.3(18) provide the county board of supervisors with authority to enter into such contracts, §§79.9 and 79.10 would appear to govern the amount of payment permissible under the contracts.

Specifically, you ask the following questions:

1. What is the legality of the contract, assuming arguendo that it is "advantageous to the county", which provides for the payment of mileage and expenses, seemingly in violation of §§79.9 and 79.10?

2. If the payments of mileage and expenses under the four previous year contracts was an illegal payment by the county, can and should the county of Shelby require reimbursement of the excess payments by the sheriff?

The answer to your questions requires a brief explanation of the nature of mileage expense, as contemplated by §§79.9 and 79.10. Generally, "mileage" is compensation paid to public officers or employees for their travel expenses incurred in the discharge of official duties, based upon the number of miles traveled. 67 C.J.S., *Officers*, §225 (1978). The term imputes the necessity of travel in order for an individual to be entitled to such payment. *Id.* Accordingly, where a statute provides for mileage for an officer or employee while engaged in necessary travel, no mileage accrues unless the individual in fact makes a journey for which such mileage is provided. *Id.*

Chapter 79, The Code 1979, sets forth general provisions governing payment of fees, mileage, and expenses of public officers and employees. Section 79.9, as amended by 1979 Session, 68th G.A., ch. 2, §41, contains specific provisions concerning payment of mileage to public officers and employees:

CHARGE FOR USE OF AUTOMOBILE. When a public officer or employee, other than a state officer or employee, is entitled to be paid for expenses in performing a public duty, a charge shall be made, allowed and paid for the use of an automobile of [fifteen] *eighteen* cents per mile for actual and necessary travel *effective July 1, 1979, and twenty cents per mile effective July 1, 1980.* A statutory provision stipulating necessary, mileage, travel, or actual reimbursement to a *local* public officer or employee shall be construed to fall within [this fifteen cents]*the mileage reimbursement* limitation *specified in this section* unless specifically provided otherwise. Any peace officer, *other than a state officer or employee*, as defined in section [748.3] *eight hundred one point four (801.4) of the Code* who is required to use [his] *a* private vehicle in the performance of [his] official duties shall receive reimbursement for mileage expense at the rate [of fifteen cents per mile] *specified in this section.* (Bracketed words are deletions)

This statute is quite precise in allowing peace officers, defined in §801.4 as sheriffs and their regular deputies who are subject to mandated law enforcement training, to receive the specified reimbursement for "mileaeg expense" incurred while using a private vehicle to perform official duties. The rate of such reimbursement is both definite and mandatory. Hence, a sheriff or deputy using a private vehicle to perform official duties may, effective July 1, 1980, claim 20 cents for each mile traveled while engaged in such duties. The individual may not, however, claim such reimbursement either in excess of 20 cents per mile or for mileage not actually incurred in the performance of official duties.

Section 79.10 further provides:

No law shall be construed to give to a public officer or employee both mileage and expenses for the same transaction.

Section 337.11(10) contains a similar prohibition:

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, or in case one or more legal papers are served on the same trip, 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 and also in the case of separate papers served.

Both §79.10 and §337.11(10) seek to preclude double payment for the same "transaction" or "trip". Accordingly, a sheriff who has received mileage reimbursement for travel under §79.9 could not also receive payment for expenses of gas and oil used in his or her private automobile during the travel. 1932 Op. Atty. Gen. 55.

Sections 332.3(18) and 332.35 govern the use of motor vehicles by county sheriffs and their deputies in the performance of their official duties. Section 332.3(18) states:

The board of supervisors at any regular meeting shall have power:

18. To own and operate automobiles used or needed by the county sheriff and used in the performance of the duties of that office; to operate a service garage for the purpose of servicing automobiles or other motor vehicles owned and operated by the county in the performance of its duties, and the board may own and service all motorcycles used by the county sheriff in the performance of the duties of that office. The board of supervisors may also make such contracts with the employees of the sheriff's office who use automobiles in the performance of their duties in connection with the use of such automobiles as in their judgment shall be advantageous to the county.

Section 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.

Under the above-cited sections, a county board of supervisors has two options concerning the provision of automobiles to be used by sheriffs or deputies in the performance of their official duties. First, the board may itself purchase and provide for the service of the automobiles. Alternatively, the board and a sheriff or deputy may enter into a contract which provides that the sheriff or deputy will furnish a private vehicle to perform official duties. If a private vehicle is used, the board has discretion to make payment on terms which, in its judgment, are advantageous to the county. Neither §332.3(18) nor §332.35 limits the nature of the terms for payment.

Pursuant to §§332.3(18) and 332.35, Shelby County has entered into a contract with the county sheriff whereby the sheriff has agreed to use his private vehicle to perform his official duties. In consideration of the sheriff's agreement, the county pays him mileage as permitted by §79.9 as well as a monthly sum for "maintenance of said vehicle". For a violation of §§79.9 and 79.10 to occur under this arrangement, the payment for maintenance would have to be considered payment of expenses for the same transaction, in contravention to the proscription contained in §79.10.

We conclude that, for the following reasons, the arrangement does not violate §§79.9 and 79.10. First, the contract between Shelby County and the county sheriff does not authorize payment of mileage and expenses for the same transaction. By its express terms, the contract distinguishes between mileage expense, which is payable only for the

actual miles traveled, and maintenance, which is payable on a monthly basis regardless of actual travel. Since payment for maintenance is not related to actual travel or usage, it should not be considered reimbursement of expenses for the same transaction under §79.10, or for the same trip under §337.11(10). Rather, the agreement for payment of maintenance is analogous to an equipment lease agreement whereby a sum is paid to obtain general usage of the equipment on a monthly basis. Second, we must presume that the Legislature intended §§332.3(18) and 332.35 to be effective and to achieve a reasonable result. §4.4, The Code 1979. The sections do permit a board of supervisors to exercise discretionary authority to enter into contracts providing for the use of private vehicles by sheriffs on terms "advantageous to the county." Accordingly, the Legislature must have intended that such contracts could encompass payment of compensation in addition to the mileage expense permitted by §79.9, provided such compensation is not related to the same "transaction" or "trip". We do not, however, comment on the fiscal soundness of such an arrangement, which is admittedly debatable. A board of supervisors may, for example, conclude that the amount of mileage expense paid pursuant to §79.9 is both "advantageous to the county" and sufficient reimbursement to a sheriff or deputy who uses his or her private vehicle to perform official duties.

In summary, it is our opinion that a contract established pursuant to §§332.3(18) and 332.35 may provide for payment of money to a sheriff or deputy in addition to the mileage expense reimbursement for actual and necessary travel paid under §79.9. Such contract's payment of a monthly sum to a sheriff or deputy in consideration for that individual's agreement to furnish his or her private vehicle in the performance of official duties is not violative of §79.10 as a payment of mileage and expenses for the same transaction.

October 3, 1980

COUNTY OFFICERS: State Conservation Commission; Writing Fees. §§106.5, 106.44, 106.53, 321G.4, 321G.6, The Code 1979. Section 106.53 requires that the writing fees contained therein be charged in addition to the other writing fees contained in Chapter 106. (Ovrom to Rush, State Senator, 10-3-80) #80-10-3 (L)

October 6, 1980

MUNICIPALITIES: Licensing of Security Guards — §§80A.1, 80A.3, 80A.4, 80A.8, 364.1, and 364.2, The Code 1979. Muncipalities may require gun registration for armed security guards. Municipalities may not require armed security guards furnishing such work for hire to obtain a city license in order to perform services within the city. (Blumberg to Connors, State Representative, 10-6-80) #80-10-4 (L)

October 10, 1980

STATE OFFICERS AND DEPARTMENTS: Civil Penalties. §§302.3(2), 455B.25, .44, .49, .82(3), .115; 666.3, 666.5 and 666.6, The Code 1979; and 1979 Sess., 68th G.A., Ch. 111, §8(3) and (4). Sections 302.3(2) and 666.3 do not authorize depositing the proceeds of civil penalties and civil fines along with the proceeds of criminal fines in the school fund. Accordingly, the civil fines and penalties collected pursuant to §§455B.25, .44, .49(1), .82(3), .115, and sections 8(3) and (4), ch. 111, Acts of the 68th G.A. (1979), are payable to the general fund of the State treasury. Fines collected pursuant to §§455B.49(2) and (3) are criminal in nature and should be deposited with the county for the

benefit of the school fund. (Schantz and Blumberg to Crane, Executive Director, Iowa Department of Environmental Quality, 10-10-80) #80-10-5

Mr. Larry E. Crane, Executive Director, Iowa Department of Environmental Quality: You have requested an opinion of the Attorney General concerning the proper disposition of monies recovered under various provisions of Chapter 455B, The Code 1979, affording remedies for violations of the statute, court and administrative orders, and departmental rules and permits.

Chapter 455B provides remedies for numerous types of violations, employing both civil and criminal sanctions. Section 455B.25 authorizes the Attorney General to institute a civil action for injunctive relief, a court imposed fine not to exceed five hundred dollars a day, or both, in the event an order or rule of the air quality commission is being violated.

Section 455B.44 provides a contempt of court remedy for violation of a court order directing compliance with an order, rule or permit of the water quality commission. A fine of $500 per day is provided for each day the court order is violated and it is expressly provided that "a conviction under this section shall not be a bar to prosecution under any other penal statute."

Section 455B.49 provides several penalties for various violations. Subsection 1 thereof provides a civil penalty not to exceed five thousand dollars per day for each day a person is in violation of any specified statutory provision or any permit, rule, standard or order. The civil penalty is expressly made "an alternative to any criminal penalty provided under part 1 of division III of this chapter." Subsection 2 provides a fine not to exceed ten thousand dollars for each day a person willfully or negligently engages in specific violations involving discharges of pollutants. Subsection 3 provides punishment by a fine of not more than ten thousand dollars or by imprisonment in the county jail for not more than six months, or both, for making false statements in certain reports or for tampering with a monitoring device.

Section 455B.82(3) provides a civil penalty not to exceed five hundred dollars for each day of violation of any provision of the chapter regulating solid waste disposal or any rule, order or permit of the solid waste commission.

Section 455B.115 provides a civil penalty not to exceed five hundred dollars for failure to notify the local police department or sheriff's department by any person who creates a hazardous condition in the manufacturing, storing, handling, transporting or disposing of a hazardous substance.

The Hazardous Waste Management Act, ch. 111, §§8(3) and (4), Acts of the 68th G.A., 1979 Sess., provides a civil penalty of not more than twenty-five thousand dollars per day for failure to take corrective action required by a cease and desist order and a civil penalty of not more than five hundred dollars per day for transporting, treating, storing or disposing of certain wastes without notifying the solid waste disposal commission.

We have located two sections of the Code which indicate that certain monetary recoveries are to be deposited in the school fund. Section 302.3

(2) defines the "temporary school fund" and provides that it includes, *inter alia*, "the proceeds of all fines collected for violation of the penal laws. . . ." Section 666.3 provides that "(a)ll fines and forfeitures . . . shall go into the treasury of the county where the same are collected for the benefit of the school fund." It seems clear that these are parallel provisions, the former defining various school funds for the guidance of school authorities and the latter directing the disposition of certain funds received by clerks of court. The latter provision also makes clear that it is the county of *collection* rather than, say, the county of the violator's residence, which receives the fines and forfeitures. As parallel provisions employing slightly different terminology, they should be given a harmonious interpretation, if possible. *Egan v. Naylor*, 208 N.W.2d 915, 918 (Iowa 1973).

It is immediately apparent that the school fund is the beneficiary of all fines collected by the use of criminal proceedings. The gist of your question is whether the terms of §302.3(2) and §666.3 may be extended to include the proceeds from civil penalties and civil fines imposed pursuant to Chapter 455B. Chapter 455B affords no explicit alternative disposition of the proceeds. Therefore, if they are not to be deposited in the school fund, the proceeds would go to the general fund of the State. *See* 70 C.J.S. *Penalties*, §20 (1951); 36 Am.Jur.2d *Forfeitures and Penalties*, §67 (1968). Stated more specifically, then, the issue you pose is whether civil penalties and civil fines are "fines collected for violation of the penal laws" within the meaning of §302.3(2) or "fines" within the meaning of §666.3. For a variety of reasons we must conclude that the language of these sections will not bear that construction and that the proceeds from Chapter 455B civil penalties and fines should be deposited in the state general fund.

First, it is rather clear from the context that the term "penal" is employed in §302.3(2) in contrast with "civil" or "regulatory" law. Indeed, a "penal" law is generally regarded as a synonym for criminal law. *See State ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W.2d 624, 629 (Iowa 1971). (An act penal in nature is generally one which imposes punishment for an offense committed against the State). *See also State v. Watts*, 186 N.W.2d 611, 614 (Iowa 1971); *State v. Nelson*, 178 N.W.2d 434, 437 (Iowa 1970).

Second, the Supreme Court of Iowa has consistently held that the term "fine," standing alone as it does in §666.3, contemplates a criminal proceeding. *See Marquart v. Maucker*, 215 N.W.2d 278, 282 (Iowa 1974); *Bopp v. Clark*, 165 Iowa 697, 147 N.W. 172, 174-75 (1914); *Olds v. Forrester*, 126 Iowa 456, 102 N.W. 419, 420 (1905); *State v. Belle*, 92 Iowa 258, 60 N.W. 525, 526 (1894). Although we have held that when the term "civil" expressly modifies "fine," a civil proceeding is contemplated, Op. Att'y Gen. #79-3-2, we clearly noted that the term "fine" ordinarily has a criminal connotation. *Id.*

Third, the history of §§302.3(2) and 666.3 and the failure to include the term "penalties" in §666.3 strongly suggest that these sections encompass only criminal fines. Section 302.3(2) is derived in substantially its present form from §1963, 1860 Code Revision. Section 666.3 derives from §2148, The Code 1851, with no significant changes. These statutes implemented certain constitutional provisions, since repealed by Amendment 35 (1974).

Article IX, §4, Iowa Const. (1846) provided:

The money which shall be paid by persons as an equivalent for exemption from military duty, *and the clear proceeds of all fines collected in the several counties for any breach of the penal laws*, shall be exclusively applied, in the several counties in which such money is paid or fine collected, among the several school districts of said counties, in the proportion to the number of inhabitants in such districts, to the support of common schools, or the establishment of libraries, as the general assembly shall, from time to time, provide by law. (Emphasis added.)

This language is identical to that employed in §303.2(2). However, Art. XII, §3, Iowa Const. (1846), the article providing for transition from the territorial law to statehood under the new constitution, provided:

All fines, penalties and forfeitures accruing to the territory of Iowa, shall accrue to the use of the state.

It is at least clear that the early lawmakers perceived a difference between "fines" and "penalties" in this precise context and employed the term "penalties" when they were intended to be included. A similar contrast may be noted in the successor provisions of the Constitution of 1857. *Compare* Art. IX (2), §4, *with* Art. XII, §4.

Fourth, the distinction between "fines" in the criminal sense and "penalties" is recognized elsewhere in Chapter 666. Section 666.5, which was drafted at the same time as §666.3, provides:

A judgment for a penalty or forfeiture, rendered by collusion, does not prevent another action for the same subject matter.

Not only does the language of this section reinforce the inference that the term "penalties" was advisedly omitted from §666.3, it also supports the conclusion that the term "penalties" was employed in this context as having reference to civil proceedings. Because of the prohibition against placing a person twice in jeopardy, *see* Art. I, §12, Iowa Constitution, §666.5 could only have application to a civil "penalty or forfeiture."

Fifth, §336.2(5) provides that one of the duties of a county attorney is "to prosecute all proceedings necessary for the recovery of debts, revenues, moneys, fines, penalties, and forfeitures accruing to the state or his county, or to any school district or road district in his county. . . ." This provision has been in The Code in this form since 1915 and also employs a distinction between "fines" and "penalties" in this context. This section also contemplates that funds other than the school fund may be the beneficiary of civil monetary recoveries.

Finally, several provisions of The Code indicate that the General Assembly, when it wishes to specify that monetary recoveries from civil proceedings should be deposited in a school fund, expressly so provides. *See, e.g.*, §511.7 (penalties for violations of chapter 511 paid to state treasury for use of the school fund); §515.93 (penalties for misrepresentations relating to fire insurance paid to county school fund); §535.5 (forfeiture of eight cents per hundred for violation of usury laws paid to county school fund).

For all these reasons, we cannot conclude that the General Assembly intended to include monies collected by civil process to be deposited along with criminal fines in the county school fund. It follows that the proceeds of actions brought pursuant to §§455B.25, 455B.49(1), 455B.82(3),

455B.115 and §§8(3) and (4) of ch. 111, Acts of the 68th G.A. (1975) should be deposited in the state general fund. Sections 455B.49(2) and 455B.49(3) impose criminal fines and these proceeds should be deposited with the county school fund. The proper characterization of §455B.44 presents a somewhat more difficult question. Contempts of court may be either criminal or civil, but the distinction is difficult to apply, *Knox v. Municipal Court*, 185 N.W.2d 705, 707 (Iowa 1971). Moreover, the Legislature has employed both civil and criminal terminology in drafting §455B.44. Although we might reach a different result if it were a matter of first impression, this question appears to be controlled by *Gunn v. Mahaska*, 155 Iowa 527, 136 N.W. 929, 931 (1912). The issue there was whether collection fees were to be deducted from a fine for contempt. It was held that a fine for contempt was not a fine for breach of the penal laws within the meaning of Art. IX(2), §4, Iowa Const. Because, as noted above, that language is identical to that employed in §302.3(2), we feel obliged to regard *Gunn* as controlling authority for the proposition that the proceeds from fines for contempt should not be deposited in the school fund.

In summary, §§302.3(2) and 666.3 do not authorize depositing the proceeds of civil penalties and civil fines along with the proceeds of criminal fines in the school fund.

October 10, 1980

COURTS: Actions to Establish Paternity: Blood test. Ch. 675, Code of Iowa 1979; H.F. 2516, 68th General Assembly; §§675.39, 675.40, Code of Iowa 1981. H.F. 2516 relating to the custody and visitation rights of a child born out of wedlock and the use of blood tests in actions to establish paternity may have an effect on cases filed before January 1, 1981, the effective date of the act. The important factor is when the application to the court is made. The application must be made after January 1, 1981, but the case may be filed before that date. (Robinson to Kenyon, Union County Attorney, 10-10-80) #80-10-6 (L)

October 14, 1980

TAXATION: Eligibility of Reservists and National Guard Personnel for Military Service Tax Exemption. §427.3(4), The Code 1979; 1978 Session, 67th G.A., ch. 1040, §1. The repeal of Chapter 35C, The Code 1977 and 1978 Session, 67th G.A., ch. 1040, §1, did not affect or change the concept of "active duty" as that term is defined in §427.3(4) through incorporation by reference to §35C.2, The Code 1977, so that reservists and guard personnel whose active duty in military service during the Vietnam Conflict only consisted of active duty for training are not eligible to claim the military service tax exemption for property tax purposes. (Griger to Gilbert, Major General of Iowa National Guard, 10-14-80) #80-10-7 (L)

October 29, 1980

MENTAL HEALTH: Trust Income: Disability Support Payments: Presumption of Competency. 42 U.S.C. §407, 42 U.S.C. §423; §§222.81, 229.27, 230.18, 230.30, 663.628, The Code 1979. A trust fund may be invaded for the support and maintenance of a beneficiary residing in a state hospital or county care facility. Social security disability benefits paid to a recipient residing in a public care facility may not be reached to reimburse the facility for the costs of past care and maintenance provided to the recipient. Absent a specific finding of incompetence, a person hospitalized for mental illness must be presumed to be competent to handle his/her own financial affairs. Where a person has been adjudicated to be incompetent, a guardian or conservator should be

appointed to manage the incompetent's financial affairs. (Mann to Mahaffey, Poweshiek County Attorney, 10-29-80) #80-10-8

Mr. Michael W. Mahaffey, Poweshiek County Attorney: You have requested an opinion of the Attorney General on the question of whether income received by a legal resident of Poweshiek County may be applied to bills received by the County from the Linn County Care facility for the maintenance and support of such resident. You relate the following facts:

The situation concerns a woman, a legal resident of Poweshiek County, who recently was transferred from the Mental Health Institute in Mt. Pleasant to the Linn County Care Facility. The medical authorities thought this was a more appropriate place for her to be. Before being transferred to Mt. Pleasant, she had been at the Linn County Psychiatric Care Unit.

Poweshiek County is presently responsible for monthly payments of $425.00 a month to the Linn County Care Facility. Of that amount, $250.00 a month is received by the county for this person from a trust set up in her name. In addition, it is our understanding that, because she is again in a state institution, she will qualify for disability benefits under the social security administration and will begin receiving shortly an estimated $280.00 a month. Consequently, Poweshiek County may eventually be receiving more money for the care of this person than we have to pay to Linn County Care Facility.

Specifically, you ask the following questions:

1. If we begin receiving more money than we owe the Linn County Care Facility, can be (sic) apply that money to the bills we have from the Linn County Psychiatric Unit in the amount of $1,800 to $2,000?

2. If not, what is the county auditor to do with this additional money? Can a conservator be set up for this person to relieve the county from the responsibility of having to handle this money?

I. As we view question number one, it requires a two part answer. From the information that you relate, it is apparent that the person in question will receive monies from two sources—the trust fund and the Social Security Administration. Our response requires a different analysis for each source of money.

First, we will address the question of monies available from the trust fund. We assume, for purposes of this discussion, that the trust doesn't have a provision expressly providing for the support of the trust beneficiary at a mental health facility or county care facility.

The general rule appears to be that a state may not reach a trust in which the trustee has uncontrolled discretion in making expenditures on behalf of the committed incompetent. Generally, the intent of the settlor controls the distribution of trust income or corpus. However, some courts have held that where a statute expressly permits recovery from "trust" or "trustees", the right to reach the fund is usually granted. W. C. Craig III, *Incompetent—Trust—Claim for Support*, 92 A.L.R.2d 838, 848 (1963).

The Iowa Legislature has enacted such statutes. Section 222.81, The Code 1979, provides that the total amount of liability incurred for the care and custody of a mentally retarded person shall be allowed as a claim against the estate of the mentally retarded person involved, or against the estates of the father and mother of that person. Similar provisions are found at §§230.18 and 230.30, The Code 1979, with respect to costs of the support of the mentally ill.

Although the Iowa Supreme Court has not decided the precise effect of these statutes on a trust, the Court has discussed the forerunners of the above statutes. Some of the cases are as follows: *In Re Todd's Estate*, 243 Iowa 930, 54 N.W.2d 521 (1952) (where the court held that reimbursement out of a pension fund is permissible); *In Re Tone's Estate*, 240 Iowa 1351, 39 N.W.2d 401 (1949), (beneficiary may enjoy benefaction free from appropriation of creditors); *Roorda v. Roorda*, 230 Iowa 1103, 300 N.W. 294 (1941), (beneficiary had no interest in the income or prinicpal of the trust which might be subjected to his debts); *Jones v. Coon*, 229 Iowa 756, 295 N.W. 162 (1940), (trust could not be subjected to claims of a beneficiary's creditors); *Standard Chemical Co. v. Weed*, 226 Iowa 882, 285 N.W. 175 (1939), (where the court held that a testator has the right to create a trust for the benefit of his son in a manner that would prevent his creditors from appropriating the benefaction; *State v. Cole*, 155 Iowa 654, 136 N.W. 887 (1912), (estate of an insane person in the possession of their guardian is not liable to execution); *Guthrie County v. Conrad*, 133 Iowa 171, 110 N.W. 454 (1907), (under Code §2297, providing that public support of insane persons shall not release relatives liable therefor, and that they shall be responsible to the county for sums paid by it to the state for the hospital expenses of such insane person, a father is liable for the care and maintenance in such a hospital of his minor son); *Marshall County v. Lippincott*, 137 Iowa 102, 111 N.W. 801 (1907), (statute permitting the state to recover from trust funds is inapplicable where the state agreed to accept the labors of the incompetent as a farmhand in return for supporting him); and *State v. Colligan*, 128 Iowa 536, 104 N.W. 905 (1905), (in the absence of statutory provision authorizing recovery, the state cannot recover compensation for maintaining a nonresident patient in a state hospital).

Although, as a general proposition, the Iowa Supreme Court had held that the trust fund is not reachable by creditors of the beneficiary, it appears that the court will allow a trust fund to be invaded for the support and maintenance of a person at a state hospital where authorized by statute. We, therefore, conclude that the income from a trust fund may be used to cover the costs of providing care for a person at a state or county care facility.

Accordingly, monies received from such a fund by Poweshiek County may be applied to retire bills received from the Linn County Psychiatric Unit.

We now turn to the question of monies received by the person in question as disability benefits from the social security administration. Such benefits are authorized by 42 U.S.C. §423 as a part of a federal scheme to provide for the aged and disabled. The federal congress also addressed the question of the alienability of benefits received pursuant to §423. At 42 U.S.C. §407, the Congress stated the following:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Section 407 was before the United States Supreme Court in *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 34 L.Ed.2d 608, 93 S.Ct. 590 (1973). In *Philpott*, the court held that all claimants, including a state,

are subject to §407, and are therefore precluded from reaching social security disability insurance payments.

In spite of *Philpott*, the Fifth Circuit Court of Appeals recently held otherwise in the case of the *Department of Health and Rehabilitative Services v. Davis*, 616 F.2d 828 (5th Cir. 1980). The court distinguished *Philpott* and held that §407 did not preclude the state of Florida from recovering reimbursement for past care and maintenance given to an incompetent whose guardian had accumulated such benefits. In pertinent part, the court stated the following:

Philpott is different from this case, however, since there the welfare recipient was capable, at least in part, of providing for his own care, and the state was not acting *in loco parentis*, as it is here. The beneficiary in *Philpott* was merely receiving assistance in providing for himself. Glasscock, however, determined to be incompetent by the Veterans' Administration since February 21, 1952, has been in confinement until the present because he is apparently incapable of caring from himself to any degree. Glasscock has had no needs during the period he has been in the Florida State Hospital that were not met by the state. Accordingly, the state is seeking to have the guardian, who is responsible for overseeing her ward's care and maintenance, do what is required by Florida law: apply the benefits received by the ward for care and maintenance to reimburse Florida for undertaking his care and maintenance. Thus, contrary to the guardian's argument, *Philpott* does not control the outcome of this case.

616 F.2d at 830.

We are not persuaded, however, by the reasoning of the *Davis* court. We find no exception in §407 based on the capability of the incompetent to provide for his/her own care, nor an exception for the state in acting *in loco parentis* that will permit a state to reach disability benefits. We, therefore, conclude that disability benefits received from the social security administration by a resident of Poweshiek County may not be applied to accumulated bills from the Linn County Psychiatric Unit.

II. You next inquire as to what will be the most appropriate disposition of monies that Poweshiek County may receive in excess of the costs incurred by the county for providing care to the person who is the subject of this inquiry. You ask what is the duty of the county auditor with respect to excess monies received, and you ask if a conservator may be appointed to handle the finances of the mentally impaired person involved in this inquiry.

It is our opinion that the first question to be answered is one of whether the mentally impaired person involved is incompetent and therefore incapable of handling her own affairs. We note that you indicate that the person in question is receiving care and treatment for mental illness. But you offered no information as to whether this person has been specifically adjudicated to be incompetent. Under §229.27, The Code 1979, hospitalization of a person for mental illness, either voluntarily or involuntarily, does not constitute a finding of or equate with nor raise a presumption of incompetence, nor does it cause the person so hospitalized to be under any legal disability for any purpose, absent a specific finding of incompetence. Accordingly, absent a specific finding of incompetence, we must presume that a person hospitalized for mental illness is competent to handle her own financial affairs. It is, therefore, our opinion that any excess monies due the person in question must be

paid to her, unless she has been adjudicated incompetent or until she is adjudicated to be incompetent in some future proceedings.

Assuming that an adjudication of incompetence has already occurred, we concur in your suggestion that either a guardian or conservator should be appointed to manage the incompetent's affairs. We suggest the possibility of a guardian or combined guardian/conservator because there may be, on occasion, a necessity for someone to consent to appropriate forms of medical treatment, as well as manage the incompetent's financial affairs. This combined approach is permissible under §633.628, The Code 1979. See generally 39 Om.Jur.2d *Guardian And Ward* §78 (1968); 39 C.J.S. *Guardian & Ward* §69 (1976).

In summary, we conclude that a trust fund may be invaded for the support and maintenance of a beneficiary residing in a state hospital or county care facility. Disability benefits paid to a recipient residing in a public care facility may not be reached to reimburse the facility for the costs of past care and maintenance provided to the recipient. Absent a specific finding of incompetence, a person hospitalized for mental illness must be presumed to be competent to handle his or her own financial affairs. Where a person has been adjudicated to be incompetent, a guardian or conservator should be appointed to manage the incompetent's financial affairs.

October 29, 1980

COUNTIES AND COUNTY OFFICERS; MUNICIPALITIES; CITY ASSESSOR: Salary, office hours, supervision. Ch. 441; §§441.1, 441.2, 441.6, 441.16, The Code 1979. The conference board fixes the salary of the city assessor. The city assessor may set the hours for which that office will be open to the public. (Bennett to Yenger, State Senator, 10-29-80) #80-10-9 (L)

October 29, 1980

CITIES AND TOWNS: City officers, official misconduct — §§362.5, 372.13(8), 721.2(6), 721.11, The Code 1979. A "knowing" violation of the requirements for compensating elected city officials contained in §372.13(8), The Code 1979, could constitute nonfelonious misconduct in office in violation of §721.2(6) of the Code. Acceptance of payments by elected city officials pursuant to an interest in a contract to furnish anything of value to the city, in the absence of open, public and competitive bidding, is a serious misdemeanor in violation of §721.11, The Code 1979. The authority to seek collection of payments made in violation of §362.5 or §372.13(8), The Code 1979, rests with the city attorney. (Dallyn to Johnson, State Auditor, 10-29-803 #80-10-10

Honorable Richard D. Johnson, Auditor of the State of Iowa: You have requested an Attorney General's Opinion concerning compensation and payments made to elected city officials pursuant to §§362.5 and 372.13(8), The Code 1979. Specifically, you pose the following questions:

1. With respect to §362.5 of the Code, does acceptance of payments by elected officials for work performed for the city, not connected to the duties of the position to which the official was elected, and without benefit of competitive bids in writing, constitute a public offense or official misconduct?

2. If the compensation of elected officials is not set by the city council in accordance with the requirements of §372.13(8) of the Code, does payment of that compensation by the council constitute a public offense or official misconduct?

3. Does the authority to seek restitution of payments made in violation of §362.5 or §372.13(8) of the Code rest with the county attorney or with other officials?

Your first question involves §362.5, The Code 1979, which prohibits any city officer or employee from having "an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for his city." This section standing alone does not make a violation of its prohibition a crime, nor does it provide for fine or imprisonment as a sanction. Hence, a violation of §362.5 is not a "public offense" on its face as defined in §701.2, The Code 1979, nor is it a simple misdemeanor by operation of §701.8 of the Code. *Contra* §372.13(6), The Code 1979 ("Failure by the clerk to make publication is a misdemeanor").

Under the pre-revised criminal code, however, a violation of §362.5 would have been an indictable misdemeanor by operation of §§687.6 and 687.7, The Code 1977 (when the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is an indictable misdemeanor). *See Leffingwell v. Lake City*, 257 Iowa 1022, 135 N.W.2d 536, 539 (1965). Furthermore, with the advent of the new criminal code, the prohibition of §362.5 was incorporated into §721.11, Supplement to the Code 1977. Section 721.11, The Code 1979, now provides that any officer of any subdivision of the state who is directly or indirectly interested in any contract to furnish anything of value to the subdivision where such interest is prohibited by statute, and where such contract is not the result of open, public and competitive bidding, commits a serious misdemeanor. Thus, in answer to your first question, a violation of the prohibition against private interests in public contracts contained in §362.5 of the Code constitutes a serious misdemeanor by operation of §721.11, The Code, a crime punishable by imprisonment not to exceed one year, or a fine not to exceed one thousand dollars, or both. *See* §903.1, The Code 1979.

Your second question refers to §372.13(8), The Code 1979, which provides in part:

By ordinance, the council shall prescribe the compensation of the mayor, council members, and other elected city officers, but a change in the compensation of the mayor shall not become effective during the term in which the change is adopted, and the council shall not adopt such an ordinance changing the compensation of the mayor or council members during the months of November and December immediately following a regular city election. A change in the compensation of council members shall become effective for all council members at the beginning of the term of the council members elected at the election next following the change in compensation.

As with §362.5 discussed above, §372.13(8) does not on its face make a violation of its requirement a "public offense" or simple misdemeanor. Moreover, there does not appear to be a section of the new criminal code which adopts the specific language of §372.13(8) and makes a violation of its requirements a criminal offense.

It does appear, however, that a "knowing" violation of the requirements of §372.13(8) could, in the right factual situation, constitute nonfelonious misconduct in office in violation of §721.2(6), The Code 1979. Section 721.2(6) provides that any public officer who knowingly fails to perform any duty required of him or her by law commits a serious

misdemeanor. Section 372.13(8), while perhaps discretionary in the sense that it does not mandate that a city council initially act to compensate each and every elected official in the city, is mandatory once the decision to compensate has been made. That is, if the council decides to compensate city officials, the council is under a duty to set and pay such compensation only in accordance with §372.13(8). *See* §362.2(11) The Code 1979 (The use of the word "shall" in the city code of Iowa imposes a duty). Thus, for example, compensation may only be prescribed by enactment of an ordinance, and any change in the compensation of council members shall only be made effective as of the beginning of the term next following that in which the change was made.

In an early case construing a forerunner of §372.13(8), the Supreme Court heard the appeal of city council members who had voted to increase their salaries for the same year in which they had voted, in violation of the city charter and Laws 6th G.A., Ch. 210, §5. The defendants claimed that, in voting to increase their salaries, they were acting in a judicial or quasi-judicial capacity and, therefore, were not criminally liable for any error or mistake of law. In rejecting this claim, the Court addressed the question of the council's duty as follows:

> Defendants were presumed to know the law, and it will be assumed that they put a proper interpretation upon the provisions . . . relating to their *duties* and disabilities. * * * The crime consists in a perversion of their *powers and duties* . . . . (emphasis added)

State v. Shea, 106 Iowa 735, 738, 72 N.W. 300 (1897).

In light of this precedent, together with the definition of "shall" as used in the city code, the duty placed upon city council members by operation of §372.13(8) would appear to be enforceable by the criminal sanction of §721.2(6), The Code 1979. Of course, any failure to perform any of these duties required by law must be done "knowingly." Section 721.2 deals only with intentional misconduct, which means that the person must have acted with actual, positive knowledge of the facts surrounding his or her act or failure to act. *See* Op. Att'y Gen. #79-9-15, at 8. These facts must be such as would have made a reasonable person aware of the duty, and the person must have intentionally disregarded this duty or the facts giving rise to it.

Your third question asks, in effect, who is the real party in interest entitled to restitution for unlawful payments and, therefore, whose legal representative has authority to initiate judicial or other proceedings for collection of these payments. Where city funds have been dispersed in violation of §362.5 or §372.13(8), The Code 1979, it is the municipal entity (the city) itself who is the party with standing to seek recovery of its funds. Thus, the question becomes what official is authorized to act on behalf of the city.

As an initial matter, it is clearly not the county attorney (who *would* prosecute any serious misdemeanor violations of §721.2(6), The Code 1979). In civil actions for recovery of funds, §336.2 restricts the appearance of the county attorney to those actions in which the *state or county* is a party.

The most obvious answer, of course, is that the city attorney would initiate any proceedings to recover payments improperly made under

§362.5 or §372.13(8), The Code 1979. This is only logical, as it is the duty of the city attorney to represent the city in litigation pending in court. *See Rankin v. City of Chariton*, 160 Iowa 265, 139 N.W. 560, 563 (1913).

In summary, a "knowing" violation of the requirements for compensating elected city officials contained in §372.13(8), The Code 1979, could constitute nonfelonious misconduct in office in violation of §721.2(6) of the Code. Acceptance of payments by elected city officials pursuant to an interest in a contract to furnish anything of value to the city, in the absence of open, public and competitive bidding, is a serious misdemeanor in violation of §721.11, The Code 1979. The authority to seek collection of payments made in violation of §362.5 or §372.13(8), The Code 1979, rests with the city attorney.

October 30, 1980

SCHOOLS: Self-insurance programs for teachers. §§279.12, 279.13, The Code 1979. A school district and teachers may contract for the establishment of a self-insurance program as a benefit of employment. Establishment of such a program by contract is not prohibited by the Code. (Norby to Murray and Hutchins, State Senators, 10-30-80) #80-10-11 (L)

October 30, 1980

ELECTIONS: Absentee voters; primary elections. Sections 39.3, 43.5, 43.41, 43.42, 48.2, 48.3, 48.11, 53.1, 53.2, 53.8, 53.11, 53.13, 53.14, The Code 1979. A written, mailed request for an absentee ballot in a primary election does not itself constitute a written declaration of a change of party affiliation under §53.51. A qualified elector applying for an absentee ballot in person after the close of registration for a primary election may not cast the ballot for the nominee of a party for which he or she is not registered, except as provided in §43.42, which permits the elector to change or declare a party affiliation only at the polls on election day. The procedures set forth in §§43.41 and 43.42 do not involve a denial of equal protection for absentee voters in primary elections. (Stork to Roberts, Buchanan County Attorney, 10-30-80) #80-10-12

Daryl E. Roberts, Buchanan County Attorney: You have requested an opinion of the Attorney General concerning the procedure required for a voter to change his or her political party affiliation in the event that the voter expects to vote by absentee ballot in a primary election. Specifically, you pose the following questions:

1. Does a mailed-in written request for an absentee primary ballot of a political party for which the requesting party is not registered constitute by itself a "written declaration" of change of affiliation within the meaning of Section 43.41, or must the requesting party execute a separate declaration of change?

2. May a voter applying for an absentee primary ballot in person after the deadline for registration has passed be permitted to cast the ballot of a party for which he/she is not registered? In other words, can the terms "polls" and "election day" in Section 43.42 be construed to include voting by absentee ballot at the office of the commissioner of elections, enabling the voter to execute the affidavit under that section at the time he/she casts his/her absentee ballot?

3. If the answer to question number two is in the negative, is it a denial of equal protection to foreclose to would-be absentee voters in a primary election one of the two means available to other voters to change their party affiliation?

Your questions must be examined in light of the inter-relationship of Chapter 43, concerning primary elections, and other Code provisions that govern elections in Iowa. Section 43.5, The Code 1979, provides:

Applicable statutes. The provisions of chapters 39, 47, 48, 49, 50, 51, 52, 53, 56, 57, 58, 59, 61, 62 and 735 shall apply, so far as applicable, to all primary elections, except as hereinafter provided.

A distinction must first be made between an "eligible elector" and a "qualified elector". An eligible elector is a person who possesses all of the qualifications necessary to entitle him or her to be registered to vote, whether or not that person is in fact registered. §39.3(1), The Code 1979. A qualified elector is a person who is registered to vote pursuant to Chapter 48, The Code 1979. §39.3(2). The provisions of Chapter 43 concerning primary elections and of Chapter 53 concerning absentee voting apply only to qualified electors. Hence, an eligible elector must register to vote before he or she is qualified either to vote in a primary election or to utilize the absentee voters law in a primary or general election.

Section 43.41 authorizes a qualified elector to change or declare a party affiliation before a primary election by filing a "written declaration" with the county commissioner:

Change or declaration of party affiliation before primary. Any qualified elector who desires to change or declare his or her political party affiliation, may, before the close of registration for the primary election, file a written declaration stating the change of party affiliation with the county commissioner of registration who shall enter a notation of such change on the registration records.

Neither §43.41 nor any other statutory provision precisely defines what constitutes a "written declaration".

Pursuant to §43.5, the provisions of Chapter 53 govern absentee voting at primary elections to the extent that the provisions are applicable to such elections. Section 53.2 sets forth basic procedural requirements for application for an absentee ballot:

Application for ballot. Any qualified elector, under the circumstances specified in section 53.1, may on any day, except election day, and not more than seventy days prior to the date of the election, make written application to the commissioner for an absentee ballot.

Nothing in this section shall be construed to require that a written communication mailed to the commissioner's office to request an absentee ballot, or any other document except the absent voter's affidavit required by section 53.13, be notarized as a prerequisite to receiving or making an absentee ballot or returning to the commissioner an absentee ballot which has been voted.

Each application shall contain the name and signature of the qualified elector, the address at which he is qualified to vote, and the name or date of the election for which the absentee ballot is requested, and such other information as may be necessary to determine the correct absentee ballot for the qualified elector. If insufficient information has been provided, the commissioner shall, by the best means available, obtain the additional necessary information.

Other sections in Chapter 53 establish how the change or declaration of party affiliation is made by absentee ballot. Section 53.8(1) states that, when sent to an applicant, an absentee ballot must be enclosed in an

unsealed envelope bearing a serial number and an affidavit.[1] Section 53.13 indicates that the state commissioner of elections has the statutory duty to prescribe the affidavit form that must be printed on the unsealed envelope. Section 53.14 further provides:

Party affiliation. Said affidavit shall designate the voter's party affiliation only in case the ballot enclosed is a primary election ballot.

The requirement of designating party affiliation by affidavit is mandatory under this section. By expressly providing a procedure for designating party affiliation by absentee ballot in a primary election, §53.14 and other accompanying provisions of Chapter 53 imply the exclusion of other procedures for making such designation. *See In re Estate of Wilson*, 202 N.W.2d 41, 44 (Iowa 1972). Accordingly, in response to your first question, a mailed, written request for an absentee ballot in a primary election does not itself constitute a "written declaration" of a change of party affiliation under §53.41. Rather, a qualified elector voting by absentee ballot in a primary election must designate party affiliation on the affidavit form supplied by the state commissioner of elections.

You inquire also about the meaning of §43.42 with respect to voting by absentee ballot. Section 43.42 provides:

Change or declaration of party affiliation at polls. Any qualified elector may change or declare a party affiliation at the polls on election day and shall be entitled to vote at any primary election. Each elector doing so shall sign an affidavit which shall be in substantially the following form:

CHANGE OR DECLARATION OF PARTY AFFILIATION

I do solemnly swear or affirm that I have in good faith changed my previously declared party affiliation, or declared by party affiliation, and now desire to be a member of the ..... party.

.....
Signature or Elector

.....
Address

Approved:

.....
Precinct election official

Each change or declaration of a qualified elector's party affiliation so received shall be reported by the precinct election officials to the commissioner of registration who shall enter a notation of the change on the registration records.

Utilization of §43.42 is contingent upon the operation of several distinct elements. The section may be utilized only by an elector who is "qualified", i.e. registered to vote pursuant to Chapter 48. Concerning place and time requirements, the section indicates that a change or declaration may be made "at the polls" and "on election day." Additionally, the section sets forth the type of affidavit that must be completed and

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[1] Section 53.8(1) further describes the procedure for mailing:

The absentee ballot and unsealed envelope shall be enclosed in a carrier envelope which bears the same serial number as the unsealed envelope. The absentee ballot, unsealed envelope, and carrier envelope shall be enclosed in a third envelope to be sent to the qualified elector.

signed by a qualified elector desiring to vote at a primary election. By allowing party affiliation to be changed or declared on election day, §43.42 basically ensures that all qualified electors will be able to vote at a primary election. In order to utilize the section, however, a qualified elector clearly must appear in person at the polls to vote. Accordingly, the procedure established by §43.52 has no application to a qualified elector who intends to vote by absentee ballot in a primary election. Rather, such voting is controlled by §43.41 in conjunction with the provisions of Chapters 48 and 53, governing registration and absentee voting respectively.

Section 53.1 sets forth the conditions for voting by absentee ballot:

Right to vote—conditions. Any qualified elector may, subject to the provisions of this chapter, vote at any election:

1. When he expects to be absent on election day during the time the polls are open from the precinct in which he is a qualified elector.

2. When, through illness or physical disability, the elector expects to be prevented from going to the polls and voting on election day.

Subject to these conditions, a qualified elector may "on any day, except election day, and not more than seventy days prior to the date of the election" make written application for an absentee ballot. §53.2, The Code 1979. In the event that an application is mailed, §53.8 states that, upon receipt of the application, the commissioner shall mail an absentee ballot to the applicant within 24 hours.[2] The ballot must be enclosed in an unsealed envelope bearing a serial number and an affidavit, which must designate the voter's party affiliation if the ballot is a primary election ballot. §§53.8(1), 53.13, 53.14. Section 53.8(2) establishes specific disclosure requirements with respect to late applications:

If an application is received so late that it is unlikely that the absentee ballot can be returned in time to be counted on election day, the commissioner shall enclose with the absentee ballot a statement to that effect. The statement shall also point out that it is possible for the applicant to personally deliver his completed absentee ballot to the office of the commissioner at any time before the closing of the polls on election day.

Alternatively, §53.11 provides for the personal delivery of an absentee ballot:

Personal delivery of absentee ballot. The commissioner shall deliver an absentee ballot to any qualified elector applying in person at his office not more than forty days before the date of the general election and the primary election, and for all other elections, as soon as the ballot is available. The qualified elector shall immediately mark the ballot, enclose it in a ballot envelope with proper affidavit, and return the absentee ballot to the commissioner. The commissioner shall record the numbers appearing on the application and ballot envelope along with the name of the qualified elector. The commissioner of any county in which there is located a city of five thousand or more population, which is not the county seat, may permit qualified electors to appear in person at some designated place within each such city and there cast an absentee ballot in the manner prescribed by this section.

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[2] Section 53.8(3) contains one exception to this procedure with respect to patients in hospitals or residents of health care facilities in the county. In these situations, §53.22 (balloting by confined persons) generally applies.

The only time restrictions in Chapter 53 concern when application for absentee ballots may *not* be made: 1) more than 70 days when mailed; 2) more than 40 days when applied for in person; 3) on election day. No time restrictions in Chapter 53 otherwise govern the ability of the commissioner of elections to receive and deliver absentee ballots to qualified electors. Section 43.41, however, specifically requires that a qualified elector change or declare a party affiliation for a primary election by filing a written declaration "before the close of registration for the primary election." The provision does not itself establish a date for the close of registration. Consequently, since Chapter 48 governs primary elections to the extent its provisions are applicable, reference is made to §48.11:

Registration time limits. The county commissioner of registration shall register, on forms prescribed by the state commissioner of elections, electors for elections in a precinct until the close of registration in the precinct. An elector may register during the time registration is closed in the elector's precinct but the registration shall not become effective until registration opens again in his precinct.

Registration shall close in a precinct at five o'clock p.m., ten days before an election, except as provided in section 48.3. The commissioner's office shall be open from eight o'clock a.m. until at least six o'clock p.m. on the day registration closes prior to each regularly scheduled election.

Section 48.2 provides for voter registration in person while §48.3 permits registration by mail as follows:

Registration by mail. As an alternative to the method of registration prescribed by section 48.2, any person entitled to register under that section may submit a completed voter registration form to the commissioner of registration in the person's county of residence by postage paid United States mail. A registration form or the envelope containing one or more registration forms for the use of individual registrants who are related to each other within the first degree of consanguinity or affinity and who reside at the same address shall be postmarked by the twenty-fifth day prior to an election or the registration will not take effect for that election. A separate registration form shall be signed by each individual registrant. Within five working days after receiving a registration by mail, the commissioner shall send the registrant a receipt of the registration by first class mail marked "do not forward". If the receipt is returned by the postal service the commissioner shall treat the registration as prescribed by section 48.31, subsection 7. An improperly addressed or delivered registration form shall be forwarded to the appropriate county commissioner of registration within two working days after it is received by any other official.

Pursuant to §§48.3 and 48.11, a qualified elector may change or declare a party affiliation under §43.41 either in person before 5:00 p.m. ten days before a primary election or by mail provided the written declaration is postmarked by the 25th day prior to the election. This time scheme precludes a qualified elector from changing or declaring a party affiliation during the nine days immediately prior to a primary election. Chapter 53 does not contain similar time restrictions for a qualified elector voting by absentee ballot. The provisions of §§43.41, 48.3 and 48.11 therefore conflict with those of Chapter 53. The former provisions apply specifically to primary elections and contain specific time restrictions for changing or declaring party affiliation in such elections, whereas the latter provisions generally govern voting by absentee ballot in all elections. According to well established principles of statutory construction, related statutes must be read in *para materia* and the terms of a

specific statute or statutes control over those of a general statute or statutes. *Berger v. General United Group, Inc.*, 268 N.W.2d 630, 638 (Iowa 1978). Sections 43.41, 48.3 and 48.11, which contain specific time restrictions for voting in a primary election, therefore do control over the more general provisions in Chapter 53 and do not permit qualified electors, after the close of registration for a primary election, to change or declare party affiliation when applying in person for absentee ballots under §53.11. Consequently, in response to your second question, we conclude that a qualified elector applying for an absentee ballot in person after the close of registration for a primary election may not cast the ballot for the nominee of a party for which he or she is not registered.

Since the answer to your second question is in the negative, you question whether the procedures established under §§43.41 and 43.42 constitute a denial of equal protection. We observe that these sections do not establish separate classifications or procedures for absentee voters; rather, the procedures for changing or declaring a political party affiliation apply equally to absentee voters and all other qualified electors. The fact that certain voters may not be able to utilize the provisions of §43.42 is not based upon a statutory classification of a discriminatory nature. *See, e.g., Luse v. Wray*, 254 N.W.2d 324 (Iowa 1977), in which the Iowa Supreme Court held that the statutory classification of §53.17, which requires absentee ballots to be delivered to patients in hospitals in health care facilities by one member of each of the two major political parties but contained no such requirement for other absentee voters, did not deny equal protection under either the "rational basis" or the "compelling state interest" test. Nothing in either §43.41 or §43.42 indicates an invidious attempt to hinder voting on the basis of race, wealth, or other improper basis. *Id.* Accordingly, we conclude that the provisions of §§43.41 and 43.42 do not constitute a denial of equal protection for absentee voters.

In summary response to your questions, we conclude the following:

1. A written, mailed request for an absentee ballot in a primary election does not itself constitute a written declaration of a change of party affiliation under §43.41.

2. A qualified elector applying for an absentee ballot in person after the close of registration for a primary election may not cast the ballot for the nominee of a party for which he or she is not registered, except as provided in §43.42, which permits the elector to change or declare a party affiliation only at the polls on election day.

3. The procedures set forth in §§43.41 and 43.42 do not involve a denial of equal protection for absentee voters in primary elections.

October 30, 1980

RESTAURANT INSPECTION; Restaurant inspection fees. Sections 170A.2 and 170A.5, The Code 1979. Sales of beer and alcoholic beverages are included in annual gross sales for purposes of calculating the license fee under §170A.5, The Code 1979. (Willits to Byerly, State Representative, 10-30-80) #80-10-13 (L)

October 30, 1980

MOTOR VEHICLES — Conviction records — Section 321.491, The Code 1979, and 1980 Session 68th G.A., H.F. 2501 §2. Magistrates and clerks of court are required to forward to the Department of Transportation records of conviction or forfeitures of bonds for either indictable or nonindictable traffic offenses. Conviction and disposition data, referred to in H.F. 2501, §2, must be forwarded to the arresting agency only if the traffic violation is an indictable offense. (Miller to Larsen, State Representative, 10-30-80) #80-10-14 (L)

October 31, 1980

COUNTIES: Article III [Sec. 39A] of the Iowa Constitution; Sections 332.3(21), 351.26, 351.37, 351.41, The Code 1979. A county ordinance providing a three day holding period for stray or at large dogs without any type of identification is a valid exercise of the county's Home Rule power which has not been preempted by nor is in conflict with the state statute providing a seven day holding period for dogs without rabies vaccination tags. (Benton to Gentleman, State Senator, 10-31-80) #80-10-16 (L)

October 31, 1980

MORTGAGES: Renegotiable rate mortgages, statute of limitations. 1980 Session, 68th G.A., S. F. 2492, §31; §§534.21(2), 614.21, The Code 1979. A renegotiable rate mortgage may be executed between a borrower and an Iowa chartered savings and loan association as a single agreement having a maturity of up to 30 years. The authorization to enter these agreements is not limited to maturities of three, four, or five years. (Norby to Johnson, Auditor of State, 10-31-80) #80-10-17

Honorable Richard D. Johnson, C.P.A., State Auditor: You have requested an opinion of the Attorney General concerning the application of Iowa's mortgage foreclosure statute of limitations, §614.21, The Code 1979, to renegotiable rate mortgages (R.R.M.'s). R.R.M.'s are authorized by 1980 Session, 68th G.A., S. F. 2492, §31 [to be codified at §534.21(2)]. This section provides as follows:

Renegotiable rate mortgage loans may be made for a term of three, four or five years, secured by a mortgage of up to thirty years, and automatically renewable at a varying interest rate. However, the authority to make home loans under this paragraph is available only for periods of time when federally chartered savings and loan associations operating in this state are granted similar authority, and the state authorization is subject to the rights and limitations imposed upon the federally chartered associations for this type of activity.

Your questions are illustrated by the following excerpt from your opinion request:

The difficulty with the Iowa statute as well as with the federal regulation is that they contemplate a series of short-term obligations rather than a single long-term obligation as the mortgage but allowing for interest rate adjustments at short intervals of time. This raises the issue as to whether or not the principal mortgage instrument can show a maturity date of, for instance, thirty years, or whether it would be required that the maturity date be shown as three, four or five years since the Iowa statute talks in terms of such short year periods. If so, this would raise the specter of Section 614.21 of the Iowa Code coming into play which provides for a ten-year statute of limitations after due date, due date in this instance being three, four or five years rather than thirty days. In other words, the maturity date of the mortgage could not be different than the maturity date set out in the note.

As we understand your concern, some confusion has arisen regarding whether S. F. 2492, §31, authorizes long-term loans secured by a mortgage of up to thirty years, or if this section only authorizes short-term loans of three, four or five years. If only loans of three, four or five years are authorized by S. F. 2492, §31, problems arise in that it would appear necessary to execute a new loan instrument and mortgage, with attendant transaction and recording expense, at the end of each three, four or five-year maturity. As discussed below, we believe that S. F. 2492, §31, authorizes a single, long-term loan agreement to be entered. The "term" of three, four or five years refers to the period between adjustments of the interest rate of the loan and is in no sense a maturity date.

Initially, if §31 were construed to allow only short-term instruments, the provision for a thirty-year mortgage would be somewhat erroneous. Under Iowa law, if enforcement of a debt is barred by a statute of limitations, enforcement of the mortgage is also barred. *Monast v. Manley*, 228 Iowa 641, 293 N.W. 12 (1940). The limitation period which applies to the debt is ten years. §614.1(6), The Code 1979. Accordingly, execution of a thirty-year mortgage in connection with a three, four or five-year loan instrument would in part be meaningless, as enforcement would be barred, at the latest, ten years after maturity of the loan.

Additionally, the provision in §31 that loans are automatically renewable indicates that one loan instrument was intended to be authorized by the section. In other words, automatic renewal would appear to more accurately describe adjustment of the terms of a continuing agreement rather than simply the possibility that the parties could enter a new agreement to finance the remaining balance. And finally, if a long-term loan were not envisioned, the limitation on interest rate increases and provision for mandatory decreases would be of no effect, as the parties would presumably be free to contract at any interest rate allowed by law if they were entering a new agreement. *See* 12 C.F.R. 545.6-4a(c)(2), (3).

As the authority of Iowa chartered savings and loans to execute R.R.M.'s is available only when similar authority is available to federally chartered savings and loans, and subject to the same rights and limitations applied to the federal institutions, we believe reference to federal regulations regarding R.R.M.'s is of significance in ascertaining the nature of the agreement which may be entered. At 12 C.F.R. 545.6-4a(b), the federal R.R.M. is described as follows:

Description. For purposes of this section, a renegotiable rate mortgage loan is a loan issued for a term of three, four or five years, secured by a long-term mortgage of up to 30 years, and automatically renewable at equal intervals except as provided in paragraph (c)(1) of this section. The loan must be repayable in equal monthly installments of principal and interest during the loan term, in an amount at least sufficient to amortize a loan with the same principal and at the same interest rate over the remaining term of the mortgage. *At renewal, no change other than in the interest rate may be made in the terms or conditions of the initial loan.* Prepayment in full or in part of the loan balance secured by the mortgage may be made without penalty at any time after the beginning of the minimum notice period for the first renewal, or at any earlier time specified in the loan contract. [Emphasis supplied.]

Although this language possibly creates the same confusion as S. F. 2492, §31, in that it speaks of three, four and five-year "terms", we believe the additional elaboration on the nature of the agreement makes it clear that long-term loan agreements are authorized. At the end of the "term", there can be an interest rate adjustment and possibly prepayment by the borrower, but we do not believe this constitutes a maturity date for purposes of the statute of limitations.[1]

In conclusion, we believe that S. F. 2492, §31, does authorize long-term loan agreements secured by mortgages of up to thirty years. The "term" of three, four, or five years referred to in this statute specifies only the frequency at which the interest rate of the loan may be adjusted and is not a maturity date for purposes of §614.21.

October 31, 1980

MUNICIPAL SUPPORT OF INDUSTRIAL PROJECTS: Projects for Beginning Businesspersons. §§419.1, 419.2, 419.16 and §§35, 36 and 37 of S.F. 2243, 68th G.A., 1980 Session. Only the eventual user of a project financed under the beginning businessperson provisions of Ch. 419 must qualify as a beginning businessperson. (Willits to Halvorson, State Representative, 10-31-80) #80-10-18

The Honorable Roger A. Halvorson, State Representative: You have requested our opinion on the following questions relating to §§35, 36 and 37 of S.F. 2243, which was enacted by the 68th G.A., 1980 Session:

1. May any person propose a building for which industrial revenue bonds could be issued and lease that building to a beginning businessperson?

2. Must that business have assets of less than $100,000.00?

3. What are the limits on the financial assets of the lessee and/or lessor?

Senate File 2243, which primarily dealt with establishment of the Iowa Family Farm Development Authority, also contained sections amending portions of Ch. 419, The Code 1979.

First, §35 of S.F. 2243, amended the definition of "Project" in §419.1 (2), The Code 1979, as follows:

'Project' means all or any part of, or any interest in, (a) any land, buildings or improvements, whether or not in existence at the time of issuance of the bonds issued under authority of this chapter, which shall be suitable for the use of any voluntary nonprofit hospital, clinic or health care facility as defined in section 135C.1, subsection 4, or of any private college or university, or any state institution governed under chapter 262, whether for the establishment or maintenance of such college or university, or of any industry or industries for the manufacturing, processing or assembling of any agricultural or manufactured products, even though such processed products may require further treatment before delivery to the ultimate consumer, or of any commercial enterprise engaged in storing, warehousing or distributing products

[1] Having discussed the nature of the agreement authorized by S. F. 2492, §31, we believe that the title "renegotiable mortgage" is itself somewhat misleading. At each renewal period, the loan will either be renewed at the appropriate index rate or the borrower may prepay all or part of the principal amount. This is the extent of what may happen at a renewal date, which may not appear to constitute "renegotiation" in that no additional bargaining occurs between the lender and borrower.

of agriculture, mining or industry including but not limited to barge facilities and river-front improvements useful and convenient for the handling and storage of goods and products, or of a national, regional or divisional headquarters facility of a company that does multistate business, *or of a beginning businessperson for any purpose* or (b) pollution control facilities which shall be suitable for use by any industry, commercial enterprise or utility. 'Pollution control facilities' means any land, buildings, structures, equipment, pipes, pumps, dams, reservoirs, improvements, or other facilities useful for the purpose of reducing, preventing, or eliminating pollution of the water or air by reason of the operations of any industry, commercial enterprise or utility. 'Improve', 'improving' and 'improvements' shall embrace any real property, personal property or mixed property of any and every kind that can be used or that will be useful in connection with a project, including, without limiting the generality of the foregoing, rights-of-way, roads, streets, sidings, trackage, foundations, tanks, structures, pipes, pipelines, reservoirs, utilities, materials, equipment, fixtures, machinery, furniture, furnishings, improvements, instrumentalities and other real, personal or mixed property of every kind, whether above or below ground level. [Emphasis in original]

Then in §36 of S.F. 2243 a definition of "Beginning businessperson" was added to §419.1, The Code 1979:

'Beginning businessperson' means an individual with an aggregate net worth of the individual and the individual's spouse and children of less than one hundred thousand dollars. Net worth means total assets minus total liabilities as determined in accordance with generally accepted accounting principles.

Finally, in §37 of S.F. 2243 a limitation on the amount of bonds for projects for a beginning businessperson is inserted in §419.2(5), The Code 1979:

To issue revenue bonds for the purpose of defraying the cost of any project and to secure payment of such bonds as provided in this chapter. *However, in the case of a project suitable for the use of a beginning businessperson, the bonds may not exceed the aggregate principal amount of five hundred thousand dollars.* [Emphasis in original]

To clarify the issue, it is helpful to extract pertinent language from §419.1(2):

'Project' means all or any part of, or any interest in, (a) any land, buildings or improvements . . . which shall *be suitable for the use of* . . . a beginning businessperson for any purpose. [Emphasis supplied]

To answer your questions, these are the key words which need interpretation.

The "test" case on Ch. 419, The Code 1979, is *Green v. City of Mt. Pleasant*, 256 Iowa 1184, 131 N.W.2d 5 (1964). In *Green*, at 1220, the Court says,

Finally, it must be remembered that these statutes for municipal promotion of industry are to be given a liberal interpretation in order to accomplish their broad social purposes. As said before in this ruling, when a municipality, with legislative permission, ventures into the field of industrial promotion expediency becomes the keynote.

Thus, when interpreting Ch. 419, The Code 1979, a liberal construction should be used to accomplish the broad social purpose of the Chapter, economic expansion. Another principle of statutory construction is that, unless a contrary intention is evident, words will be given their ordinary and commonly understood meaning. *City of Ft. Dodge v. Iowa Public Employment Relations Board*, 275 N.W.2d 393 (Iowa 1979).

The words set out above in the language extracted from the definition of project simply require that the project be suitable for the use of a beginning businessperson. There is no requirement that all the possible parties (e.g. city, county, industrial park, or developer) qualify as a "Beginning businessperson". Only the actual user of the project must qualify as a beginning businessperson.

In the language of §419.1(2), The Code 1979, the project must be "for" any of the various listed entities. (See 24 Drake Law Rev. 394) There is no requirement that the eventual user actually construct or own the project. To the contrary, §419.16, The Code 1979, specifically provides:

In order to provide available alternatives to enable municipalities to accomplish the purposes of this chapter in the manner deemed most advisable by the governing body, it is the intent of this chapter that a lessee or contracting party under a sale contract or loan agreement is not required to be the eventual user of a project; provided, that any sublessee or assignee shall assume all of the obligations of the lessee or contracting party under the lease, sale contract or loan agreement, the lessee or contracting party remains primarily liable for all of its obligations under the lease, sale contract or loan agreement, and the use of the project is consistent with the purposes of this chapter.

Thus, it is our opinion that the answers to your specific questions are as follows:

1. Any person who is otherwise qualified under Ch. 419, The Code 1979, and whose project is properly approved under that chapter, may propose a building for which industrial revenue bonds could be issued. There is no requirement that anyone but the eventual user be qualified as a beginning businessperson.

2. The eventual user must have a net worth of less than $100,000, as set forth in Sec. 36 of S.F. 2243, set out above. The beginning businessperson must be an individual. If the General Assembly had intended that other entities, such as corporations, be allowed to qualify as eventual users, the term "person," which is statutorily defined in §4.1(13) to include individuals and many entities, would have been used. "Individual" commonly denotes a natural person as distinguished from a partnership, corporation, or association. *Black's Law Dictionary*, Rev. 4th Ed.

3. There are no limits on the assets of any party (e.g. lessee, lessor, sublessee, or assignee), other than the eventual user, who must qualify as a beginning businessperson.

November 3, 1980

PHYSICIANS AND SURGEONS: Ophthalmia Prophylactics for New Borns — Religious Exemption — §140.13, The Code 1979. The religious exemption to §140.13 may include a sincere and meaningful belief based on ethical, moral or religious concepts, held with the strength of traditional religious convictions. A physician should not question those beliefs, and need not examine the parents any more than is necessary to ascertain the sincerity of the belief. It would be wise for a physician to have the parents sign some type of document when exercising the religious exemption. (Blumberg to Pawlewski, Commissioner of Public Health, 11-3-80) #80-11-1 (L)

November 3, 1980

MUNICIPALITIES: Amendments to Zoning Ordinances — §§362.2(18), (19), (20); 280.3; and 414.5, The Code 1979. Amendments to municipal zoning ordinances cannot be made by resolution. The requirements of §380.3 must be met before such amendments are valid. (Blumberg to Holden, State Senator, 11-3-80) #80-11-2 (L)

November 5, 1980

CIVIL RIGHTS/CONFIDENTIALITY/ADMINISTRATIVE RELEASE. §§601A.15(4), 601A.16, The Code 1979. The §601A.15(4) duty of confidentiality imposed on the Iowa Civil Rights Commission is not a privilege which bars the admission of evidence contained in Commission case files in district court actions authorized by §601A.16, The Code 1979. Upon the commencement of a §601A.16 action, the parties may obtain access to information in the relevant Commission case file by employing discovery techniques allowed under the Iowa Rules of Civil Procedure. (Nichols to Reis, Executive Director, Iowa Civil Rights Commission, 11-5-80) #80-11-4 (L)

November 5, 1980

PUBLIC EMPLOYEES: Leave of Absence for Military Duty. Ch. 29A, The Code 1979; §§Y 29A.1, 29A.9, 29A.28, 29A.43, 1980 Session, 68th G.A., H. F. 2518. A non-temporary employee of the state or its political subdivisions, including municipalities who is a member of the National Guard, organized reserves, or any component part of the military, naval or air forces or nurse corps of Iowa or the United States, who is ordered by the proper authority to military duty or training which can be classified as "active state service" or "federal service", as those terms are defined in §§29A.1(5) and (6), is entitled to a military leave of absence without loss of pay for the first 30 days of such service in any year. When a state employee receives a full day's pay from federal sources for duty in the National Guard, the state employee is required to count the hours lost from work as a full day of leave for military duty, or may elect to expend eight hours of compensatory time which the state employee may have accrued. The first 30 days of leave in a year which a state employee may elect to take are to be received without loss of regular pay. (Hyde to Keating, Director, Iowa Merit Employment Department, 11-5-80) #80-11-5 (L)

November 18, 1980

CAMPAIGN FINANCE DISCLOSURE COMMISSION; CONSTITUTIONAL CONVENTION QUESTION; CORPORATE CAMPAIGN CONTRIBUTIONS; ELECTIONS: Iowa Const., art. X, §3; Ch. 56, The Code 1979; §§56.2, 56.5, 56.6, 56.29, The Code 1979; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). The question to be submitted to the electors of Iowa at the 1980 general election regarding whether a constitutional convention question shall be held is a "ballot issue" as contemplated by Ch. 56, The Code 1979, and persons who fall within the definition of a "political committee" set forth in §56.2(6) who accept contributions, make expenditures, or incur indebtedness over a $100 threshhold for the purpose of supporting or opposing passage of the constitutional convention question are subject to the reporting and disclosure requirements of Ch. 56. Corporations are not prohibited from contributing or expending funds to support or oppose a ballot issue, as held by the United States Supreme Court in *First National Bank of Boston v. Bellotti*, but may be subject in certain instances to organization and disclosure requirements of Ch. 56. (Hyde to Gentleman, State Senator, 11-18-80) #80-11-6

Honorable Julia Gentleman, State Senator: This office has received your request for an opinion upon a number of questions concerning the scheduled vote on calling a constitutional convention, and related ques-

tions concerning the interpretation of campaign finance disclosure regulated by ch. 56, The Code 1979. As your letter noted, under Iowa Const., art. X, §3, at the general election in 1970 and every ten years thereafter, the question, "Shall there be a Convention to revise the Constitution, and proposed amendment or amendments to same?", is required to be submitted to the electors of Iowa. In light of this, you have specifically asked:

1. [W]hether this question is a "ballot issue" as defined in §56.2(6), The Code 1979?

2. If the answer to the first question is in the affirmative, under chapter 56 of the Code, does any committee or group of persons [as defined in §56.2(5) of the Code] receiving contributions or making expenditures to support or oppose the question of calling a constitutional convention then become a "political committee" required to file an organization statement and periodic disclosure reports?

3. Do you reach a different result in the second question if the group involved is one that communicates its position on the convention question to its own members only to educate them on the issue, as opposed to a group which is seeking to influence the public at large?

4. If the answer to the second question is in the affirmative, does the expenditure of *any* funds — beyond the threshhold of one hundred dollars — in support of or opposition to the convention question bring the organization and disclosure requirements of chapter 56 into effect?

I.

Section 56.2(6), The Code 1979, defines a "political committee" 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.* [Emphasis supplied.]

Every committee as defined in ch. 56 which promotes or opposes a "ballot issue", must file a statement of organization within ten days from the date of its organization and becomes subject to financial disclosure requirements. *See* §§56.5 and 56.6, The Code 1979. The term "ballot issue" is not defined in ch. 56, The Code 1979. "Words are to be given their ordinary meaning unless defined differently by the legislative body or possessed of a peculiar and appropriate meaning in law." *State ex rel. State Highway Commission v. City of Davenport*, 219 N.W.2d 503, 507 (Iowa 1974); *see* §4.1(2), The Code 1979. The term "ballot issue", as used through ch. 56, The Code 1979, denotes an issue or question submitted to the electors on an election ballot, for their approval or disapproval; *i.e.*, simply an issue on the ballot.

An opinion issued from this office earlier this year delineated when committees which were expending funds supporting or opposing a ballot issue became subject to the reporting requirements of ch. 56. *See* 1980 Op. Atty. Gen. #80-7-2. That opinion stated: "The determination of when an issue which may be the subject of public interest or debate becomes a ballot issue, triggering any financial disclosure requirements of ch. 56, The Code 1979, will differ from issue to issue, and it would be impracticable for us to define precisely each such instance in this opinion . . . It is our opinion that when statutory requirements concerning the

initiation of submission of any question to the electors of the state or one of its political subdivisions have been met by the governing entity charged with the responsibility to see that the question is presented to the voters at an election, the 'question' has become a ballot issue. A determination that an issue of public interest or controversy that attracts proponents to public debate is a 'ballot issue' at some earlier point could markedly chill participation in the political process." Op. Atty. Gen. #80-7-2, p. 2. The opinion noted that the general term "ballot issue" was defined similarly in a Campaign Finance Disclosure Commission Declaratory Ruling implemented December 22, 1976, and that further, in any specific instance, a declaratory ruling may be sought from the Campaign Finance Disclosure Commission.

On August 14, 1980, the Campaign Finance Disclosure Commission adopted the following Declaratory Ruling[1] in response to questions similar to yours:

Question: State Senator Bob Rush requested a declaratory ruling to the following:

1. Does the question regarding voter's desire for a constitutional convention constitute a "ballot issue" for purposes of Chapter 56?

2. Is a political committee which is urging voters to vote yes for a constitutional convention subject to the disclosure requirements of Chapter 56?

Answer: In Article X, section 3, the Iowa Constitution provides that:

". . . At the general election to be held in the year one thousand nine hundred and seventy, and *each tenth year thereafter*, . . . the question 'Shall there be a convention to revise the constitution and provide amendment or amendments to same' *shall* be decided by the electors qualified to vote for members of the General Assembly . . . " [Emphasis provided.]

The Constitution therefore provides that the question of a constitutional convention automatically appears on the general election ballot in 1970, 1980, 1990, etc. There is no provision for its omission. The Constitutional convention question under these circumstances clearly is a ballot issue. It is a question routinely placed on the ballot every ten years.

Since the constitutional convention is a ballot issue under the above circumstances, a political committee urging voters to vote either 'yes' or 'no' on the issue is subject to the disclosure requirements of Chapter 56 of the Code. Funds contributed, expended or incurred in excess of $100.00 are required to be reported.

We concur in the ruling of the Commission. It is our opinion that the question to be submitted to the voters at the 1980 general election calling for a constitutional convention is a "ballot issue", as contemplated by §56.2(6), The Code 1979.[2]

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[1] The issuance of a declaratory ruling by the Campaign Finance Disclosure Commission may be reviewed pursuant to the judicial review provisions of §17A.19, The Code 1979. *See* §17A.9, The Code 1979.

[2] A 1970 opinion from this office concluded that the question of calling a constitutional convention submitted to the voters in 1970 was not in itself a constitutional amendment or "public measure." 1970 Op. Atty. Gen. 451. In the context of construing §49.43, The Code 1966, (since amended), which required constitutional amendments and public measures submitted to the voters to be printed on a separate ballot, the

The question will appear on the November 4, 1980, election ballot, and will be voted on by the electors of the state, as required by Iowa Const., art. X, §3. No governmental entity was required to act to place the question before the voters; the Secretary of State, as state Commissioner of Elections, prepared the ballot to include the question.

Since we conclude, as did the Campaign Finance Disclosure Commission, that the question whether a constitutional convention should be held is a "ballot issue", it follows that any group or committee 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 the question would be subject to the reporting requirements of ch. 56, The Code 1979. *See* §56.2(6), The Code 1979; Campaign Finance Disclosure Commission Declaratory Ruling, August 14, 1980. Within ten days of its organization, such a committee must file an organization statement pursuant to §56.5, The Code 1979; collection, expenditure, or indebtedness of any amount exceeding $100 in any calendar year by the committee must be disclosed pursuant to §56.6, The Code 1979. The distinction between actions which are deemed "supporting or opposing a . . . ballot issue" and those merely disseminating factual or educational information may at times be slight, requiring a factual determination not appropriately made by this office. In situations where questions exist concerning the activities of a committee or organization, a declaratory ruling may be sought from the Campaign Finance Disclosure Commission.

In summary, the specific questions you have propounded may be answered:

1. The question to be submitted to the electors of Iowa at the November 4, 1980, general election regarding whether a constitutional convention shall be held is a "ballot issue", as contemplated by §56.2(6), The Code 1979.

2. Under §§56.2(6), 56.5 and 56.6, an organization, group, or committee accepting contributions, making expenditures, or incurring indebtedness over a $100 threshhold in any one calendar year for the purpose of supporting or opposing passage of the constitutional convention question are required to file an organization statement and periodic disclosure reports.

3. In any specific instance, whether an organization is a "political committee" as defined in §56.2(6), The Code 1979, or is engaging in those activities which will bring it under the reporting requirements of ch. 56, The Code 1979, is a factual determination more properly made by the Iowa Campaign Finance Disclosure Commission.

(Footnote Cont'd)

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opinion noted: "Plainly, the proposition called for by the 1964 amendment [Iowa Const., art. X, §3] is not in and of itself a constitutional amendment . . . [I]t is not what one ordinarily thinks of as a 'public measure'. In other words it is neither fish nor fowl, but something else which the constitution requires be submitted to the people. However, the statutes are completely silent on the manner of submission." 1970 Op. Atty. Gen. at 452.

This opinion was issued prior to the 1975 adoption of the Campaign Disclosure—Income Tax Checkoff Act, and does not consider whether the question calling for a constitutional convention is a "ballot issue", as contemplated by ch. 56, The Code 1979.

4. The receipt, expenditure or indebtedness of *any* amount in excess of $100 in any calendar year for the purpose of supporting or opposing the constitutional convention question may trigger the organization and disclosure requirements of ch. 56, The Code 1979.

II.

Your letter also posed a series of questions concerning an interpretation of §56.29, The Code 1979, restricting corporate contributions to political campaigns, in light of the United States Supreme Court decision in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) and a 1978 opinion from this office, 1978 Op. Atty. Gen. 706. Specifically, you have inquired:

1. May a corporation donate its own funds to a 'political committee' which supports or opposes the question of calling a constitutional convention? We ask about funds other than those which §56.29 of the Code permits a corporation to use in the administration of a political action committee formed by corporate officers to solicit individual contributions.

2. May a corporation utilize its own funds to communicate its position on the convention question to and educate its own officers and employees?

3. May a corporation utilize its own funds to communicate its position on the constitutional convention question directly to the public?

4. May a membership group utilize funds derived from dues paid with corporate monies to support or oppose the constitutional convention question?

5. May a corporation contribute its own funds to a group or committee which either supports or opposes the constitutional convention question, but which does not organize or disclose under chapter 56 of the Code?

Section 56.29, The Code 1979, as amended in 1977, provides:

1. 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.

2. Except as provided in subsection 3 of this section, *it shall be unlawful for any member of any committee, or employee or representative thereof, or candidate for any office or the representative of such candidate, to solicit, request, or knowingly receive from 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, or representative thereof, any money, property, or thing of value belonging to such insurance company, savings and loan association, bank, or corporation for campaign expenses, or for the purpose of influencing the vote of any elector. Nothing in this section shall be construed to restrain or abridge the freedom of the press or prohibit the consideration and discussion therein of candidacies, nominations, public officers, or public questions.*

3. 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 mem-

bers for contributions to a committee sponsored by that entity and of financing the administration of a committee sponsored by that entity. The entity's employees to whom the foregoing authority does not extend may voluntarily contribute to such a committee but shall not be solicited for contributions. 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.

4. The restrictions imposed by this section relative to making, soliciting or receiving contributions shall not apply to a nonprofit corporation or organization which uses those contributions to encourage registration of voters and participation in the political process, or to publicize public issues, or both, but does not use any part of those contributions to endorse or oppose any candidate for public office or support or oppose ballot issues.

5. Any person convicted of a violation of any of the provisions of this section shall be guilty of a serious misdemeanor. [Emphasis supplied.]

This section has been interpreted to prohibit both profit and nonprofit corporations[3] from contributing directly or indirectly to *any* committee, whether organized as a candidate's committee or political committee, for the purpose of influencing the vote of any elector as to a candidate or ballot issue.[4] *See* 1978 Op. Atty. Gen. 307; Campaign Finance Disclosure Commission Declaratory Ruling, March 23, 1976. "Contribution" is defined in §56.2(4), The Code 1979, as:

a. A gift, loan, advance, deposit, rebate, refund, or transfer of money or a gift in kind.

b. The payment, by any person other than a candidate or political committee, of compensation for the personal services of another person which are rendered to a candidate or political committee for any such purpose.

'Contribution' shall not include services provided without compensation by individuals volunteering their time on behalf of a candidate or political committee except when organized or provided on a collective basis by a business, trade association, labor union, or any other organized group or association. 'Contribution' shall not include refreshments served at a campaign function so long as such refreshments do not exceed fifty dollars in value or transportation provided to a candidate so long as its value computed at a rate of ten cents per mile does not exceed fifty dollars in value.

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[3] Section 56.29, The Code 1979, refers to a "corporation organized pursuant to the laws of this state or any other state, territory or foreign country, *whether for profit or not* . . .". Nonprofit corporations or organizations which contribute or expend funds to encourage voter registration and/or to publicize public issues but do not endorse, support or oppose candidate or ballot issues are exempted from the restrictions by §56.29(4), The Code 1979.

[4] Pursuant to §56.29(3), The Code 1979, a corporation may establish a political action committee and contribute resources to the committee for the committee's use in financing the administration of the political committee and soliciting contributions from stockholders and administrative officers. All contributions made to such a committee are specifically subject to disclosure.

Thus, the direct expenditure by a corporation of funds to advertise or publicize one view of a ballot issue would appear to be an indirect contribution in the form of free advertising to those committees organized to espouse a similar view. All contributions, whether direct or indirect, for the purpose of influencing the vote of any elector, are prohibited.

These restrictions contained in §56.29, The Code 1979, must, however, be analyzed differently in light of the United States Supreme Court's decision in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, *reh. den.*, 438 U.S. 907, 98 S.Ct. 3126, 57 L.Ed.2d 1150 (1978).

In *Bellotti*, a Massachusetts statute[5] that prohibited expenditures by banks and business corporations to influence the outcome of referenda, unless the underlying issue materially affected the property, business, or assets of the corporation, was held unconstitutional.

Under a First Amendment analysis, the Court determined that character of the communication (in this case, publication of political views concerning a referendum on a graduated individual income tax), not the speaker, determined whether the communications were within constitutional protections:

> . . . '[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' If the speakers here 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 corporation, association, union, or individual.

435 U.S. at 776-77. The Court found no compelling interest had been shown by the state in asserting the need to prevent rich and powerful corporations either from dominating communications in the electoral process or from wielding undue influence with the possibility for corruption, *when* the election in question concerns a referendum or public measure.

> 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.'

435 U.S. at 790.

Further, the Court determined that the state's interest in protecting the rights of share holders whose views differed from those expressed

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[5] Massachusetts Gen. Laws Ann., ch. 55, §8 (West Supp. 1977) provided in relevant part: "No corporation . . . , shall directly or indirectly give, pay, expend or contribute, . . . any money or other valuable thing 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 Court noted that appellant banks "wanted to spend money to publicize their views on a proposed constitutional amendment that was to be submitted to the voters as a ballot question at a general election on November 2, 1976." 435 U.S. at 769.

by management on behalf of the corporation, could not justify the infringement on speech which is protected by the First Amendment. The Court limited its consideration to the expenditure of corporate funds to espouse viewpoints concerning referenda, indicating the state's interest may justify restrictions on contributions to candidates. 435 U.S. at 788.

Since 1978, at least one federal circuit court has interpreted *Bellotti* to determine a state statute which permitted expenditures but prohibited contributions by corporation in support of or in opposition to ballot issues overbroad and constitutionally impermissible. *C & C Plywood Corp. v. Hanson*, 583 F.2d 421 (9th Cir. 1978). Similarly, a 1978 opinion from this office concluded that the §56.29 restrictions on corporate contributions or expenditures in campaign practices conflict with First Amendment protections. 1978 Op. Atty. Gen. 706.

That 1978 opinion, after analyzing *Bellotti*, determined that an Iowa court faced with the question of the constitutionality of §56.29, The Code 1979, would find it an invalid restriction on free speech protections, and strike it down. Thus, the opinion concluded that it was "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" and "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." 1978 Op. Atty. Gen. 710, 713. The analysis and language employed in this opinion has resulted in some confusion, however, as to the restrictions, if any, on corporate participation in the political arena. We believe three separate questions must be answered before the limits on corporations can be defined. It is important to note that this discussion concerns only corporate expenditures or contributions to support or oppose a *ballot issue*.

First, it seems clear from the analysis contained in *Bellotti* and the 1978 Attorney General's opinion that an insurance company, savings and loan association, bank, profit or nonprofit corporation may spend its funds directly on advertising or publicizing its views supporting or opposing a ballot issue. We believe that the statement contained in the 1978 opinion that a corporation may "take a public position" on a ballot issue was intended to express this conclusion. In *Bellotti*, banks attempting to spend money directly to oppose a referendum brought the challenge which resulted in the invalidation of the restrictions on such expenditures. Assuming that the Iowa statute, §56.29, The Code 1979, would be read by a court to prohibit such direct corporate expenditures as indirect contributions, we believe that the prohibition would be impermissible.

Second, it also seems clear from *Bellotti* that any prohibition on contributions by an insurance company, savings and loan association, bank and profit or nonprofit corporation to any political committee which supports or opposes a ballot issue would be equally invalid. The Massachusetts statute struck down in *Bellotti* prohibited corporate contributions for the purpose of influencing the vote on a ballot question, and we believe that §56.29, The Code 1979, would similarly give way to First Amendment protections. In this context, arguments that the prohibitions limit hidden corporate influence or corruption are weakest, since any

contribution exceeding $25 in value to any political committee must be disclosed by that committee.

Finally, the validity of reporting and disclosure requirements that may be imposed on an insurance company, savings and loan association, bank and profit or nonprofit corporation which expends or contributes funds to support or oppose a ballot were not addressed by *Bellotti.* The 1978 Attorney General's opinion concluded that committee organization, reporting or disclosure requirements "impose too greatly on protected First Amendment freedoms" when applied to corporate support or opposition to ballot issues. 1978 Op. Atty. Gen. at 712-713. We believe this conclusion may well exceed the analytical authority offered in *Bellotti,* particularly in light of the Supreme Court's decision in *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), upholding substantive provisions of the Federal Election Campaign Act of 1971 with respect to campaign finance disclosure requirements.

We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since [*N.A.A.C.P. v. Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958)], we have required that the subordinating interests of the State must survive exacting scrutiny. We have also insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed . . . This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure. 424 U.S. at 64-65.

Buckley delineated at least three state interests which appear to outweigh the infringement on privacy of association and belief guaranteed by the First Amendment which disclosure statutes may impose: providing information as to the source of political campaign funds to identify for the voter those interests to which a candidate is most likely to be responsive, deterring corruption by exposing large contributions and expenditures; and facilitating detection of violations. While similar state interests could not justify total prohibitions on corporate participation in public discussion of ballot issues, it does not necessarily follow that the same interests would give way in the context of disclosure or reporting requirements.[6] The Court in *Bellotti* simply was not faced with a challenge to the validity of reporting and disclosure requirements which may be imposed on corporations spending or contributing funds in support of or in opposition to a ballot issue.

The author of the 1978 Attorney General's opinion noted the difficulty and risk in forecasting judicial interpretation of any statute. "Questions as serious as those who [sic] proffer simply should not be answered in

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[6] The 1978 Attorney General's opinion so concluded: "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.' , . . . and disclosure and reporting requirements cannot serve to expose the potential for graft, part of a system of candidate contributions from willing corporate sponsors." 1978 Op. Atty. Gen. at 712.

a vacuum and would not be if tendered to the courts." 1978 Op. Atty. Gen. at 707. In this instance, we believe that speculation concerning the validity of corporate contribution disclosure requirements was not necessary, and exceeded the scope of direct guidance offered by earlier judicial interpretations of *Buckley* and *Bellotti*. Chapter 56, The Code 1979, contains no reporting or disclosure mechanism which may be tested in the manner set out in the 1978 opinion.

Corporations may contribute funds directly to political committees formed to support or oppose a ballot issue.[7] Those committees are required to file both an organization statement, §56.5, The Code 1979, and disclosure reports, listing the name and mailing address of each "person", as defined in §56.2(5), The Code 1979, who contributes more than $25 in a calendar year. A corporation which spends funds directly on advertising or publicizing views which support or oppose a ballot issue, is unlikely to be deemed to be a "political committee" required to file reports. The definition of "person" set out in §56.2(5) includes "any individual, *corporation*, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, labor union, or any other legal entity." Section 56.2(6) defines "political committee" as "*persons* organized" for certain purposes. An individual would not be required to organize a committee or file disclosure reports when he or she spends money to support or oppose a ballot issue, so long as that individual involves no person other than those who are paid by the individual. Similarly, an individual corporation, as a single legal entity, may spend money to support or oppose a ballot issue without organizing or filing reports pursuant to §§56.5 and 56.6, The Code 1979. Corporations which band together with other individuals, corporations, or legal entities for the purpose of accepting contributions, making expenditures, or incurring indebtedness in any one calendar year exceeding $100 to support or oppose a ballot issue would fall within the definition of "political committees" and would be subject to reporting requirements. It is unlikely that a court would determine that organization and disclosure requirements which may be imposed on individuals become too onerous and infringe impermissibly on First Amendment protections when imposed on corporations.

Thus, in response to your questions, it is our opinion:

1. A corporation may donate its own funds to a "political committee" which supports or opposes the question of calling a constitutional convention. The committee receiving any such contribution would be required to disclose it, pursuant to §56.6, The Code 1979.

2. A corporation may utilize its own funds to communicate its position on the convention question to its own officers and employees. So long as the corporation involved no other "person" in the communication, it would not be subject to disclosure requirements. There have never been restrictions on any corporation or individual spending money to "educate" others about a ballot issue, if no position supporting or opposing the issue were taken. *See* 1978 Op. Atty. Gen. at 710.

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[7] The contributions must be made by the corporation on its own behalf. Section 56.12, The Code 1979, prohibits contributions made in the name of another "person".

3. A corporation may utilize its own funds to communicate its position on the constitutional convention question directly to the public. So long as the corporation involved no other "person" in the communication other than those receiving compensation, it would not be subject to disclosure requirements. A corporation which forms part of a group of persons communicating a position to the public may become subject to organization and reporting requirements as a "political committee".

4. A "membership group" which takes a position supporting or opposing a ballot issue may become subject to organization and reporting requirements as a "political committee." Any such determination is more properly made in a specific factual instance by the Campaign Finance Disclosure Commission. The nature of the organization, the length of its existence, the purpose for which it was created, and the activities it undertakes may be relevant considerations to such a determination. We note that a membership group which incorporates as a method of avoiding organization and disclosure requirements imposed by ch. 56 may be soliciting and expending "dues" which would more properly be designated "contributions". It is unlikely that a court would determine that such a membership group, despite its corporate status, is entitled to the interpretation of §56.29 suggested by *Bellotti.*

5. A corporation may contribute its own funds to a group or committee which supports or opposes the constitutional convention question, but which has not filed an organization statement or disclosure reports pursuant to §§56.5 and 56.6, The Code 1979. If that committee or group accepts contributions, makes expenditures or incurs indebtedness exceeding $100 in any calendar year, it is required to comply with the reporting requirements of ch. 56. The committee, not the contributor, is the entity responsible for disclosure, and any willful violation of the provisions of ch. 56 constitutes a serious misdemeanor. Section 56.16, The Code 1979.

November 18, 1980

SHERIFF — A spouse or relative of a sheriff may be compensated on a fixed fee per-meal basis for feeding prisoners. Constitution of Iowa, §39A, §§338.1, 338.2, The Code 1979. (Williams to Barry, Assistant Muscatine County Attorney, 11-18-80) #80-11-7(L)

November 18, 1980

CIVIL RIGHTS / EXPARTE COMMUNICATIONS: Sections 17A.17, 601A.15, The Code 1979. The Executive Director, Director of Compliance, Director of Operations, and Internal Hearing Officer of the Iowa Civil Rights Commission may discuss the merits of a contested case with the Commissioners of the Iowa Civil Rights Commission, if they do not have a personal interest in the case, have not been directly involved in its investigation or prosecution, and have not acted in the position of an advocate for the complainant, as long as extra record evidence is not thereby improperly considered or used. (Jacobs to Reis, 11-18-80) #80-11-8

Ms. Artis Van Roekel Reis, Executive Director, Iowa Civil Rights Commission: You have requested an opinion from this office as to whether §17A.17, The Code 1979, or any other provision of the law prohibits the Executive Director, Director of Compliance, Director of Operations, or hearing officer who issued a determination of probable cause or no probable cause (internal hearing officer) from advising the Commissioners of the Iowa Civil Rights Commission regarding the merits of a

contested case after the hearing officer's proposed decision is issued but prior to the Commission's final action in the case. It is the opinion of this office that these staff members may engage in such discussions if they have no personal interest in the case and have not directly engaged in investigating, prosecuting, or advocating in the case, as long as extra-record evidence is not improperly considered or used.

Section 17A.17, The Code 1979, provides for disqualification of a decisionmaker in a contested case on the basis of personal bias. It also prohibits a participant in the making of any proposed or final decision in a contested case from having prosecuted or advocated in that case, or from being subject to the authority of any person who has done so. In addition, §17A.17 prohibits ex parte communications between the individuals assigned to render a proposed or final decision in a contested case, and parties or their representatives or any persons who have a personal interest in or who are engaged in prosecuting or advocating in the case.

This ex parte communications provision is applicable to the issue raised in this request. Specifically, Section 17A.17(1), The Code 1979, provides:

Unless required for the disposition of ex parte matters specifically authorized by statute, individuals assigned to render a proposed or final decision or to make findings of fact and conclusions of law in a contested case, shall not communicate, directly or indirectly, in connection with any issue of fact or law in that contested case, with any person or party, except upon notice and opportunity for all parties to participate as shall be provided for by agency rules.

However, without such notice and opportunity for all parties to participate, individuals assigned to render a proposed or final decision or to make findings of fact and conclusions of law in a contested case, may communicate with members of the agency, and may have the aid and advice of persons other than those with a personal interest in, or those engaged in prosecuting or advocating in the case under consideration or a pending factually related case involving the same parties.

The Commissioners are members of the Iowa Civil Rights Commission[1] and are the individuals who make findings of fact and conclusions of law and render final decisions in contested case proceedings before that agency.[2] Since the Executive Director, Director of Compliance, Director of Operations and internal hearing officer are not members of the Commission,[3] the Commissioners may discuss the merits of a contested case prior to a final decision with them only if those staff members have no personal interest in and have not prosecuted or advocated in the case under consideration or a pending factually related case involving the same parties.

The Iowa Civil Rights Act establishes several procedural steps through which complaints are processed by the Iowa Civil Rights Commission. After a complaint is filed, "an authorized member of the commission" makes "a prompt investigation" and issues a recommendation to the Commission's internal hearing officer, who then issues a determination of probable cause or no probable cause. §601A.15(3)(a), The Code 1979.

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[1] §601A.2(9), The Code 1979.
[2] §601A.15(8), The Code 1979.
[3] §17A.2(10), The Code 1979.

If this hearing officer determines that there is probable cause to credit the allegations of the complaint, the "staff of the commission" must then "promptly endeavor to eliminate the discriminatory or unfair practice by conference, conciliation, and persuasion", §601A.15(3)(c), The Code 1979. When the Executive Director determines that informal resolution is "unworkable", and thirty days has expired from the date of the initial conciliation meeting without agreement, the Director, "with the approval of a commissioner", serves a notice on the respondent, requiring it to answer the charges of the complaint at a public hearing. §601A.15(5), The Code 1979. The "investigating official" is expressly prohibited from participating in the hearing or in the deliberations of the Commission in the case. The case in support of the complaint is presented at the hearing by an attorney or agent of the commission. §601A.15(6), The Code 1979. In practice, the Commission utilizes the services of an assistant attorney general to represent the complainant at the hearing.

The purpose behind the concept of "internal separation" within an administrative agency is "the protection . . . of the judging function, so that it will not become contaminated through influence of those who are prosecuting or investigating." 2 K.C. Davis, *Administrative Law Treatise* §13.05, p. 201 (1958). The Iowa Civil Rights Act itself provides for the insulation of the decisionmaker from the investigating official, and the Commission has avoided problems of undue influence of the prosecutor on the decisionmaker through the use of prosecuting attorneys from the Iowa Department of Justice. Unless the Executive Director, Director of Compliance, Director of Operations, or internal hearing officer has a personal interest in a case beyond a devotion to the principles of non-discrimination, or has in some manner been directly involved in investigating the complaint or in "advocating" for a complainant during the conciliation or hearing stage, it is the opinion of this office that there is no violation of either §601A.15(6) or §17A.17(1) if those staff members discuss the merits of a contested case with the Commissioners.

Indeed there are strong arguments in favor of permitting consultations between agency decisionmakers and agency staff members:

> The reasons for consultation with agency specialists involve one of the principal elements of strength of the administrative process. The typical commissioner or board member is not necessarily a specialist in all the fields of specialization that are drawn upon in deciding cases . . . The special strength of the administrative process does not grow out of diversity of backgrounds of agency heads . . . The strength lies in staff work organized in such a way that the appropriate specialization is brought to bear upon each aspect of a single decision . . .

2 K.C. Davis, *Administrative Law Treatise*, §11.10, p. 84 (1958). In the absence of a special statutory provision, most state and federal courts permit consultations between agency decisionmakers and noninvestigating and nonprosecuting staff as long as extra-record evidence does not come in. *Id.* §11.09, p. 72.

If the Commissioners considered extra-record facts provided by staff members and based their decisions upon them, there would be a violation of the IAPA, which provides:

> Findings of fact shall be based solely on the evidence in the record and on matters officially noticed in the record.

§17A.12(8), The Code 1979. However, this does not prevent staff members from evaluating and analyzing evidence properly admitted and made a part of the record, and from making recommendations to the Commissioners based upon that evidence. Indeed, the IAPA seems to contemplate precisely this type of assistance:

The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

§17A.14(15), Th Code 1979.

CONCLUSION

Therefore, it is the opinion of this office that the Executive Director, Director of Compliance, Director of Operations, and internal hearing officer of the Iowa Civil Rights Commission may discuss the merits of a contested case with the Commissioners if they do not have a personal interest in the case, have not been directly involved in its investigation or prosecution, and have not acted in the position of an advocate for the complainant, as long as extra-record evidence is not thereby introduced and improperly used.

November 26, 1980

CONSTITUTIONAL LAW: GOVERNOR: ITEM VETO. Iowa Constitution, Art. III, §16; House File 2598, 68th G.A., 1980 Session; §§97B.59, 97B.67, The Code 1979. The Governor's attempted item veto of sections 25 and 26 of H.F. 2598 is invalid. H.F. 2598 is not an appropriation bill and is consequently not subject to item veto. (Fortney to Bruner, State Representative, 11-26-80) #80-11-9

The Honorable Charles Bruner, State Representative: You have requested an opinion of the Attorney General regarding Governor Robert D. Ray's exercise of an item veto with respect to portions of House File 2598, adopted by the 1980 Session of the Sixty-eighth General Assembly. It is our opinion that House File 2598 is not an appropriation bill within the purview of the Iowa Constitution, article III, section 16. Consequently, the bill is not subject to an item veto and the attempted exercise of such veto power is constitutionally ineffective.

House File 2598 is entitled "An act relating to administration, benefits, and funding of certain public retirement systems, and to make appropriations." Section 2 of the bill does, in fact, make an appropriation, which will be discussed further. However, this is the only section which contains an appropriation. The balance of the bill effectuates substantive changes in the state's general laws. The bill increases the amount of retirement benefits, changes the method of computing an employee's period of service, alters eligibility criteria for retirement benefits, amends the concept of "vested", and increases certain court costs. The only provision of House File 2598 which can be denominated an appropriation is section 2 which provides:

There is appropriated from the general fund of the state to the judicial retirement fund the sum of seven hundred twenty thousand (720,000) dollars for the fiscal year beginning July 1, 1980, and ending June 30, 1981.

On May 20, 1980, the Governor transmitted House File 2598 to the Secretary of State accompanied by a veto message.[1] The Governor vetoed two sections of the bill, section 25 and section 26. Section 25 amended §97B.59, The Code 1979, as follows:

The [department] *legislative council* shall employ an actuary *for the department to serve* as its technical advisor. The compensation of the actuary and of other employees shall be fixed by the department within the appropriations made therefor *and subject to the approval of the legislative council.*

Section 26 amended §97B.67, The Code 1979, by adding the following new subsection:

It is the intent of the general assembly that the general assembly meeting in 1982 review whether there is sufficient unobligated revenue in the general fund of the state to appropriate funds to pay the benefit increases provided in sections three (3), fourteen (14) and twenty-one (21) of this Act from the general fund of the state, and if sufficient revenue is available, the general assembly shall appropriate the funds necessary.

The authority of the Governor to exercise a veto is found in Iowa Constitution, article III, section 16. If the Governor wishes to veto a bill he or she must disapprove the measure as a totality. The only exception to this rule is found in Amendment 4 of the 1968 Amendments which authorized the item veto of appropriation bills. The Amendment reads:

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.

If a bill is not an appropriation bill, it is not subject to the authority conferred on the Governor by the 1968 Amendment. Without question, section 2 of the House File 2598 makes an appropriation. Our analysis thus focuses on the question of whether the inclusion of a single appropriation in a bill, the balance of whose provisions does not make appropriations, converts the bill, as a whole, into an appropriation bill.

The seminal case on this question was decided by the United States Supreme Court in 1977. *Bengzon v. Secretary of Justice and Insular Auditor of the Philippine Islands*, 299 U.S. 410, 57 S.Ct. 252, 81 L.Ed. 312 (1937), presented a factual pattern nearly identical to that raised by House File 2598. The statute in question was concerned with retirement "gratuities" to be paid to public employees and officials. The act

[1] The Governor's veto was based in part on the belief that sections of House File 2598 represented an unconstitutional intrusion by the General Assembly into the areas reserved to the executive. These concerns, which raise significant questions of constitutional law, are not addressed in this opinion and we do not pass upon them. We speak here only to the constitutionality of the Governor's item veto.

provided, in various sections, classifications of employees entitled to a gratuity, a method of computing the amount to be paid, an entitlement for successor beneficiaries in the event of the employee's death, etc. In one section of the bill an appropriation was made as follows: "The necessary sum to carry out the purposes of this Act is hereby appropriated out of any funds in the Insular Treasury not otherwise appropriated." The Governor-General of the Philippines had item veto authority with respect to appropriation bills. In reliance on this authority, the Governor-General vetoed that section of the bill that granted a retirement gratuity to certain justices of the peace.

In characterizing the issue raised in *Bengzon*, the Court stated: "The precise question for consideration, therefore, is — did the bill . . . constitute an appropriation bill; and, if so, was [the vetoed section] . . . an item of such bill?" 229 U.S. 410, 413. A unanimous United States Supreme Court concluded that the Philippine statute was not an appropriation bill. The Justices reasoned that if one were to eliminate that section of the bill which admittedly was an appropriation,

> the remaining eleven sections could stand as a generic act of legislation, leaving the specific matter of appropriation to be dealt with by later enactment. The term 'appropriation act' obviously would not include an act of general legislation; and a bill proposing such an act is not converted into an appropriation bill simply because it has had engrafted upon it a section making an appropriation. An appropriation bill is one the primary and specific aim of which is to make appropriations of money from the public treasury. To say otherwise would be to confuse an appropriation bill proposing sundry appropriations of money with a bill proposing sundry provisions of general law and carrying an appropriation as an incident. 299 U.S. 410, 413.

From a policy standpoint, the Court reasoned that to uphold the veto's validity would result in a distortion of the intended purposes of the item veto authority. The Governor would not be negating an item or items of an appropriation, but instead taking affirmative steps to enact general legislation in a form not intended by the legislature.

The analysis of the United States Supreme Court has been followed by state appellate courts. For example, the Maryland Supreme Court has referred with favor to the *Bengzon* holding as ". . . the principle that an act of the General Assembly which relates primarily and specifically to a subject matter of general legislation cannot be converted into an appropriation bill merely because there may be an incidental provision for an appropriation of public funds." *Dorsey v. Petrott*, 13 A.2d 630, 640, 178 Md. 230 (1940). *See also Cenarrusa v. Andrus*, 582 P.2d 1082 (Idaho, 1978); Muyskens, *Item Veto Amendment to the Iowa Constitution*, 18 Drake L.Rev. 245, 248 (1969).[2]

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[2] The Muyskens article contains the following language: "Once an allocation of money is determined to be an appropriation, it would seem that a bill containing a qualified provision would be an appropriation bill, but such is not the case, for simply because a bill appropriates money does not render that bill an appropriation bill as the term is contemplated in the item veto amendment." 18 Drake L.Rev. 245, 248. The Iowa Supreme Court has referred to this article as "an excellent and exhaustive treatise on the item veto amendment to the Iowa Constitution." *State ex rel. Turner v. Iowa State Highway Commission*, 186 N.W.2d 141, 152 (Iowa 1971).

House File 2598 is similar to the statutes examined in the cited cases. The primary and specific aim of House File 2598 is not the making of appropriations. The statute's aim is to revamp the system of retirement benefits payable to public employees and to increase specific court costs to underwrite the increased pension benefits. House File 2598 is an act of general legislation to which section 2 is an incident. Were section 2 to be removed from House File 2598, the remaining sections would comprise a whole generic piece of general law. Consequently, applying the principles enunciated in *Bengzon*, we are compelled to say that House File 2598 is not an appropriation bill. Therefore, the bill is not subject to the exercise of an item veto.

The Iowa Supreme Court has explicitly addressed the issue of what results when the Governor exceeds his or her veto authority. In *State ex rel. Turner v. Iowa State Highway Commission*, 186 N.W.2d 141 (Iowa 1971) we find the following language:

we wish to express our view of the result which might attend where a governor has exceeded his authority in attempting to veto a portion of a bill which is not an appropriation bill or a portion of an appropriation bill other than a so-called "item" of such a bill. In Iowa, our Constitution does not require the Governor's affirmative approval of a bill before it becomes law, but, conversely, does require the Governor's affirmative disapproval in exercising the veto power. It necessarily follows therefore that should the Governor of Iowa exceed his authority and attempt to disapprove an item in a nonappropriation bill, or to disapprove part of an appropriation bill which is not in and of itself an "item", the natural result would be that the bill as a whole would become law as though he had approved it or had failed to exercise the affirmative disapproval required by our Constitution. 186 N.W.2d 141, 151.

In reliance on the decision of our Supreme Court in *Highway Commission*, it is our opinion that House File 2598, inclusive of sections 25 and 26, became law in the form enacted by the General Assembly.

November 26, 1980

SCHOOLS: Transfers from the general fund to schoolhouse fund. §§278.1, 291.13, ch. 442, The Code 1979. A transfer of funds from the general fund to the schoolhouse fund may not be authorized either by vote of the school board or electorate. (Norby to Patchett, State Representative, 11-26-80) #80-11-10 (L)

November 26, 1980

BEER AND LIQUOR: Class "C" beer permit Sunday sales privilege. §§17A.18(1), 123.3(4), 123.15, 123.29, 123.32, 123.134, The Code 1979. No authority exists for local authorities to deny the privilege of Sunday beer sales to the holder of a valid class "C" beer permit. No hearing need be held regarding the extension of the privilege of Sunday beer sales to the holder of a valid class "C" beer permit. (Norby to DeKoster, State Senator, 11-26-80) #80-11-11 (L)

November 26, 1980

MENTAL HEALTH: Discharge Proceedings. §4.1(36)(a), Chapter 229, §§229.15(4), 229.16, and 229.22(4). A court is required to terminate proceedings and completely discharge a person who has been involuntarily hospitalized for serious mental impairment when the court receives a medical report from the chief medical officer of a mental health facility indicating that the patient has been tentatively dis-

charged pursuant to §229.16, The Code 1979. A tentative discharge of a person from a mental health facility prior to the receipt of a court order directing the same is only permitted under §229.16. A tentative discharge, as used in §229.16, means a release from custody, which continuing release is contingent upon the subsequent approval of the committing court. It does not contemplate further custody or treatment. Section 229.16 only authorizes the tentative discharge of persons who no longer require any treatment or care. (Mann to Chickering, Judicial Hospitalization Referee, 11-26-80) #80-11-12

Mr. Chet R. Chickering, Judicial Hospitalization Referee: You requested an opinion of the Attorney General on the question of whether a state mental health institute can legally discharge a patient without court order. Specifically, you ask the following questions:

a. Upon the receipt of a medical report from a mental health institute indicating a patient has been "tentatively discharged" pursuant to Section 229.16 is the Court required to terminate the proceedings and completely discharge the individual?

b. Is a "tentative discharge" of a patient for an unlimited or unspecified duration of time; prior to receival of a Court Order directing the same, permitted under any section of chapter 229 other than Section 229.16?

The standards for discharge of a person from a mental health facility are set forth in §229.16, The Code 1979. That section reads as follows:

Discharge and termination of proceeding. *When in the opinion of the chief medical officer a patient* who is hospitalized under subsection 2, or is receiving treatment under subsection 3, or is in fulltime care and custody under subsection 4 of section 229.14 *no longer requires treatment or care for serious mental impairment, the chief medical officer shall tentatively discharge the patient* and immediately report that fact to the court which ordered the patient's hospitalization or care and custody. *The court shall thereupon issue an order confirming the patient's discharge from the hospital or from care and custody, as the case may be, and shall terminate the proceedings pursuant to which the order was issued.* Copies of the order shall be sent by certified mail to the hospital and the patient. (emphasis added)

The goal in construing a statute is to ascertain the legislative intent and, if possible, give it effect. *Iowa State Education Association v. Public Employees Relations Board*, 269 N.W.2d 446 (Iowa 1978); *City of Des Moines v. Elliott*, 267 N.W.2d 44 (Iowa 1978). In doing so, one must look to what the legislature said, rather than what it might have or should have said. *Kelly v. Brewer*, 239 N.W.2d 109 (Iowa 1976); *Steinbeck v. Iowa District Court*, 224 N.W.2d 469 (Iowa 1974).

Applying the foregoing principles to §229.16, we conclude that a court is required to terminate proceedings and completely discharge a person who has been involuntarily hospitalized for serious mental impairment when the court receives a medical report from the chief medical officer of a mental health facility indicating that the patient has been tentatively discharged pursuant to §229.16. The statutory language says that the court "shall", upon receipt of such a medical report, "issue an order confirming the patient's discharge" and "shall terminate the proceedings". The legislature used the word "shall", and that word imposes a duty upon the court to act as directed by the statute. §4.1(36)(a), The Code 1979. Accordingly, the court must enter an order confirming a patient's discharge and terminating proceedings against the said patient upon receipt of a medical report tentatively discharging the patient pursuant to §229.16.

Secondly, a "tentative discharge" of a patient from a mental health institute prior to the receipt of a court order directing the same is only permitted under §229.16, The Code 1979. No other provisions of chapter 229 permits such a "tentative discharge". Under §229.15(4), The Code 1979, the chief medical officer of a mental health facility may authorize a convalescent or limited leave for a patient, or arrange for and complete the transfer of a patient to a different hospital for continued fulltime custody, care and treatment, when in the opinion of the chief medical officer the best interest of a patient would be served by such a leave or transfer. Further, under §229.22(4), The Code 1979, the chief medical officer must discharge a patient, detained pursuant to court order, for emergency evaluation and treatment after the expiration of forty-eight hours. But neither of the above provisions permit a "tentative discharge" prior to receipt of a court order. Section 229.15(4) does not authorize a discharge, tentative or otherwise. It merely authorizes a leave or a transfer, neither or which is synonymous with the term "tentative discharge" as used in §229.16. "Tentative discharge", as used in §229.16, means a release from custody, which continuing release is contingent upon the subsequent approval of the committing court. *State ex rel. Lafollette v. Circuit Court of Brown County*, 37 Wis.2d 329, 155 N.W.2d 141 (1967); *State v. City of Springfield*. 375 S.W.2d 84, 92 (Mo. 1964); *State v. Powell*, 139 Mont. 583, 367 P.2d 553, 557 (1961); *Davison v. Rodes*, 299 S.W.2d 591, 594 (Kan. 1956). It, therefore, does not contemplate further custody or treatment. On the other hand, the limited leave or transfer permitted under §229.15(4) contemplates both subsequent custody and treatment. Thus, they are not synonoymous with a "tentative discharge" so as to require a prior court order or subsequent court approval.

This conclusion in no way implies that a court is precluded from revoking the leave or transfer authorized by the chief medical officer subsequent to a due process hearing held to consider objections to the leave or transfer as authorized by the chief medical officer under §229.15(4).

Along the same lines, §229.22(4) does not authorize a "tentative discharge" prior to the receipt of a court order. It, in fact, authorizes a full and complete discharge by the chief medical officer of a person detained under court order for emergency evaluation and treatment, absent the filing of a petition for involuntary commitment of the patient. However, this discharge must be considered to be pursuant to a court order as §229.22(4) only permits the court to order the patient to be detained for a period of forty-eight hours.

We therefore conclude that no provision of chapter 229, other than §229.16, authorizes a tentative discharge of a patient from a mental health facility. We further conclude that the tentative discharge of a patient under §229.16 is contingent upon the chief medical officer's conclusion that the patient "no longer requires treatment or care". If the chief medical officer concludes that a patient requires further treatment, irrespective of whether the proposed treatment will be in an in-patient or out-patient care setting, s(he) cannot discharge that patient under §229.16. The chief medical officer may not discharge a patient who requires further treatment prior to the receipt of a court order, as such discharge is not authorized by §229.16, and as the commiting court re-

tains jurisdiction over the committed patient until final satisfaction of the committing order. Op. Att'y Gen. #80-3-4. Section 229.16 only authorizes the discharge of persons who no longer require any treatment or care.

In summary, we conclude that a court is required to terminate proceedings and completely discharge a person who has been involuntarily hospitalized for serious mental impairment when the court receives a medical report from the chief medical officer of a mental health facility indicating that the patient has been tentatively discharged pursuant to §229.16, The Code 1979. A tentative discharge of a person from a mental health facility prior to the receipt of a court order directing the same is only permitted under §229.16. A tentative discharge, as used in §229.16, means a release from custody, which continuing release is contingent upon the subsequent approval of the committing court. It does not contemplate further custody or treatment. Section 229.16 only authorizes the tentative discharge of persons who no longer require any treatment or care.

November 28, 1980

CONSTITUTIONAL LAW: Iowa Railway Finance Authority. Art. I §6, Art. I §9, Art. III §1, Art. III §5, Art. III §31, Iowa Constitution; S.F. 2378 (68th G.A. 1980). The Iowa Railway Finance Authority Act promotes a public purpose and is constitutional. The issuance of railway finance bonds does not create public debt and is not an extension of the state's credit. The act does not violate the due process clause, the privilege and immunities clause or the restriction on the delegation of legislative power. (Hamilton to Drake, State Senator, 11-28-80) #80-11-13

The Honorable Richard F. Drake, State Senator: You have asked for an opinion of the Attorney General concerning Senate File 2378 which created the Iowa Railway Finance Authority. [hereinafter referred to as the Act]. Specifically you have asked:

Does Senate File 2378, . . . violate any provision of the Iowa Constitution, including the prohibition against state debt?

The question that you present is a very important one considering the significant role of S.F. 2378 in the state's effort to remedy the worsening rail situation in Iowa. After a thorough review of the several constitutional questions presented by S.F. 2378, as discussed below, it is the conclusion of the Attorney General that the Act is not in violation of any provision of the Iowa Constitution and is a constitutionally valid enactment of the Iowa Legislature.

1. The Issues

As you realize, the open nature of your question necessitates that the first task in this opinion is to identify what the possible constitutional infirmities of S.F. 2378 might be. Sound guidance as to what these constitutional issues might be is found in the opinion of the Iowa Supreme Court in *John R. Grubb, Inc. v. Iowa Housing Finance*, 255 N.W.2d 89 (Iowa 1977). That opinion, which we believe serves as a polestar for this opinion, dealt with the constitutionality of the Iowa Housing Finance Authority Act. The close parallels between the public objective, the statutory language and the mode of achievement found in the Housing

Finance Authority Act and the Railway Finance Authority Act means that the analysis used by the Iowa Supreme Court in *Grubb* would in large part be determinative of the issues raised in any constitutional challenge to the Railway Finance Authority Act.

Of the several issues raised in *Grubb* and to be addressed in the context of the Railway Finance Authority Act, the main three are:

1. Whether the Act violates Art. III §31 of the Iowa Constitution, prohibiting the expenditure of public funds for private purposes, i.e. is rebuilding the state's railroad system a public purpose?

2. Whether the Act violates the Art. III §5 prohibition on creating state indebtedness without a referendum of the people?

3. Whether the Act violates the Art. III §1 prohibition on lending the state's credit?

In addition to these there are several other issues considered in the *Grubbs* case which are also addressed here but which are of lesser importance. These are:

1. Whether the Act violates Art. I §9, the due process clause?

2. Whether the Act violates Art. I §6, the privileges and immunities clause?

3. Whether the Act violates Art. III §1, as an undue delegation of legislative power?

Because you have asked for an opinion regarding the constitutionality of S.F. 2378 our analysis must be prefaced with a discussion of the standard set by the Iowa Supreme Court for finding legislative enactments unconstitutional. The standard, as stated and developed in a number of recent cases can only be described as one of considered deference by the courts to the legitimate actions of the legislature.

This standard has recently been stated:

[I]n considering the constitutionality of legislative enactments, we accord them every presumption of validity and find them unconstitutional only upon a showing that they clearly infringe on constitutional rights and only if every reasonable basis for support is negated. *Woodbury Cty. Soil Conservation Dist. v. Ortner*, 279 N.W.2d 276, 277, (Iowa 1979), *Bryan v. City of Des Moines*, 261 N.W.2d 685, 687-88 (Iowa 1978), *Chicago Title Insurance Co. v. Huff*, 256 N.W.2d 17, 25 (Iowa 1977); *Grubb* supra 255 N.W.2d at 92-93, *State v. Wehde*, 258 N.W.2d 347, 350 (Iowa 1977) and *City of Waterloo v. Selden*, 251 N.W.2d 506, 508 (Iowa 1977).

From this starting point it must be noted that S.F. 2378 carries a very strong presumption of constitutionality which can only be surmounted by the clearest showing of violation of a constitutional stricture. Such a showing can not be made in this case.

II. Public Purpose — Art. III §31

The initial question concerning the Rail Finance Authority Act is whether it authorizes the use of public funds for a private purpose. Stated another way the question becomes whether public financial assistance of the state's rail network is a public purpose.

The constitutional restriction in this regard is found in Art. III §31 of the Iowa Constitution, which in pertinent part provides that:

[N]o public money or property shall be appropriated for local, or private purposes unless such appropriation, compensation, or claim, shall be allowed by two-thirds of the members elected to each branch of the General Assembly.

The focus of the analysis is whether the provisions of the Act providing assistance to the state's economically troubled rail system and making an appropriation for that use are for a public or private purpose.

A starting point for guidance on this question is the legislative language contained in the Act. Section 3 of the Act sets forth numerous specific legislative findings concerning the need for and the purpose of the Act. These findings provide that:

1. The establishment of the authority is in all respects for the benefit of the people of the state of Iowa, for the improvement of their health and welfare, and for the promotion of the economy, which are public purposes.

2. The authority will be performing an essential governmental function in the exercise of the powers and duties conferred upon it by this chapter.

3. There will exist a serious shortage of viable rail lines and railway facilities serving the rural and agricultural communities of the state.

4. There exists a serious problem in this state regarding the ability of agricultural producers to transport economically farm products to traditional markets because of the abandonment and possible abandonment of railway facilities within the state.

5. These conditions are making it more and more difficult for farmers and farm related businesses to survive in the present state of the economy thus threatening the very heart blood of Iowa.

6. One major cause of this condition has been recurrent shortages of funds in private channels and the high interest cost of borrowing.

7. These shortages have contributed to reductions in construction of new railway facilities, and have made the sale, purchase and repair of existing railway facilities a virtual impossibility in many parts of the state.

8. Iowa faces the possible consequences of two railroad bankruptcies and further reductions in service by other railroads due to deteriorating rail facilities. The loss of rail service on three thousand ninety miles may be the immediate consequences of the bankruptcies, with a resultant increase in transportation costs. This will be accompanied by a reduction in Iowa farm income. Any prolonged loss of service on the essential portions of these rail facilities means the loss of jobs in Iowa and a loss to the state economy.

9. A stable supply of adequate funds for financing of railway facilities is required to encourage construction of railway facilities, the rehabilitation of existing facilities and to prevent the abandonment of others in an orderly and sustained manner and to reduce the problems described in this section.

10. It is necessary to create a railway finance authority to encourage the investment of private capital and stimulate the construction, rehabilitation and repair of railway facilities and to prevent the abandonment of others through the use of public financing.

and most importantly:

11. All of the purposes stated in this section are public purposes and uses for which public moneys may be borrowed, expended, advanced, loaned or granted.

These findings indicate that when the legislature enacted S.F. 2378, there was no doubt in the minds of the elected officials who voted in favor of the Act but that it was for a public purpose. Our office or the courts are not required to threat a legislative declaration of purpose as final, binding or conclusive, *Simpson v. Low Rent Housing Agency of Mount Ayr*, 224 N.W.2d 624, 627 (Iowa 1974). However, the Court has said that it will not find an absence of public purpose except where the absence is so clear "as to be perceptable by every mind at first blush". *Dickson v. Porter*, 240 Iowa 393, 417, 35 N.W.2d 66, 80 (1948). Given the findings of the legislature and the known importance of the rail system to the state's economic well being, it is extremely doubtful that the Iowa Supreme Court would find the purpose of the Act to be anything but public. This is especially true in light of the provision in §18 of the Act which states that:

The Act, being necessary for the welfare of this state and its inhabitants shall be liberally construed to effect its purpose.

Given this backdrop of authority, it is the opinion of the Attorney General that financial assistance to the state's rail industry, as provided in the context of S.F. 2378 is a public purpose.

Even if a colorable argument could be made that such use of public funds is not for a public purpose, the need to address that question may well be mooted by the last clause of Art. III §31. This states that public funds can not be spent for private purposes.

[U]nless such appropriation, compensation or claim, shall be allowed by two-thirds of the members elected to each branch of the General Assembly.

In this situation the records of the vote on S.F. 2378 indicates that the Act did receive more than a two-thirds vote of the members of each branch of the General Assembly on each occasion that it was considered. On April 25, 1980, the Senate passed S.F. 2378 on a vote of 45 yes to 4 no. On April 26, 1980, the House of Representatives passed S.F. 2378, as amended, on a vote of 92 yes and 5 no. The Senate on April 26, 1980, concurred in the House amendments and passed the Act, on a vote of 38 yes and 3 no. Therefore, even if S.F. 2378 in some way represents the use of public funds for a private purpose, a position we do not support, the two-thirds majority vote of the General Assembly still would mean that the Act is beyond assault under the language of Art. III §31.

III. Public Debt — Article VII §5

The second major issue concerning S.F. 2378 is whether the bonds to be issued under the Act violate the restrictions of Art. III §5 of the Iowa Constitution, which prevents the contracting of indebtedness by or on behalf of the state without the required referenda. The Iowa Supreme Court has held that "debt" in the context of Art. III §5 "arises only where the state itself is under a legally enforceable obligation". *John R. Grubb, Inc. v. Iowa Housing Finance*, supra, 255 N.W.2d at 97.

Section 14 of the Act provides that:

The authority is performing a public function on behalf of the state and is a public instrumentality of the state".

However, Section 7 provides that the authority is a separate corporate entity distinct from the state, with the power to sue and be sued in its own name, to contract, to promulgate rules and regulations, to issue bonds and notes and to exercise the other general powers set forth in the section.

Any party attempting to establish that the authority is a state agency must contend with the specific language of the statute. Section 12 of the Act provides that:

PAYMENT OF BONDS—NONLIABILITY OF STATE. Bonds issued under the provisions of this Act, and judgments based on contract or tort arising from the activities of the authority or persons acting on its behalf, shall not constitute a debt or liability of the state or of any political subdivision within the meaning of any constitutional or statutory debt limitation and no appropriation shall be made, directly or indirectly, by the state or any political subdivision for the payment of the bonds or judgments, or for the indemnification of a person subject to a judgment arising from that person's actions on the authority's behalf, but are special obligations of the authority payable solely and only from the sources provided in this Act.

Section 9 of the Act provides in part that:

BONDS. All bonds issued by the authority shall be payable solely out of the revenues and receipts derived from the lease or sale by the authority of its railway facilities or as may be designated in the proceedings of the governing board under which the bonds shall be authorized to be issued by the governing board, or derived from any loan agreement between the authority and the borrower with respect to railway facilities or any other funds of the authority which the board may designate except that no tax funds which the authority may receive from the state or any political subdivision shall be used for payment of the bonds.

* * *

The Iowa Supreme Court faced this same question and nearly identical statutory language in the *Grubb* case and reached a similar result. There, the Court in ruling that the bonds were not public debt said:

The above legislative declarations are determinative of the issue plaintiffs raise here. *Grubb*, supra, 255 N.W.2d at 97-98.

The Attorney General is of the opinion that the statutory language is determinative of the question in this situation as well. Therefore, it is our opinion that the bonds issued by the authority under S.F. 2378 do not represent indebtedness of the state as contemplated in Art. VII §5 of the Iowa Constitution.

IV. Pledge of States Credit — Article III, Section 1

A related issue is the possible claim that the Act unconstitutionally pledges the state's credit in violation of Art. VII, §1 of the Iowa Constitution. This section provides that:

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 or association, or corporation, unless incurred in time of war for the benefit of the State.

This provision has been interpreted to withhold from the state all power or function of suretyship. *Grout v. Kendall*, 195 Iowa 467, 473, 192 N.W. 529, 531 (1923). *See Grubbs, supra* 255 N.W.2d at 98 and cases cited therein. However, the Court in *Grubbs* found nothing in the Housing Finance Authority Act that would place the state in the position of a suretyship. The same is true with the present statute. Nothing in the Railway Finance Authority Act makes the state a surety of the authority's obligations. In fact the very language of the Act, in Section 12, *supra*, negates that view when it states that "bonds issued under the provisions of the Act . . . shall not constitute a debt or liability of the state . . . within the meaning of any constitutional or statutory debt limitation". While it could be argued that the Act pledges the State's credit by creating a moral obligation, the case law in this jurisdiction, e.g. *Grubbs*, and the majority of other jurisdictions have ruled that such moral obligation does not translate into a pledge of credit. *See* citations in *Grubbs supra*, 255 N.W.2d at 98. It is the opinion of the Attorney General that there is no merit in the position that the Railway Finance Act pledges the credit of the State.

V. Article 1, Section 6

Another possible constitutional challenge to Senate File 2378 could be that it somehow violates Article 1, Section 6, of the Iowa Constitution which prohibits the general assembly from granting "to any citizen, or class of citizen, privileges and or immunities, which, upon the same terms shall not equally belong to all citizens".

The argument would be that the Railway Finance Act denies equal protection by granting to certain groups of citizens privileges not available to others, i.e. the ability to live adjacent to a modernized railroad and the economic advantages associated therewith.

The law in Iowa does not require that all laws apply alike to all citizens of the state. *Grubbs*, supra 255 N.W.2d at 95. It is sufficient if an enactment applies to all members of a class, providing the classification is not purely arbitrary but rests in a reasonable basis. *Green v. City of Mt. Pleasant*, 256 Iowa 1184, 131 N.W.2d 5, 15-16 (1964).

In the context of the Railway Finance Act, it is not clear that any citizens of the state will be benefited at the expense of, or more than others. All citizens of the state will benefit economically by an improved transportation system. While the improvement of any one segment of rail line can be expected to have a certain localized effect, the economic benefit that it may create through higher returns for grain and less energy consumption is eventually passed on to the whole economy by such things as increased tax revenues. The local benefit that may be derived is no different than that which results when state funds are spent to build or rebuild a section of the state highway system. For this reason we doubt that a sound showing can be made that the effect of the Act will be to treat different classes unequally.

Even if such classification can be established it is our opinion that it rests on a reasonable basis and therefore does not violate Article 1, Section 6 of the Iowa Constitution. When the Railway Finance Act was passed there were several known railway systems that were in dire economic straits. The legislature in passing the legislation knew that the

financial aid it may generate would most likely be used to try to rebuild sections of those rail lines. Thus, if a classification is possible it would be between those railroads in financial trouble and those that were not.

The Iowa Supreme Court has said that:

One who challenges a statute on this constitutional ground must negate every conceivable basis which may support the classification, and the classification must be sustained unless it is patently arbitrary and bears no relationship to a legitimate governmental interest. *Avery v. Peterson*, 243 N.W.2d 630, 633 (Iowa 1976).

The purpose of the act, as stated in Section 2, provides that:

DECLARATION OF NECESSITY AND PURPOSE. The purpose of this Act is to benefit the citizens of Iowa by improving their general health, welfare and prosperity and insuring the economic and commercial development of the state. Access to adequate railway transportation facilities is essential to the economic welfare of the state. This Act is intended to preserve for the citizens of Iowa those railway facilities now in existence in the state which have a viable future but which for a variety of economic and legal reasons may well go out of service if the state does not provide the financing mechanism contained in this Act.

* * *

Given this purpose, as stated in the Act, we believe that there is a reasonable basis for the act, and thus any classification made within it. Therefore it is our opinion that S.F. 2378 in no way violates Article 1, Section 6, the privileges and immunities clause of the Iowa Constitution.

VI. Due Process — Article I, Section 9

Another possible challenge to the Act is that it violates Article I, §9 of the Iowa Constitution which provides in pertinent part that "no person shall be deprived of life, liberty, or property, without due process of law". The argument would be that the possible use of state funds to finance this program would injure Iowa taxpayers because there is no rational relationship between the purposes of the Act and the public health, safety, or welfare.

The Iowa Supreme Court in *Green v. Shama*, 217 N.W.2d 547, 555 (Iowa 1974) ruled that the due process clause doesn't limit the state's police power unless the legislation in question is "an arbitrary, unreasonable, or improper use of such power". This finding can only be made if "no rational basis exists for believing . . . [the legislation] furthers the public health, safety, morality and general welfare" *Richards v. City of Muscatine*, 237 N.W.2d 48, 57 (Iowa 1975).

Previously in this opinion we have opined that the Act has a strong public purpose and can not be seen as arbitrary or unreasonable. This finding disposes of any possible due process challenge that could be made.

VII. Delegation — Article III, Section 1

A challenge often made to any innovative and complex legislative enactment is that it represents an improper delegation of the legislative power in violation of Art. III, §1 of the Iowa Constitution. This challenge was put forward in the *Grubbs* case and could well be made in litigation involving the Iowa Railway Finance Authority Act.

The Iowa Supreme Court has noted that "the intricacies of the modern problems the legislature seeks to solve have dictated the use of general

rather than detailed standards in enactments resolving those problems". *Grubbs supra* 255 N.W.2d at 99. The Court in *Goreham v. Des Moines Met. Area Solid Waste Agency*, 179 N.W.2d 449, 455 (Iowa 1970) noted that:

[W]hen the legislature has adequately stated the object and purpose of the legislation and laid down reasonably clear guidelines in its application, it may then delegate to a properly created entity the authority to exercise such legislative power as is necessary to carry into effect that general legislative purpose.

In this case the legislative goals are clear and the policy of the act well articulated. The powers of the Railway Finance Authority are clearly defined and limited. In addition the means available to the Authority to effectuate its purposes are clearly specified. It is our opinion that the Railway Finance Authority Act, just like the act considered in *Grubbs*, does not represent an improper delegation of legislative power.

In conclusion, it is the opinion of the Attorney General that the Iowa Railway Finance Authority Act, is a valid legislative enactment and contains no constitutional informatives. While an inventive litigant may be able to devise a challenge different than those issues discussed above, we believe that this opinion identifies and addresses the most important questions presented by the Act. The Railway Finance Authority Act represents a very important legislative effort to try to address the rail crisis faced by this state. Our analysis shows that there is nothing in the Iowa Constitution to prevent this effort from continuing.

December 5, 1980

COUNTIES AND COUNTY OFFICERS; MUNICIPALITIES; LOCAL BOARDS OF HEALTH: Fees for services. IOWA CONST. Art. III, §38A; ch. 137, §§137.6(2), 137.7(3)(4), The Code 1979. Local boards of health have the authority to assess fees for various health services beyond those specifically enumerated in ch. 137, The Code 1979. (Bennett to Hoth, Des Moines County Attorney, 12-5-80) #80-12-1

Steven S. Hoth, Des Moines County Attorney: We have received your letter requesting the opinion of this office as to whether pursuant to §137.6(2), The Code 1979, a local board of health may adopt rules which provide for the charging of fees for various public health services such as "disposal site inspections, vehicle permits, housing permits, air pollution equipment permits, pool permits, animal control, public health nursing home visits, subdivision permits, milk inspection permits, and other related things."

Section 137.7(4), The Code 1979, permits 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." Section 137.7(3), The Code 1979, provides that "reasonable fees for personal health services" may be charged. Personal health services might include the various services provided by pubilc health nurses such as visits to residents of health care facilities, health screening, and home visits. Section 137.6(2), The Code 1979, lists as a power of a local board:

[m]ake and enforce such reasonable rules and regulations not inconsistent with law or with the rules of the state board as may be necessary for the protection and improvement of the public health.

The question whether local boards could, absent express statutory authority, adopt rules setting fees for such services under the "reasonable rules" provision of §137.6(2), The Code 1979, may be answered by a determination of the intent of the Legislature relative to such fees. The answer to that question would be based on the determination as to whether the county board of health is authorized to establish fees for such services under the authority granted county governments by the County Home Rule Amendment, Article III, [Sec. 39A] of the Iowa Constitution.

Article III, [Sec. 39A] of the Iowa Constitution provides:

Counties or joint county-municipal corporation governments are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy and tax unless expressly authorized by the general assembly. The general assembly may provide for the creation and dissolution of joint county-municipal corporation governments. The general assembly may provide for the establishment of charters in county or joint county-municipal corporation governments.

If the power or authority of a county conflicts with the power and authority of a municipal corporation, the power and authority exercised by a municipal corporation shall prevail within its jurisdiction.

The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in expressed words is not a part of the law of this state.

The County Home Rule Amendment contains four basic limitations. In an opinion issued by this office the limitations are described as follows:

First, counties have no power to levy any tax unless expressly authorized by the General Assembly. Second, in the event the power or authority of a county conflicts with that of a municipal corporation, a municipal corporation's power and authority prevails within its jurisdiction. Third, the home rule power exercised by a county cannot be "inconsistent with the laws of the General Assembly." Fourth, home rule power can only be exercised for local or county affairs and not state affairs. Op. Att'y Gen. #79-4-7 p. 8.

This office, in the same opinion, stated that those limitations should be narrowly construed, while a county's power under the Home Rule Amendment should be broadly construed and subject to liberal interpretation absent expressed statutory conflict. Op. Att'y Gen. #79-4-7 p. 24.

The first two limitations would not be applicable in this circumstance, as there is not an attempt to levy any tax. Similarly, the fourth limitation which prohibits home rule power from being exercised for state affairs would not be applicable to this situation. The Home Rule Amendment provides that the exercise of governmental power in the determination of local affairs cannot be "inconsistent with the laws of the General Assembly." This limitation has been termed one of "preemption." The term preemption has been explained by this office to be "where it is determined that an expressed statutory authority limitation on county power or evidence clearly implying an intent to vest exclusive jurisdiction with the state exists." Op. Att'y Gen. #80-4-5 p. 1.

The Legislature has enumerated specific items for which fees for licenses or permits may be charged, i.e., the provision of personal health services; the collection or disposal of solid waste; the construction or

operation of private water supplies; and the construction or operation of sewage disposal facilities. While we can find no other provision in ch. 137, The Code 1979, which provides that fees may be charged by the board of health for additional services or permits there is no indication that the Legislature intended to prohibit the counties from charging fees for other health-related services. In Op. Att'y Gen. #80-3-13 at 4 we stated "The relevant inquiry in determining whether the exercise of power by a county is authorized is not whether there is a specific grant of authority from the State, but rather whether the state has itself decided to govern the particular subject matter." In this instance there is a specific grant of authority from the state for the counties to charge fees for health services and licenses for particular items. Thus, it was clearly anticipated that counties would, through the reasonable rules provision of §137.6(2), The Code 1979, establish fees for the various enumerated services and licenses. There is no indication of any legislative intent to limit the charging of fees to those services specifically enumerated nor is there any indication of an intent to vest the state with exclusive jurisdiction in the decision for which health services fees may be charged. The language of ch. 137, The Code 1979, relating to the counties' ability to charge fees for health services and licenses is permissive rather than restrictive.

Whether county boards of health possess home rule powers was addressed earlier this year by the Iowa Supreme Court.

In *Kasparek v. Johnson County Bd. of Health*, N.W.2d 511 (Iowa 1980), the Iowa Supreme Court concluded that the home rule amendment applies to the county board of health. In this action the Johnson County Board of Health independently appealed from a decision by the district court which held that a regulation adopted by it and approved by the Johnson County board of supervisors was unconstitutional. The plaintiffs argued that the board of health had no authority to appeal independently of the board of supervisors. In determining that the board of health did have the authority to bring the appeal the court stated:

The authorities plaintiffs rely on are rooted in the prior doctrine that counties, municipalities and their local agencies have only such powers as are expressly granted by the legislature. This principle is no longer valid following adoption of the home rule amendments. *Kasparek* at 514.

The purpose of ch. 137, The Code 1979, is to provide for the localization of public health activities. As §137.5 states, "the county board shall have jurisdiction over public health matters within the county . . ." Clearly, the Legislature determined that the localization of public health services would be of greater benefit to the residents of the state in that the local board of health would have a greater awareness of the health services needs of their individual locales. If local boards of health are expected to carry out these needed programs a system of reimbursement must be developed. A reasonable method would be for the board to assess fees for services it provides. This would place the local board in a better financial position to maintain and promote the health of the residents under its jurisdiction. A further benefit would be that the costs of providing the additional services would be assumed by the individuals using them which is more equitable than everyone having to bear the cost of, for example, a pool permit.

In conclusion, it is the opinion of this office that the County Home Rule Amendment, Article III, [Sec. 39A] of the Iowa Constitution permits the local board of health under the reasonable rules provision of ch. 137, The Code 1979, to adopt rules which provide for the charging of fees for pubilc health services not enumerated in that chapter.

December 5, 1980

EXECUTIVE COUNCIL: Authorization of travel payments in advance. Iowa Const., art. VII, §1; §§8.2 and 8.13, The Code 1979. The State may make payment of travel expenses of state employees in advance. The Executive Council must approve advance payments for out-of-state travel by state employees. The Executive Council does not need to approve out-of-state travel by state employees if no expenditure of state funds is made. (Norby to Wellman, Secretary, Executive Council, 12-5-80) #80-12-2

W. C. Wellman, Secretary, Executive Council of Iowa: You have requested an opinion of the Attorney General regarding the payment of dues by the Iowa Library Commission for membership in the Western Council of State Librarians. Annual dues for the Western Council are currently $3,000 per year. Membership in the Western Council primarily provides Library Department personnel with the opportunity to attend conferences which provide educational programs. In addition, the Western Council pays for travel and lodging expenses of Library Department personnel attending these conferences. Your questions arise in connection with the practice of the Western Council paying travel expenses of Library Commission members from funds collected as dues from members. According to available information, these payments for travel and lodging are made directly to individual Library Department employees by the Western Council. The Library Department is not involved in the transmission of these payments. Your concerns with this procedure are as follows. First, whether a state agency may enter into such an arrangement, in effect obtaining credit toward future travel expenditures (although it does not appear that the Western Council could be considered a debtor of the State of Iowa.) Secondly, if such an arrangement may be made, what role should the Executive Council fulfill in the process of approving the payment of dues and subsequent travel reimbursement?

Initially, it does not appear that the State is prohibited from obtaining credit to be applied against future services provided to the State. Iowa Const., art. VII, §1, provides as follows:

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.

A recent Attorney General's opinion concluded that advance payment of travel expenses did not violate Art. VII, §1. Op. Atty. Gen. #79-7-18. This opinion reasons that such payments do not place the State in the position of a surety, as such payments are not made to discharge the debts of a third party, but are in fact made to discharge primary obligations of the State itself. Although in the context of the situation considered herein, the Western Council is an intermediary in the process of payment from the State to the individual employee, we do not believe that this obscures the fact that this payment discharges an obligation of the State itself and not an obligation of a third party. Accordingly, we

do not believe that payment of dues to the Western Council violates Art. VII, §1.

The second aspect of your question requires consideration of the appropriate procedure of the Executive Council in approving the payment of dues to the Western Council. As these dues will necessarily involve travel outside of the State by Library Department employees, §8.13(2) would appear to provide a requirement of Executive Council approval at some point in time. Section 8.13(2) provides as follows:

The state comptroller shall be limited in authorizing the payment of claims, as follows:

* * *

No claims for expenses in attending conventions, meetings, conferences or gatherings of members of any association or society organized and existing as quasi-public association or society outside the state of Iowa shall be allowed at public expense, unless authorized by the executive council; and claims for such expenses outside of the state shall not be allowed unless the voucher is accompanied by so much of the minutes of the executive council, certified to by its secretary, showing that such expense was authorized by said council. This section shall not apply to claims in favor of the governor, attorney general, Iowa state commerce commissioners, or to trips referred to in section 217.20.

This section does not appear to require Executive Council approval of out-of-state travel per se. Two aspects of a particular example of out-of-state travel must be present before Executive Council approval is required. First, the travel must involve a convention, meeting, conference or gathering of an association or society organized or existing as a quasi-public association or society. *See* 1940 Op. Atty. Gen. 188. Secondly, the expenditure must constitute a "claim" for purposes of §8.13. Although the term claim is not defined in ch. 8, it would appear that claims are expenditures from those funds defined in §8.2. *See* 1970 Op. Atty. Gen. 489; §§8.2(2), 8.2(3), 8.2(4), The Code 1979. Accordingly, Executive Council approval appears necessary only when a claim is being made for expense of travel to the types of activities listed in §8.13(2).

Initially, it appears that the meetings conducted by the Western Council are within the scope of activities listed in §8.13(2). Additionally, the initial payment of dues constitutes a claim as state funds are involved. §8.2(2). As it is clearly contemplated at the time of payment of dues that this payment will be used for travel, Executive Council approval of this expenditure appears necessary. Regarding the actual instances of travel, however, it does not appear that Executive Council approval is necessary. No claim is involved, as no state funds, or other funds under the control of the State of Iowa, are being expended. *See* §§8.2(2), 8.2(3), 8.2(4). As stated previously, the approval of the Executive Council is not required simply because out-of-state travel is involved, but only when the State is expending funds in connection with this travel. Accordingly, the Executive Council does not need to approve travel by Library Department employees when that travel is reimbursed directly to the employee by the Western Council.

In conclusion, the Library Commission may pay dues to the Western Council of State Librarians. The fact that part of these dues will be used to reimburse Library Department employees for future travel expense does not make their payment inappropriate. The Executive Council

must approve initial payment of these dues, but no Executive Council approval is required in connection with individual instances of travel when the expense of this travel is reimbursed directly to Library Department employees by the Western Council.

December 5, 1980

MOTOR VEHICLES: Schools; §321.372(1), The Code 1979. Section 321.372(1) requires the driver of a school bus to use the flashing warning lights and to extend the stop arm when loading or unloading students at a school. (Mull to Miller, State Senator, 12-5-80) #80-12-3(L)

LAW ENFORCEMENT

Policemen and Firemen, Sheriff, Authority of Reserve Peace Officers. §§80B.2, 80B.3(3), and 321B.2, The Code 1979, and 1980 Session, 68th G.A., Ch. 1191, §§1, 3, 4, 6, 8, 9 and 10; Reserve peace officers have the authority to serve papers and, if properly certified, to invoke implied consent coextensive with regular peace officers employed by the same enforcement agency. The Iowa Law Enforcement Academy Council need not admit reserve peace officers to academy programs. (Hayward to Swanson, Asst. Monegomery County Atty., 12-5-80) #80-12-4(L)

MUNICIPALITIES

Benefits for Surviving Spouses. §411.6(8)(c), The Code 1979. Surviving spouses shall receive a benefit under §411.6(8)(c) so long as they remain unmarried. Once they remarry, the benefit ceases and cannot be restarted, even if the subsequent marriage ends. (Blumberg to Anstey, Appanoose County Attorney, 12-5-80) #80-12-5(L)

MUNICIPALITIES

Transit Systems. §§364.4 and 384.12(10), The Code 1979. A city may may extend its transit system service outside the city limits upon a contract. The use of taxes levied pursuant to §384.12(10) for the operation and maintenance of a transit system that has been so extended is not prohibited. (Blumberg to Kirkenslager, State Senator, 12-5-80) #80-12-6(L)

December 9, 1980

GOVERNOR: APPROPRIATIONS; STATUTES. Section 8.31, The Code 1979, 1979 Session, 68th G.A., ch. 11, §4. The reduction in expenditure of legislative appropriations ordered by the Governor pursuant to §8.31, The Code 1979, applies to line item appropriations, such as the appropriation for public transit purposes to implement a state assistance plan. A state agency, acting in accordance with the Governor's order, may modify or alter existing contractual obligations with another public agency concerning the allocation of such appropriations. (Stork to Rush, State Senator, 12-9-80) #80-12-7

Honorable Bob Rush, State Senator: You have requested an opinion of the Attorney General with respect to the following questions:

1. Does the uniform 3.6% reduction in state expenditures recently ordered by Governor Ray pursuant to §8.31, The Code 1979, affect a special state appropriation such as the state transit operating assistance fund?

2. May the State of Iowa decrease the amount of its contractual obligations as a result of the Governor's announcement?

Your correspondence indicates that the East Central Iowa Council of Governments (East Central) and the Iowa Department of Transportation (D.O.T.) have executed a contract that provides for the allocation of state funds to East Central to assist with the financing of a rural transportation system. The source of these funds is an appropriation to the D.O.T. passed by the General Assembly in 1979:

	1979-1980 Fiscal Year	1980-1981 Fiscal Year
3. For public transit purposes to implement a state assistance plan	$2,000,000	$2,000,000

a. Notwithstanding chapter eight (8) of the Code, it is the intent of the general assembly that funds appropriated for public transit purposes to implement a state assistance plan shall be allocated in whole or in part to a public transit system prior to the time actual expenditures are incurred if the allocation is first approved by the state department of transportation. A public transit system shall make application for advance allocations to the state department of transportation specifically stating the reasons why an advance allocation is required and this allocation shall be included in the total to be audited.

1979 Session, 68th G.A., ch. 11, §4(3). Pursuant to the above statement of legislative intent, we understand that practically the entire appropriation of $2,000,000 has been obligated by way of contract or agreement to various public transit systems, but that a substantial amount of the appropriation has not in fact been advanced to such systems by the D.O.T. Thus, although such funds are obligated and allocated, they remain, for the most part, in the state treasury.

The allocation of appropriated funds to East Central is based upon an agreement with the D.O.T. entitled "Joint Participation Agreement for the State Transit Assistance Program", which contains several provisions with respect to the allocation of $90,000 to East Central from D.O.T. According to §1.3 of the Agreement, its purpose is "to provide financial assistance to the PUBLIC AGENCY [East Central] as appropriated and authorized by H. F. 738, Second Session of the Sixty-eighth General Assembly for operating assistance as described in the application herein made as a part of this AGREEMENT . . . ". In furtherance of this purpose, the Agreement sets forth "mutual covenants, promises and representations" concerning the terms and conditions upon which $90,000 will be allocated to and a transit system administered by East Central. Section 3.1, for example, provides that D.O.T. must promptly reimburse East Central for all justified and complete billings, but may deny part or all of any reimbursement request that D.O.T. feels is not warranted or justified or that may exceed the rightful amount of reimbursement to East Central. Other provisions in the Agreement specify definitions of terms, the performance period, roles and responsibilities of the parties, performance standards, payment procedures, reporting requirements, and audit and inspection procedures. Certain "standard provisions" and "appendices" are also made part of the Agreement but are not attached. These include "contract nonperformance" and "hold harmless" provisions. We recognize that the validity and enforceability of such a contract, which simply defines the terms, conditions and procedures for a legislative financial grant, may be subject to question. For the purposes of this opinion, however, we will consider the agreement between East Central

and D.O.T. to be a valid contract, the performance of which is considered a legal duty by the parties involved.[1]

By Executive Order #38, the Governor directed the implementation of §8.31, The Code 1979, requiring a uniform and prorated reduction in allotments of legislative appropriations to prevent an overdraft or deficit in the state budget at the end of this fiscal year. The amount of the reduction ordered by the Governor was 3.6% in each respective appropriation for the remaining three-quarters of the fiscal year. East Central has expressed concern that, in order to comply with the Order, D.O.T. may reduce the amount of its $90,000 funding commitment to East Central.

We observe that the state assistance plan for public transit, upon which the East Central-D.O.T. contract is based, is funded by a line item appropriation made to a department of state government. Two earlier opinions of this office have discussed how such an appropriation would be affected by §8.31. Op. Atty. Gen. #80-8-8 and Op. Atty. Gen. #80-9-3. The former opinion concluded that §8.31 does not permit the Governor to make selective reductions in allotments of appropriations but, instead, requires uniform and proportionate reductions among all departments, agencies, and establishments on the basis of their respective appropriations. The latter opinion determined that such reductions are to be made on a line item rather than a department-by-department basis. We note further that §§8.30 and 8.31 specifically and consistently refer to the payment of "all appropriations in full". The sections do not enumerate exceptions for particular types of appropriations.[2] Pursuant to our prior opinions and the express language of §§8.30 and 8.31, we conclude, in response to your first question, that the appropriation for the public transit assistance plan is subject to the 3.6% reduction ordered by Governor Ray.

The administrator of the public transportation division of the Department of Transportation has statutory authority under §307.25(3) to accept and expend state funds, which implies the authority to enter into contracts for this purpose. Additionally, §307.25(6) states that the administrator shall perform such other duties and responsibilities as assigned by the director and commission of the Department of Transportation. One such duty involves the execution of contracts and agreements. §307.10(9). Also, pursuant to §§28E.12 and 28E.13, public agencies may contract with one another to perform any governmental service, activity, or undertaking which the agencies are authorized by law to perform.

The definitional section of Chapter 8 does establish limited exceptions:

> The terms 'department and establishment' and 'department' or 'establishment', mean any executive department, commission, board, institution, bureau, office, or other agency of the state government, including the state department of transportation, except for funds which are required to match federal aid allotted to the state by the federal government for highway special purposes, and except the courts, by whatever name called, other than the legislature, that uses, expends or receives any state funds.

§8.2(1). Such exceptions, which do not include an appropriation for public transit assistance, are recognized by the Governor in his Executive Order:

> 4. I further direct the State Comptroller to prepare such modified allotments for the second quarter of fiscal year 1981, which commences

You also raise the question of whether the State of Iowa may decrease the amount of its contractual obligations as a result of the Governor's order. More precisely, in light of the factual situation presented, the question is whether a state agency, acting in accordance with Executive Order #38, may modify or alter its contractual obligations for the allocation of appropriated funds to another public agency. We conclude, for the following reasons, that such obligations may be modified or altered.

Contracting parties are generally presumed to contract in reference to existing law. 17 Am.Jur.2d, *Contracts*, §257 (1964). The Iowa Supreme Court has held that "existing statutes and the settled law of the land are a part of every contract and must be read into it as though it were specifically referred to therein." *Cornick v. Southwest Iowa Broadcasting Co.*, 252 Iowa 653, 656, 107 N.W.2d 920, 921 (1961). Stated differently, parties may not contract in defiance of a statute which regulates the subject matter of their agreement. *Id.* By virtue of such a rule, laws existing at the time of a contract's execution affect its validity, obligations, performance, and enforcement. 17 Am.Jur.2d, *Contracts*, §257 (1964). The contractual obligations for the allocation of $90,000 from D.O.T. to East Central is premised on a legislative appropriation. The General Assembly has clearly expressed its intent with respect to the payment of such an appropriation:

. . . All appropriations now or hereafter made are hereby declared to be maximum and proportionate appropriations, the purpose being to make the appropriations payable in full in the amounts named in the event that the estimated budget resources during each fiscal year of the biennium for which such appropriations are made, are sufficient to pay all of the appropriation in full . . .

§8.30, The Code 1979. The provisions of §§8.30 and 8.31 govern allotments of "all appropriations" and, accordingly, regulate the operation of any contract or agreement which involves the allocation and expenditure of such appropriations. In this regard, §8.31 plainly establishes a procedure for allocation of an appropriation to a state department such as the Department of Transportation. Before such an appropriation can become available to a department for expenditure, the department *must* submit to the governor, not less than 20 days before the beginning of each quarter of a fiscal year, a requisition for an allotment of the amount estimated to be necessary to carry on its work during the ensuing quarter. Only allotments of appropriations made for equipment, land, permanent improvements, and other *capital* projects may be allotted in one amount by major classes or projects, which are then expendable without regard to quarterly periods. The appropriation to D.O.T. for public transit purposes is not affected by this exception.

Another ground for modification of the D.O.T.-East Central agreement is founded upon its possible violation of law. An agreement that violates a provision of either the State Constitution or a constitutional statute, or that cannot be performed without violation of such a provision, is void.

(Footnote Cont'd)

October 1, with the exception of appropriations excluded by Section 8.2(1), The Code, pertaining to the courts, the legislature, constructive trust funds such as tax refund allocations, federal highway matching funds, and obligated, encumbered or contracted capital items.

Keith Furnace Co. v. Mac Vicar, 280 N.W. 496, 225 Iowa 246 (1938). This office has previously concluded that §8.31 is a constitutional delegation of legislative authority to the Governor and requires the Governor to prevent an overdraft or deficit in the several funds of the state at the end of each fiscal year. Op. Atty. Gen. #80-8-8. The performance of a contract or agreement for allocation of appropriated funds which would effect an overdraft or deficit in the state budget would violate both §8.31 and the express intent of the General Assembly in §8.30 to make appropriations payable in full only in the event that estimated budget resources during the fiscal year are sufficient to pay such appropriations. Consequently, to the extent the agreement between D.O.T. and East Central could violate §§8.30 and 8.31, it must be deemed void.

Under Iowa law, the doctrine of impossibility of performance also provides a legal excuse for nonperformance of the contract by D.O.T. *Nora Springs Co-op Co. v. Brandau*, 247 N.W.2d 744, 747 (Iowa 1976). A promise that becomes objectively impossible to perform due to no fault of the nonperforming party is generally excusable as a matter of law. *Id.* There appears to be nothing to suggest that D.O.T., at the time it executed its agreement with East Central, could reasonably have anticipated that state revenues would decline substantially to justify utilization of §8.31 by the Governor to prevent an overdraft or deficit in the state budget. Indeed, since §8.31 had never been previously used in Iowa, neither East Central nor D.O.T. probably contemplated its application during the period of their agreement. The reason for the impossibility of performance in this situation, i.e., a finding by the Governor that estimated budget revenues are insufficient to pay all appropriations in full, is entirely fortuitous and unavoidable insofar as the parties to the agreement are concerned. Hence, it appears that the doctrine of impossibility of performance would apply to the agreement between D.O.T. and East Central as a legal basis for D.O.T. to decrease the amount of its original binding commitment to East Central.

Finally, the contract clauses of the federal and state constitutions do not proscribe the impairment of contractual obligations by operation of an existing statute. The freedom of parties to contract is protected by Article I, §10 of the United States Constitution and Article I, §21 of the Iowa Constitution. The former provides in pertinent part that no state shall pass any law impairing the obligation of contracts. Similarly, Article I, §21, states:

> No Bill of Attainder, ex post facto law, or law impairing the obligation of contracts, shall ever be passed.

A separate discussion of the federal and state 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*, 254 N.W. 2d 737, 745 (Iowa 1977). In view of the similarity and the historical relationship of the federal and state contract clause provisions, the latter should receive a construction similar to that given its counterpart in the Federal Constitution. *Des Moines Joint Stock Land Bank of Des Moines v. Nordholm*, 253 N.W. 701, 217 Iowa 1319 (1934). Accordingly, interpretations of the federal contract clause by federal courts are instructive in determining the meaning and effect of Article I, §21, in the Iowa Constitution. *See Davenport Water Co. v. Iowa State Commerce Comm.*, 190 N.W.2d 583, 593 (Iowa 1971).

The Contract Clause does limit the power of the state to modify its own contracts as well as to regulate those between private parties. *Frost v. State of Iowa*, 172 N.W. 575, 583 (Iowa 1970). The clause applies, however, only to a state law enacted *after* the making of a contract whose obligation is asserted to have been impaired. *Oshkosh Waterworks Co. v. Oshkosh, Wis.*, 187 U.S. 437, 23 S.Ct. 234, 47 L.Ed. 253 (1903); *Schlothan v. Territory of Alaska*, 276 F.2d 806 (9th Cir.); *cert. den.* 362 U.S. 990, 80 S.Ct. 1079, 4 L.Ed.2d 1022 (1960). Since §8.31 was in existence substantially prior to the time that East Central and D.O.T. entered into their agreement, the statute does not contravene Article I, §21.

We observe that the appropriation for public transit purposes contains an "intent clause" that appears to permit an allocation of the appropriation in a manner similar to that authorized under §8.31 for capital projects. The clause indicates that, notwithstanding Chapter 8 of the Code, "it is the intent of the general assembly that funds appropriated for public transit purposes to implement a state assistance plan shall be allocated in whole or in part to a public transit system prior to the time actual expenditures are incurred if the allocation is first approved by the state department of transportation." This expression of legislative intent directly conflicts with both the allocation procedure set forth in §8.31 and the expression of legislative intent in establishing that procedure, as set forth in §8.30. A state agency, such as D.O.T., receiving an appropriation, such as that for public transit assistance, is thus faced with the dilemma of deciding whether to adhere to statutory mandates governing the expenditure of virtually all appropriations or, rather, the expression of legislative intent attached to a specific appropriation.

We conclude, for the following reasons, that the expression of legislative intent concerning the allocation of an appropriation, as expressed in an intent clause, does not supplant statutory provisions governing the allocation of that appropriation.

First, the expression of an intent is, by definition, only directory. An "intent" is defined variously as a "purpose", an "aim", an "objective", and a "goal". *Webster's New Collegiate Dictionary* (1979). Such terms imply that, to the extent possible, a certain result is to be effectuated by particular means. The expression of an intent is therefore to be distinguished from the expression of a mandate, which requires accomplishment of a certain result in order to avoid the application of specified sanctions.

Second, an examination of the types of qualifications placed on appropriations by the General Assembly indicates that two distinct approaches are employed. One involves the intent clause, which is merely precatory and provides an agency with certain guidelines to follow in the allocation and expenditure of an appropriation. The agency, which depends upon future legislative appropriations in order to function, is directly accountable for any failure to follow the guidelines; nevertheless the availability of the appropriation itself is not dependent upon adherence to the guidelines. Alternatively, the General Assembly, on occasion, qualifies the expenditure of an appropriation by an express condition or restriction. For example, H. F. 734, "An Act relating to and appropriating from the general fund of the state and various trust funds for various operations

and grants and aids to departments and agencies of the state whose responsibilities relate to agricultural affairs, economic development, energy research, coal research, and natural resources management and research and providing for a penalty", contained the following appropriation to the Department of Agriculture and the accompanying condition:

2. REGULATORY DIVISION
From the general fund for salaries, support, maintenance, and miscellaneous purposes . . $3,011,735 $2,977,256

It is the condition of the appropriations made by this subsection that for every dollar of federal funds received for indirect costs in excess of the amount appropriated for the meat and poultry section of the regulatory division, one dollar of the amount appropriated shall be returned to the general fund of the state.

1979 Session, 68th G.A., ch. 12, §1(2). Unlike an intent clause, the above qualification is not merely directory but, rather, suggests that the appropriation is not to be expended unless the condition is satisfied. In this respect, the qualification is both binding and mandatory. The General Assembly chose not to employ such language with respect to the qualification on the appropriation for public transit purposes, but instead qualified the appropriation through the use of an intent clause.

Third, the limited nature of the Governor's veto power in the context of appropriations bills suggests that, if the General Assembly intends to establish a binding condition on an appropriation, it should do so by clear and unambiguous language. To veto a legislatively imposed qualification on an appropriation, the Governor clearly must veto the accompanying appropriation as well. *Welden v. Ray*, 229 N.W.2d 706, 713 (Iowa 1975). An informed decision on whether to utilize the veto power in a particular case may depend in part upon the binding nature of the qualification deemed objectionable by the Governor. Accordingly, if the General Assembly intends to establish a binding condition on an appropriation, it should do so by language that is plainly mandatory and restrictive, such as that employed in H. F. 734 cited previously. Such language removes any question or confusion as to whether the agency must adhere to the qualification placed on the appropriation.

Finally, certain principles of statutory construction suggest that the intent clause to the appropriation for public transit purposes is indeed precatory, and functional only to the extent that the mandatory provisions of §8.31 are not violated. The Iowa Supreme Court has indicated that a statutory exception must be strictly construed and must not encroach unduly upon the statutory provision to which it is an exception. *Heiliger v. City of Sheldon*, 236 Iowa 146, 18 N.W.2d 183 (1945). Any doubts or implications should be resolved in favor of the rule and against the exception. 236 Iowa at 154, 18 N.W.2d at 186. Additionally, where a statute makes legal and possible an act which would otherwise be unauthorized, the statute should be construed as permissive only, even if the word "shall" has been utilized. *See Lodge v. Drake*, 243 Iowa 628, 630, 51 N.W.2d 418, 419 (1952). The intent clause of the public transit appropriation does attempt to create an exception to the statutory provisions of Chapter 8 concerning the allotment of appropriations. It should therefore be construed as permissive and as having only limited application.

We recognize that state agencies traditionally have followed the provisions set forth in the intent clauses to appropriations. The fact that an

agency must seek future appropriations from the Legislature provides a significant incentive for the agency to adhere to any qualifications placed upon its existing appropriation. Additionally, an intent clause may serve an important purpose in preventing confusion with respect to the proper manner in which an appropriation should be expended. Accordingly, we do not suggest that an agency disregard the provisions of an intent clause to an appropriation. We conclude only that an intent clause to an appropriation is not sufficient to create an exception to statutorily-mandated procedures concerning the allocation of that appropriation. Consequently, the language of the intent clause to the public transit appropriation does not exempt the appropriation from the allocation procedures of §8.31.

In summary response to the questions you raised, we conclude:

1. The uniform 3.6% reduction in state expenditures recently ordered by the Governor pursuant to §8.31, The Code 1979, does apply to the line item appropriation for public transit purposes to implement a state assistance plan.

2. A state agency, acting in accordance with the Governor's order to make reductions in its appropriation pursuant to §8.31, may modify or alter its contractual obligations with another public agency concerning the allocation of such appropriation.

December 9, 1980

STATE OFFICERS AND DEPARTMENTS: Board of Nursing — Denial of a License — §§147.3, 147.4, 147.55, 152.1, 152.10, The Code 1979. The Board of Nursing can determine whether the refusal to administer blood to patients on religious or other grounds is the failure to conform to the minimum standards of the acceptable and prevailing practice of nursing. If it so finds, it may deny an applicant a license on that basis. Such should not constitute unlawful discrimination. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 12-9-80) #80-12-8(L)

December 9, 1980

USURY: Interest rate limitation. 1980 Session, 68th G.A., S. F. 2375, §1; §535.2, The Code 1979. The context of ch. 535.2 requires application of its provisions to any written instrument which requires payment of interest and which creates an enforceable right to payment of principal and interest. It is incorrect to narrow the application of this section to exclude any type of debt instrument which has the above described characteristics. Whether a debt instrument is identified as a "note" or an "agreement" is not determinative of whether the limitations of S. F. 2375, §1, apply, but the nature of the debt instrument determines whether these limitations apply. (Norby to Jochum, State Representative, 12-9-80) #80-12-9

Honorable Thomas Jochum, State Representative: We have received your request for an opinion of the Attorney General asking three questions concerning 1980 Session, 68th G.A., S. F. 2375, §1. We would like to respond to your second question at this time and will respond to the other two in a separate opinion.

Senate File 2375, §1, provides as follows:

Section 1. Section five hundred thirty-five point two (535.2), subsection four (4), Code 1979 Supplement is amended to read as follows:

4. *a.* Notwithstanding the provisions of subsection 3, with respect to any agreement which was executed prior to August 3, 1978, and which contained a provision for the adjustment of the rate of interest specified

in that agreement, the maximum lawful rate of interest which may be imposed under that agreement shall be nine cents on the hundred by the year, and any excess charge shall be a violation of section 535.4.

b. Notwithstanding the limitation contained in paragraph a of this subsection, with respect to a written agreement for the repayment of money loaned, which was executed prior to August 3, 1978, and which provided for the payment of over fifty percent of the initial principal amount of the loan as a single payment due at the end of the term of the agreement, the interest rate may be adjusted after the effective date of this Act according to the terms of the agreement to any rate of interest permitted by the laws of this state as of the date an adjustment in interest is to be made. This paragraph does not authorize adjustment of interest in any manner other than that expressly permitted by the terms of the written agreement, and nothing contained in this paragraph authorizes the collection of additional interest with respect to any portion of a loan which was repaid prior to the effective date of an interest-rate adjustment.

Your second question is as follows:

Is there any legal distinction between a "note" and an "agreement" as an instrument providing for repayment of a loan, as far as the maximum interest rate allowed by S. F. 2375, §1, is concerned?

This question requires determination of the scope of coverage of S. F. 2375, §1. Initially, we would note two points. First, that your concern relates to debt instruments, including those secured by a mortgage on real property. Secondly, that the nature of a particular debt instrument is of controlling significance, not the title given to the instrument.

Initially, §§535.2(3) and 535.2(4), as amended by S. F. 2375, §1, expressly apply to "any written agreement for payment of interest." Section 535.3(d) applies to "any contract, *note* or other written agreement", which appears to include notes as a subset of a larger set of written agreements.

The term "note" appears to embrace a large number of different types of instruments. At 10 C.J.S. *Bills and Notes*, §7, a note is defined as follows:

A note, in commercial law, has been defined as the written promise to pay another a certain sum of money at a certain time. It is an agreement to pay money; it cannot be treated as cash. [Footnotes omitted.]

In *Black's Law Dictionary*, a note is defined as follows:

NOTE, n. A unilateral instrument containing an express and absolute promise of signer to pay to a specified person or order, or bearer, a definite sum of money at a specified time.

Black's Law Dictionary, 1210 (4th rev. ed. 1968). *See also* 28A *Words and Phrases*, p. 462.

An "agreement" is defined in *Black's Law Dictionary* as follows:

AGREEMENT. A coming or knitting together of minds; a coming together in opinion or determination; the coming together in accord of two minds on a given proposition; in law a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties, of certain past or future facts or performances; the consent of two or more persons concurring respecting the transmission of some property, right, or benefits, with the view of contracting an obligation, a mutual obligation. Bac.Abr.; Rocha v. Hulen, 6 Cal.App.2d 245, 44 P.2d 478, 482.

The act of two or more persons, who unite in expressing a mutual and common purpose, with the view of altering their rights and obligations. The union of two or more minds in a thing done or to be done; a mutual assent to do a thing. Com. Dig. "Agreement," A. 1. See Agregatio Mentium. Carter v. Prairie Oil & Gas Co., 58 Okl. 365, 160 P. 319, 322. A compact between parties who are thereby subjected to the obligation or to whom the contemplated right is thereby subjected to the obligation or to whom the contemplated right is thereby secured. People v. Mills, 160 Misc. 730, 290 N.Y.S. 48, 52.

Although often used as synonymous with 'contract', Douglass v. W. L. Williams Art Co., 143 Ga. 846, 85 S.E. 993, it is a wider term than 'contract' (Anson, Cont. 4.) An agreement might not be a contract, because not fulfilling some requirement. And each of a series of mutual stipulations or constituent clauses in a contract might be denominated an 'agreement.' The meaning of the contracting parties is their agreement. Whitney v. Wyman, 101 U.S. 396, 25 L.Ed. 1050. 'Agreement' is seldom applied to specialties. Pars. Cont. 6.

'Agreement' is not synonymous with 'promise' or 'undertaking.' It signifies a mutual contract, on consideration. Andrews v. Pontue, 24 Wend. N.Y. 285; Wain v. Warlters, 5 East, 10; wherein parties must have a distinct intention common to both, and without doubt or difference. Blake v. Mosher, 11 Cal.App.2d 532, 54 P.2d 492, 494.

The writing or instrument which is evidence of an agreement.

Black's Law Dictionary, 89 (4th rev. ed. 1968). This definition appears to primarily stress the bilateral nature of an agreement, but is defined as being broader than a contract.

We believe that the context of ch. 535.2 requires application of its provisions to any written instrument which requires payment of interest and which creates an enforceable right to payment of principal and interest. We believe it would be incorrect to narrow the application of this section to exclude any type of debt instrument which has the above described characteristics. In conclusion, whether a debt instrument is identified as a "note" or an "agreement" is not determinative of whether the limitations of S. F. 2375, §1, apply, but the nature of the debt instrument determines whether these limitations apply.

December 9, 1980

REAL ESTATE: Sales of Subdivided Land Outside of Iowa. Chapter 117A, 1979 Code of Iowa. Sale or lease of time-sharing arrangements are governed by Chapter 117A when the time-sharing arrangement meets the definitional standards of §117A.1(1). (Thomas to Johnson, Director, Iowa Real Estate Commission, 12-9-80) #80-12-10

Mr. Eugene O. Johnson, Director, Iowa Real Estate Commission: We have received your opinion request concerning whether Chapter 117A, 1979 Code of Iowa, *Sales of Subdivided Land Outside of Iowa*, would include time sharing arrangements.

Time sharing is a relatively new concept and is a rapidly growing marketing area in the real estate and vacation fields. It has come, in general use, to mean an arrangement whereby two or more persons or purchasers will share possession and use of land or appurtenant structures on land for designated periods during any particular year or prearranged use period.

In our opinion, certain sales or leases, designated as time sharing arrangements, would be governed by Chapter 117A and those selling

or leasing such would be required to comply with the provisions of Chapter 117A.

Subsection §117A.1(1), 1979 Code of Iowa, defines "subdivided land":

1) "Subdivided land" means any improved or unimproved land divided or proposed to be divided for the purpose of sale or lease into five or more lots or parcels, or *additions thereto, or parts thereof;* however, subdivided land does not apply to a subdivision subject to section 306.21 or chapter 409 nor to the leasing of apartments, offices, stores, or similar space within an apartment building, industrial building, or commercial building unless an *undivided interest in the land is granted as a condition precedent to occupying space in said structure.* Subdivided land shall not include any subdivisions of land located within the state of Iowa." [Emphasis Added]

Neither of the two exclusionary provisions mentioned in the above subsection of the statute are relevant to your inquiry as they relate to "Establishment, Alteration and Vacation of Highways" (§306.21) and "Plats," (Chapter 409), of land situated in this state.

The American Land Development Association (ALDA), a private association representing the recreation, resort and residential real estate development industry has proposed a model statute. Time sharing is defined in the *Model Act* as:

". . . any arrangement for Time-Share Intervals in a Time-Share Project whereby the use, occupancy or possession of real property has been made subject to either a Time-Share Estate or Time-Share Use whereby such use, occupancy or possession circulates among purchasers of the Time-Share Intervals according to a fixed or floating time schedule on a periodic basis occuring (sic) annually over any period of time in excess of three (3) years in duration."

Section 1-103, ALDA *Model Act.*

A "Time Share Project" means any real property that is subject to a time sharing program. Additionally the *Model Act* defines "Time Share Estate" as "an ownership or leasehold estate in property devoted to a time-share fee (tenants in common, time span ownership, interval ownership) and a time share lease."

A distinction is drawn, and is adopted for purposes of discussion in this opinion, between Time Share Estate and Time Share Use. The *Model Act* defines Time Share Use as:

". . . any contractual right of exclusive occupancy which does not fall within the definition of a 'Time-Share Estate' including, without limitation, a vacation license, prepaid hotel reservation, club membership, limited partnership or vacation bond."

Section 1-103, ALDA *Model Act.*

The *Model Act* has been adopted in full by the State of Nebraska, and South Dakota is considering verbatim adoption. Other jurisdictions have adopted legislation controlling time sharing, including the states of Florida, South Carolina, California and Hawaii. In addition, legislation is being considered in this area by Colorado, Nevada and Virginia.

Within our jurisdiction, Chapter 117A would apply to any Time Share Project granting a Time Share Estate as that term is defined by the ALDA *Model Act.* Thus, a Time Share Use would not be covered as it is merely governed by the contractual provisions mandating a contractual duty for a service or accommodation.

For our purposes it would be helpful to define "undivided interest" as that term is used in §117A.1(1). It must be understood that the term "undivided" is synonymous with "absolute" when referring to legal title to property. An absolute interest in property would be that which is so completely vested in the individual that he can by no contingency be deprived of it without his own consent. *Hough v. City Fire Insurance Co.*, 29 Conn. 10, 20 (1860), which was cited by the Iowa Supreme Court in *Garner v. Hawkeye Insurance Co.*, 69 Iowa 202, 28 N.W. 555 (1886).

Any interest which is capable of being re-sold, devised, transferred or in any way alienated without affecting the rights of others enjoying the use of the land or additions thereto would be an undivided interest, one which is absolute. *Hough*, 29 Conn. at 20 and *"Condominium Act,"* §718.103(9), (16), (19) and (20), 1979 Fla. Stat. Ann.

The Iowa statute provided that subdivided land includes land divided into "five or more lots or parcels or additions thereto, or parts thereof." §117A.1(1). It is clear that any structure added to land is an "addition thereto" or a "part thereof." Thus, the addition of a structure, or structures, on land which contains five or more units would be governed by the provisions of Chapter 117A.

Therefore, Chapter 117A controls time share estates in which the land, or additions thereto, is divided into five or more parcels or units. In addition, any time share estate which provides that the original purchaser, or any subsequent purchaser, may sell, transfer, devise or in some other way dispose of his or her interest without serious restraint would be controlled by Chapter 117A.

Some time sharing arrangements use such terms as "fee-simple," "title" or "estate" without further definition to describe the interest held by the purchaser, owner or user. Mere use of words does not in itself change the character of a thing done or contemplated. The intent of the parties and the document memorializing and controlling their agreement will be given legal effect.

To determine the application of Chapter 117A some examples of time sharing arrangements would be helpful. Accordingly, there follow four typical situations which have occurred or are occurring in the time share sales field.

Situation A: A developer proposes to offer for sale and to sell time shares in buildings containing five or more units, with the buildings located in different states. The purchaser receives a title, to share with 299 other purchasers, to the real property upon which the buildings are located. The purchaser, therefore, receives a 1/300th interest in the real property upon which is situated the time share buildings. The purchaser can sell his or her interest or devise it by will or transfer it to anyone without prohibition by either the developer or other co-owners.

Chapter 117A would govern the offering for sale and the sale of such time share estates. The developer would be selling an interest in land which the purchasers can do with as they choose. They can devise it, sell it or transfer it in any fashion they choose without serious prior restraint exercised by the co-owners or developer. The ALDA *Model Act* would consider Situation A as creating a time share estate.

Situation B: A developer holds a long term lease of 99 years on a property which contains a 200 unit building. Developer sells to purchaser a time share estate in which the purchaser can use any unit, within the 200, for two weeks during any one calendar year. The developer again exercises no control over the transfer of the purchaser's right to use, occupy or sell except for scheduling of use times.

Under the circumstances of Situation B, it again becomes clear that Chapter 117A would govern the offering for sale and sale of such additions to the land or parts thereof (the 200 unit building). It is a time share estate and the developer and purchaser stand in similar relationship with each other as those parties held in Situation A.

Situation C: A developer holds fee simple title to five different buildings containing 100 units each in five different states. The developer sells a right to use any of the 500 units for one to two weeks per year. However, the purchaser is restricted to sole use only for the purchaser and family. The purchaser cannot attempt to sell, lease, devise or otherwise transfer the interest and if the purchaser dies the interest and right to use reverts to the developer.

Situation C becomes what may be called a "pure use" time sharing arrangement and would *not* be governed by Chapter 117A. The purchaser has only purchased a right to use a particular unit (out of 500) for one to two weeks per year. The purchaser can do nothing else with that unit without the developer's consent and upon the purchaser's death all interest and right to use reverts to the developer who could re-sell the now vacant right to use. Under the ALDA *Model Act*, Situation C would be a time share use.

Situation D: The developer leases the use of any of 2,000 units to a lessee-purchaser who receives a certificate of ownership and use providing that said lessee-purchaser has a 1/2000th interest in the time sharing association which was created upon the sale of leases to enough persons to totally occupy 2,000 units for one full calendar year, except for a two-week maintenance period. The association membership controls the recreational uses of the premises, the scheduling of use times and maintenance expenses of the leaseholds. Prior to the lessee-purchaser attempting use, the association, (or developer prior to a majority of all leases being sold) must issue a certificate and an identification card to the lessee-purchaser. The association, made up of other lessee-purchasers, is given title to the land and buildings upon sale of a majority of the leases by the developer. The association and developer exercise no control over the lessee-purchaser's ability to use the property. Indeed, the lessee-purchaser can sub-lease his interest, give it to his children, or even transfer it (with or without consideration) to any other person.

Chapter 117A would govern Situation D. The granting, with the lease, of an undivided 1/2000th interest in the land as a member of the association prior to any use is the provision of an undivided interest as a condition precedent to occupying space in the structure under a lease arrangement.

Any person buying from the lessee-purchaser or in any other way acquiring the lessee-purchaser's privileges of use and occupancy would

then substitute for the lessee-purchaser as a member of the association and would enjoy similar rights to future sub-leasing, sale, or transfer.

The four preceding examples are not meant to be all inclusive or to cover all possible time sharing arrangements. They merely exemplify some of the more typical time sharing arrangements. The particular factual arrangements, documents creating the time share estate or use and the intent of the parties would be relevant to any inquiry as to whether a particular developer or seller of time share estates would have to comply with Chapter 117A.

As a caveat, we would advise the Commission that the potential for abuse is great in the offering for sale or sale of time sharing arrangements. The Commission should look carefully to the title or interest held by developers offering time share estates. A long-term lease arrangement is of particular concern because acts done by the developer (or unwittingly by lessee-purchasers) which are violative of the lease terms might abrogate the lease and defeat any present or future interest held by a prior purchaser of a time share estate or use.

The Commission is advised to consider promulgating administrative rules which would implement Chapter 117A insofar as it governs time sharing arrangements. Those time sharing arrangements governed by Chapter 117A would be required, at a minimum, to undergo the same registration requirements enumerated in the statute.

STATE OFFICERS AND DEPARTMENTS

Iowa Department of Transportation. Chapters 17A, 307, 307A, 327H, §§17A.1(2), 17A.2(7), 17A.2(7)(a), 17A.3(1)(b), 17A.4, 17A.7, 307.26(6), 307.10(5), 307A.2(13), 327H.18. If any agency statement of policy, practice or procedure substantially affects the legal rights or procedures of the public or a segment thereof, the agency is required to promulgate administrative rules instead of only adopting a policy. (Goodwin to Waldstein, State Senator, 12-9-80) #80-12-11(L)

December 10, 1980

STATE OFFICERS AND DEPARTMENTS: Department of Social Services, Bureau of Community Correctional Services, Presentence Reports. 21 U.S.C. §1175; 42 U.S.C. §4582; 42 C.F.R. §§2.12, 61; Chapter 905, The Code 1979; §§905.2, 905.4(9), §§68A.2; 68A.7; Chapter 901; §§901.2, 901.3, 904.4; §125.37; Chapter 692; §§692.1, 692.2, 692.3, 692.4, 692.7, 692.18. A pre-sentence investigation report submitted to the courts by the judicial district department of correctional services must be kept confidential. Section 901.4, The Code 1979, grants the courts authority to disclose its contents under limited circumstances. Reports containing a client's medical or psychiatric treatment records are confidential and must be sealed by the court. Reports containing information relative to a client's treatment for substance abuse are confidential and may be disclosed in limited circumstances pursuant to applicable state and federal law. Reports containing client criminal history data are confidential and may be redisseminated only in accordance with the applicable provisions of Chapter 692, The Code 1979. The judicial district departments of correctional services are not liable for violations of confidentiality by the courts. (Brenneise to Reagen, Commissioner, Dept. of Social Services, 12-10-80) #80-12-12(L)

December 10, 1980

CRIMINAL LAW; IMPLIED CONSENT: Authority of peace officer to compel assistance of a physician in OMVUI case. §321B.5, The Code 1979. A physician has no duty to certify the death or unconsciousness of a driver to enable a peace officer to obtain a body specimen for purposes of chemical testing for alcohol. (Huber to Pope, State Representative, 12-10-80) #80-12-13(L)

BEER AND LIQUOR

Beer and Liquor Control Department: Ownership of Liquor License or Beer Permit by Department Employees. §§123.17, 123.45, The Code 1979. An employee of the Iowa Beer and Liquor Control Department may not hold a liquor license or a beer permit, and may not own stock in a corporation which holds a license or permit. Spouses and children of Department employees may generally hold a license or permit and own stock in a corporation holding a license or permit. (Norby to Gallagher, 12-10-80) #80-12-14(L)

December 10, 1980

BEER AND LIQUOR: Tax on liquor licensees. §§123.3(10), 123.96, 442.42, The Code 1979. A municipality which holds a liquor control license is subject to the same tax applied to private licensees on liquor purchases from state liquor stores. (Norby to Correll, Black Hawk County Attorney, 12-10-80) #80-12-15(L)

LABOR/EMPLOYMENT

Iowa Department of Job Service. 29 U.S.C. §§49-49i; §§96.5(3)(b)(1), 96.11(11), 731.3, The Code 1979. The Iowa Department of Job Service is obligated under Chapter 96 of the Iowa Code to follow certain provisions of federal law and regulations established by the United States Department of Labor. Such provisions and regulations, which preclude Job Service from making referrals of job applicants to employers involved in labor disputes, control over any potentially conflicting provisions in Iowa's "right-to-work" law set forth in Chapter 731. (Stork to Miller, State Representative, 12-11-80) #80-12-16(L)

REAL ESTATE

Real Property; Subdivision Platting. §409.1, The Code 1979. When a landowner sells a tract to which §409.1 applies to that the seller keeps part of it, and the buyer buys part on contract and part by deed so that he can obtain financing, it is reasonable to conclude that there is not a subdivision into three or more parts under §409.1. If the contract is forfeited and seller sells off that part of the real estate to a third party, seller has subdivided into three parts under §409.1. (Ovrom to Murray, State Senator, 12-12-80) #80-12-17(L)

December 12, 1980

SCHOOLS: Taxes; levy for cash reserves. §§8.6(4)(c), 298.8, 442.2, 442.9, 444.7, The Code 1979. Section 8.6(4)(c) does not provide authority for school districts to levy a separate tax for the purpose of crediting a cash reserve balance. (Norby to Schnekloth, State Representative, 12-12-80) #80-12-18

Honorable Hugo Schnekloth, State Representative: You have requested an opinion of the Attorney General regarding a question of school finance. You have asked whether local school districts have authority to levy a property tax for the specific purpose of creating or increasing their cash reserve balance. This levy is in addition to all other levies authorized by the Code. You have indicated that districts have relied on §8.6(4)(c), The Code 1979, for authority to make a levy for cash reserves.

A levy for cash reserves is a levy of an additional amount of revenue for a school district's general fund, rather than creation of a separate and distinct fund. While such a levy will increase the cost to the taxpayers in a year when such a levy is made, the district is subject to a maximum limitation on expenditures during each school year. §442.5(2), The Code 1979. The availability of additional reserves would, however, be beneficial in several ways. The presence of additional reserves might eliminate the need for a school to borrow funds during periods when receipt of tax revenues is not sufficient to meet current expenditures. In addition, the presence of a reserve balance would allow a school to spend up to their maximum limit even if current receipts, whether from property taxes or state aid, were insufficient to fund the authorized level of expenditure.[1] For example, the recent 3.6% decrease in state aid to school districts might be replaced in full or in part from cash reserves, thereby allowing a district to spend up to their maximum limitation despite this cut in state aid.

In addressing your question, the important determinant is whether authority exists for such a levy. Statutes which provide for taxation should be construed in favor of the taxpayer and against the levying body. *Great Northern R. R. v. Board of Supervisors of Plymouth Co.*, 197 Iowa 903, 196 N.W. 284 (1923). In addition, several statutory sections indicate that tax levies may be made only in an amount provided by law. §§298.8, 442.9, 444.7, The Code 1979. In light of these principles, our inquiry should be directed toward both finding specific authority for the levy and ascertaining if any limitations on taxing authority are exceeded by such a levy.

Several provisions of the Code provide express authority to levy taxes for the general fund. §§298.7, 298.15, 298.17, 442.2, 442.9, 442.14, 613A.10, The Code 1979. Section 8.6(4)(c) and (d) have apparently been relied upon as authority to levy an amount of tax for cash reserves in addition to the express levies cited above. Sections 8.6(4)(c) and (d) provide as follows:

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[1] An illustration of this problem is presented by the personal property and livestock tax replacement funds. §§427.12 and 427A.17, The Code 1979. The full amount of these payments due to the school districts from the State is used in calculating the amount of the foundation tax levy. §§442.2(2) and 442.2(3), The Code 1979. The Legislature may, however, appropriate less than the amount necessary, resulting in a proration of replacement funds among taxing districts. §§423.17(5) and 427A.12(8). The Legislature has, however, taken action to allow school districts to recover the amount lost due to proration of the property tax replacement fund. 1980 Session, 68th G.A., ch. 1076, §9 [amending §442.2(2)].

§8.6(4) The specific duties of the comptroller shall be: To prescribe all accounting and business forms and the system of accounts and reports of financial transactions by all departments and agencies of the state government other than those of the legislative branch, and to consult with all state officers and agencies which receive reports and forms from county officers, in order to devise standardized reports and forms which will permit computer processing of the information submitted by county officers, and to prescribe forms on which each municipality, at the time of preparing estimates required under section 24.3, shall be required to compile in parallel columns the following data and estimates for immediate availability to any taxpayer upon request: . . .

§8.6(4)(c) For the proposed budget year, an estimate of revenue from all sources, other than revenue to be received from property taxation, separately stated as to each such source, to be allocated to each of the several funds, and for each fund the actual or estimated unencumbered cash balance, whichever is applicable, to be available at the beginning of the year, the amount proposed to be received from property taxation allocated to each fund, and the amount proposed to be expended during the year plus the amount of cash reserve, based on actual experience of prior years, which shall be the *necessary cash reserve* of the budget adopted exclusive of capital outlay items. The *estimated expenditures plus the required cash reserve for the ensuing fiscal year less all estimated or actual unencumbered balances at the beginning of the year and less the estimated income from all sources other than property taxation shall equal the amount to be received from property taxes*, and such amount shall be shown on the proposed budget estimate.

§8.6(4)(d) To insure uniformity, accuracy, and efficiency in the preparation of budget estimates by municipalities subject to chapter 24, [which includes local school districts] the comptroller shall prescribe the procedures to be used and instruct the appropriate officials of the various municipalities on implementation of the procedures. [Emphasis supplied.]

This section outlines the following formula for calculating the amount to be received from property taxes:

Estimated expenditures

\+ required cash reserve

— all estimated or actual unencumbered balances at beginning of the year

— estimated income from all sources other than property taxes

= the amount to be received from property taxes.

In compiling data pursuant to the above formula, if a school were able to set a desired figure for "required cash reserve", they would in effect be able to control the amount to be received from property tax and subsequently the rate of the levy. Accordingly, the central question of this opinion is whether the language of §8.6(4)(c) constitutes an authorization to levy a tax or is it merely a description of a form which the comptroller supplies to school districts as an aid to the accounting process? In other words, can §8.6(4)(c) be relied upon as authorization to levy a tax? Section 444.7 appears to indicate that the forms provided are merely aids to local officials and not a source of authority to levy a tax. This section provides, in relevant part, as follows:

It is hereby made a simple misdemeanor for the board of supervisors to authorize, or the county auditor to carry upon the tax lists for any year, an amount of tax for any public purpose in excess of the amount certified or authorized as provided by law. The state comptroller shall prescribe and furnish the county auditors forms and instructions to aid them in

determining the legality and authorized amount of tax levies . . .

In addition, §442.9(1)(b) appears to prohibit any levy in addition to that provided for in §442.2 and 442.9 unless such levy is authorized by the school budget review committee. (*See* §§442.12 and 442.13 for a description of the school budget review committee.)

Three express authorizations to levy taxes for a school's general fund are contained in ch. 442. §§442.2(1), 442.9(1) and 442.14. These levies allow a district to raise an amount of revenue equal to the "district cost", as defined in §442.9. These sections provide as follows:

§442.2(1) Each school district shall *cause to be levied each year*, for the school general fund, a foundation property tax of *five dollars and forty cents per thousand dollars of assessed valuation* on all taxable property in the district. For the purpose of this chapter, a school district is defined as a school corporation organized under chapter 274.

* * *

§442.9(1) The state comptroller shall determine the additional school district property tax levy for each school district, which is in addition to the foundation property tax levy, as follows:

a. As used in this chapter, 'district cost per pupil' for the school year beginning July 1, 1975, and subsequent school years means district cost per pupil in weighted enrollment. The district cost per pupil for the budget year is equal to the district cost per pupil for the base year plus the allowable growth.

b. The district cost for the budget year is equal to the district cost per pupil for the budget year multiplied by the weighted enrollment, plus the additional district cost allocated to the district under section 442.27 to fund media services and educational services provided through the area education agency. *A school district may not increase its district cost for the budget year except to the extent that an excess tax levy is authorized by the school budget review committee as provided in section 442.13.*

c. *The amount to be raised by the additional school district property tax levy is equal to the district cost for the budget year, less the product of the state or district foundation base and the weighted enrollment.* [Emphasis supplied.]

§442.14(1) For the budget year beginning July 1, 1979, and each succeeding school year, if a school board wishes to *spend more than the amount permitted under sections 442.1 to 442.13*, and the school board has not attempted by resolution to raise an additional enrichment amount for that budget year, the school board may raise an additional enrichment amount not to exceed ten percent of the state cost per pupil multiplied by the adjusted enrollment in the district, as provided in this section. However, the additional enrichment amount may be used only for educational research, curriculum maintenance or development, or innovative programs.

§442.14(2) The board shall determine the additional enrichment amount per pupil needed, within the limits of this section, and *shall direct the county commissioner of elections to submit the question of whether to raise that amount under the provisions of this section and section 442.15, to the qualified electors of the school district at a regular school election* held during September of the base year. If a majority of those voting favors raising the enrichment amount, the board may include the approved amount in its certified budget.

§442.14(3) The additional enrichment amount needed shall be raised within the limits provided in this section by a combination of an *enrichment property tax* and a *school district income surtax* imposed in the proportion of a property tax of twenty-seven cents per thousand dollars of assessed valuation of taxable property in the district for each five percent of income surtax.

§442.14(4) The additional enrichment amount for a district is limited to the amount which may be raised by a combination tax in the prescribed proportion which does not exceed a property tax of one dollar and eight cents per thousand dollars of assessed valuation and an income surtax of twenty percent.

§442.14(5) Any additional enrichment amount of a school district, not exceeding five percent of the state cost per pupil, which was approved at a referendum prior to July 1, 1978, shall remain in effect for the period for which it was approved. [Emphasis supplied.]

In addition, levies for specific purposes which are paid from the general fund, but not included in district cost, are provided for in §§298.7, 298.15-.17 and §613A.10, The Code 1979. When compared to these express authorizations to levy a tax, §8.6(4)(c) appears to be lacking in language which would indicate that it constitutes such authorization. Initially, §8.6(4)(c) does not expressly state that it authorizes a tax to be levied. Secondly, §8.6(4)(c) does not state any limitation on the amount of a levy which would be made (while §§298.15-.17 and 613A.10 do not state a specific limit on the levy, the judgment for which the tax is raised would provide a limit.)

In 1974, the Attorney General considered a question similar to that considered herein. 1974 Op. Atty. Gen. 739. In this opinion, it was considered whether school districts and counties could levy a tax as part of the general fund to pay the cost of pension systems created pursuant to the Iowa Public Employees Retirement System. Ch. 97B, The Code 1973. As with the question considered here, an additional levy for this expense appeared to be contrary to the limitations on taxing contained in chs. 442 and 444. In concluding that such a tax was authorized, this opinion reasoned that the specific language of §97B.9(3), The Code 1973, should prevail over the general limitation contained in chs. 442 and 444. Section 97B.9(3) provided as follows:

Every political subdivision is hereby authorized and directed to levy a tax sufficient to meet its obligations under the provisions of this chapter if any tax is needed.

When contrasted with the specific language of §97B.9(3), we believe §8.6(4)(c) falls far short of providing the degree of specificity which would be required to authorize a tax levy which would exceed the limitations provided in ch. 442.

Sections 442.2 and 442.9 provide for the levy of tax in an amount which will fund a district up to the "district cost". *See* §442.9(1)(b). Beyond this level of taxation, it appears that a school might levy additional taxes in only two ways. Pursuant to §442.13(5), the school budget review committee may increase allowable growth, which increases district cost and consequently the amount of the tax levy, for a number of reasons specified in §442.13(5)(a) - (p).[2] In fact, §442.9(1)(b) prohibits a

[2] We do not herein express an opinion as to whether a decrease in state aid to schools satisfies any of the criteria contained in §442.13(5)(a) - (p), which would authorize the budget review committee to provide supplemental aid or authorize an increased tax levy. Similarly, we express no opinion as to whether this decrease may be funded by a transfer from an emergency fund created pursuant to §24.6, The Code 1979.

district from increasing its district cost, which affects the amount of tax levy, except as authorized by the budget review committee. Secondly, an "additional enrichment" amount may be levied if authorized by an election pursuant to §442.14. The levy for cash reserves, as currently practiced, amounts to the exercise by a local board of the power to levy taxes beyond the amount required to fund the district cost. The fact that two express procedures involving approval by the budget committee or the electorate are present in the Code mitigates strongly against any implied authority for a school board to make such a levy by its own resolution. *See State ex rel. Hutt v. Anthes Force Oiler Co.*, 237 Iowa 722, 22 N.W.2d 324, 328 1946). In other words, ch. 442 provides express authorization to levy taxes and places express limitations on the amount of the levy. In addition, ch. 442 provides means for a district to levy in excess of this limitation, but such a levy requires approval by the budget review committee or the electorate.[3] In light of the pervasiveness of this system of taxation contained in ch. 442, we do not believe any authority exists for a school board to authorize a levy for the general fund which exceeds the amount expressly authorized in ch. 442 and in those express provisions outside of ch. 442. *See* §§298.7, 298.15-.17 and 613A.7.

In conjunction with the above discussion of §8.6(4)(c), we can find no other authority in the Code for a distinct tax levy for the specific purpose of increasing the cash reserve balance. Accordingly, we believe the schools are limited to the express authority cited above for power to levy taxes for the general fund.

SOCIAL SERVICES

Judicial District Departments of Correctional Services. §§4.1(36), 28E.12, 905.4 and 905.5, The Code 1979. Unwillingness of counties in the judicial district to serve as administrative agent for the judicial district department of correctional services does not authorize the district department to act as its own administrative agent. After designating a county as administrative agent, the judicial district department may enter into an agreement with the designated county pursuant to §28E.12, The Code 1979, under which the district department performs the functions of administrative agent. (Golden to Rush, 12-12-80) #80-12-19(L)

COUNTIES AND COUNTY OFFICERS

Conservation Board — Rules for Park Management. §§111.27, 111.34, 111.46, 111.49, 111A.5 and 111A.10, The Code 1979. Camping spaces in a county-owned park may be occupied for whatever period is specified by board rules. In the absence of a board rule, the two-week limit specified in §111.49 applies. Camping spaces on state-owned land cared for and maintained by county conservation board pursuant to §111.27 agreement are subject to two-week limit specified in §111.49, which limit may not be extended by board rule. (Peterson to Hutchins, State Senator, 12-18-80) #80-12-20(L)

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[3] In contrast to the general fund, a school board may by its own resolution authorize a tax levy for the schoolhouse fund. *See* e.g. §297.5, The Code 1979. It should be noted, however, that the Code expressly authorizes the board to levy this tax.

December 19, 1980

GAMBLING: Qualified Organizations: Compensation of Employees — §§99B.1(6), 99B.7(1)(b), 99B.7(3), 99B.15, The Code 1979; 730 I.A.C. §94.3. Pursuant to section 99B.7(1)(b), a qualified organization licensed to conduct legalized gambling for the purposes of "charitable fund raising" may not remunerate or compensate any agent thereof directly or indirectly from the receipts of the games. Wages or salaries are not legitimate expense deductions under revenue rule 730 I.A.C. §94.3. (Richards to Halvorson, State Representative, 12-19-80) #80-12-21

The Honorable Rod Halvorson, State Representative: You have requested an opinion of the Attorney General regarding the legality under chapter 99B, The Code 1979, of certain financial procedures of "qualified organization" gambling licensees. As stated in your letter, "(i)t is currently the practice by a few bingo games in Iowa to compensate their employees directly or indirectly from the receipts of the bingo operation" and "(t)his is in accordance to regulations of the Iowa Department of Revenue." You ask whether such practice is proper in light of section 99B.7(1)(b), The Code 1979.

The nature of the qualified organization privilege created by section 99B.7 has been thoroughly discussed in a prior opinion of this office. "The obvious intent of this privilege is to allow engagement in limited forms of gambling for the purposes of philanthropic fund raising." Op. Att'y Gen. #80-3-12 at page 4. Licensees must "dedicate and distribute" the *net receipts* from their games to any of the uses specified in section 99B.7(3)(b) according to the time requirements of section 99B.7(3)(c) (prizes must be awarded the same day they are won with "the balance of the *net receipts*" distributed within 180 days of the date received). Net receipts, of course, are derived from the "gross receipts less reasonable expenses, charges, fees and deductions allowed by the department of revenue." Section 99B.1(6), The Code 1979. The department has added content to this definition of "net receipts" in regulation 730 I.A.C. §94.3, which provides in relevant part:

Expenses allowed will be the license fee, promotion expense, preparation expense, cleanup expense, equipment (prorated), overhead expense, prizes and other expenses incurred exclusively and directly as a result of the gambling activity. No expense item shall be allowed without a proper receipt, paid invoice or canceled checks. Before any expense item will be allowed, the burden of proof is on the licensee to show that the expense has been incurred exclusively and directly as a result of the gambling activity. The key factor is the expense must be incurred exclusively and directly as a result of the gambling activity.

Presumably this is the regulation referred to in your letter.

Upon review, it is our opinion that the legislature justified legalization of gambling in this context since the public, rather than the individuals who conduct the games, would benefit from the gambling. This conclusion is directly supported by the plain language of section 99B.7(1)(b) which states:

No person receives or has any fixed or contingent right to receive, directly or indirectly, any profit, *remuneration*, or *compensation* from or related to a game of skill, game of chance, or raffle, except any amount which the person may win as a participant on the same basis as the other participants. A person conducting a game or raffle shall not be a participant in the game or raffle.

(Emphasis added.) Although chapter 99B does not specify definitions for

either of the terms emphasized above, their meanings are universally recognized and, in general usage, they are interchangeable and synonymous. "Compensation" is "(t)he remuneration or wages given to an employee or, especially, to an officer. Salary, pay, or emolument." *Black's Law Dictionary* 354 (4th rev. ed. 1968). Likewise, "remuneration" is defined as "(r)eward; recompense; salary." *Black's Law Dictionary* 1460 (4th rev. ed. 1968). *See Treu v. Kirkwood*, 255 P.2d 409, 412 (Cal. 1953); *Doyal v. Roosevelt Hotel*, 234 So.2d 510, 513 (La.App. 1970); *Bovard v. Ford*, 83 Mo. App. 498, 501 (1900) ["(I)n its general sense Mr. Webster has defined wages or wage as 'a compensation given to a hired person for his or her services; that for which one labors; stipulated payment for service performed,' etc.; and as synonymous terms mentions: 'Hire, reward, stipend, salary, *compensation, remuneration,*' etc. (emphasis added).] Applying these definitions to subsection 1(b) the result is evident: qualified organization licensees can *not* legally pay and their agents can *not* legally receive payment out of gambling gross receipts for services rendered in conducting any games including bingo. In other words, it is an illegal practice for any qualified organization to remunerate or compensate any agent thereof directly or indirectly from the receipts of the gambling operation. We stress that the bar of section 99B.7(1)(b) by its terms applies to *indirect* remuneration or compensation. For example, it would be improper for a "charity" receiving gambling proceeds from a qualified organization to pay therefrom the salaries of the organization's agents. In short, any diverting of moneys raised under section 99B.7 from "charitable" ends to individual pockets, either directly or indirectly, cannot be reconciled with either the letter or the spirit of the act.

We have reviewed this interpretation of section 99B.7(1)(b) with the revenue rule quoted above and find them to be harmonious. Rule 730 I.A.C. §94.3 does not list remuneration, compensation, wages or salaries as allowable deductions. The general terms "overhead expense" do *not* in light of section 99B.7(1)(b) include "remuneration" or "compensation." "The plain provisions of a statute cannot be altered by administrative rule." *Schmitt v. Iowa Department of Social Services*, 263 N.W.2d 739, 745 (Iowa 1978); *See Holland v. State*, 253 Iowa 1006, 1010, 115 N.W.2d 161, 164 (1962); *Bruce Motor Freight, Inc. v. Lauterback*, 247 Iowa 956, 961 77 N.W.2d 613, 616 (1956). The other expense items contained in regulation 730 I.A.C. §94.3 remain valid in determining net receipts for purposes of section 99B.7.

In summation, the legislature's intent in legalizing gambling in the context of "charitable fund raising" is clear. In creating the qualified organization privilege, the legislature never intended thereby to create a bingo "business" or "industry." This is apparent from the obvious meaning of section 99B.7(1)(b). Qualified organization gambling was meant to be conducted by concerned volunteers, not by persons hired for pay. The practice of remunerating or compensating persons, either directly or indirectly, from the gambling receipts violates section 99B.7(1)(b). "(T)he knowing failure of any person to comply with the limitations imposed by "section 99B.7(1)(b)" constitutes unlawful gambling, a serious misdemeanor." Section 99B.15, The Code 1979. Such practice does not give rise to a legitimate expense deduction under revenue regulation 730 I.A.C. §94.3.

COUNTIES AND COUNTY OFFICERS

Drainage Districts. Sections 455.9, 455.10, 455.11, 455.12, 455.33, 455.132, 455.134, 455.135, 455.136, 455.164, The Code 1979. Sections 106.031, 106.501, 106.511 M.S.A., Sections 46-20-8, 46-20-16 S.D. Comp. Laws Ann. The petitioners for an improvement to a drainage district are ultimately liable for the preliminary expenses incurred when the improvement is not completed even though they have posted no bonds. Pursuant to Section 455.164 the county should initially pay these preliminary expenses out of the county general fund. The county is empowered to seek reimbursement from the petitioners within the district for the amount of preliminary expenses which the county pays. (Benton to Soldat, Kossuth County Attorney, 12-24-80) #80-12-22(L)

ADMINISTRATIVE LAW—CONSTITUTIONAL LAW

Probationary Operator's License. §321.178(2), The Code 1979; Iowa Const., Art. I, §6; U.S. Const. Amend. XIV. Iowa Department of Transportation rule 820 I.A.C. [07, C] 13.5(4) is an ultra vires promulgation insofar as providing for renewal of probationary operator's licenses issued pursuant to section 321.178(2). Section 321.178(2) does not violate the uniform application of laws provision of the Iowa Constitution nor the equal protection clause of the fourteenth amendment to the United States Constitution. (Gregersen to Hummel, State Representative, 12-24-80) #80-12-23(L)

December 24, 1980

MUNICIPALITIES: Special Assessments — §§4.7, 4.8, 384.60, 384.65 and 384.68(5), The Code 1979. A property owner may pay the assessment in full at any time after starting payment by installment. If paid in full after July 1, the interest accrues to December 1 of the following year. A property owner may not make payments of more than one installment at a time if less than full payment. A property owner is not entitled, by statute, to a refund of any excess payments. There is no difference in special assessments if a city pays for improvements from existing funds rather than by the issuance of bonds. (Blumberg to Johnson, State Auditor, 12-24-80) #80-12-24(L)

December 24, 1980

PHYSICIANS AND SURGEONS: Family Planning Services. Sections 148.1, 152.1, 234.21, 234.22, 234.27, The Code 1979. Section 234.22 requires that a patient be referred to a licensed physician for a physical examination but does not require the physician to perform personally every aspect of the examination. While §234.22 also requires that a patient be referred to a physician for a prescription, the statute does not require the physician to follow any particular procedure in making the prescription. (Stork to Saf, State Board of Medical Examiners, 12-24-80) #80-12-25 (L)

UNITED STATES CONSTITUTION

CONSTITUTION OF IOWA

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