State of Iowa
1984

FORTY-FIFTH BIENNIAL REPORT
OF THE
ATTORNEY GENERAL

BIENNIAL PERIOD ENDING DECEMBER 31, 1984

THOMAS J. MILLER

Attorney General

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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
BRENT R. APPEL, 1/79- ..... Deputy Attorney General
J.D., University of California, 1977
EARL M. WILLITS, 7/79- ..... Deputy Attorney General
J.D., Drake, 1974
ELIZABETH M. OSENBAUGH, 1/79- ..... Deputy Attorney General
J.D., University of Iowa, 1971
WILLIAM C. ROACH, 1/79- ..... Administrator
CLARENCE J. WEIHS, 1/79-2/84 ..... Administrative Assistant
DEBRA E. BOWERS, 2/84- ..... Administrative Assistant
SHELLEY C. JOHNSON, 11/81- ..... Administrative Assistant
EVELYN K. GALLAGHER, 1/79- ..... Administrative Assistant
KAREN A. HEGE, 10/80- ..... Accountant
JANICE K. PARKER, 9/82-8/83 ..... Legal Secretary
CONNIE J. CHAPMAN, 8/83- ..... Legal Secretary
CYNTHIA ROSEN, 10/81-10/83 ..... Secretary
MANDA STUART, 10/83- ..... Secretary/Receptionist

ADMINISTRATIVE LAW

HOWARD O. HAGEN, 2/79- ..... Division Head
J.D. University of Chicago, 1973
LYNN M. WALDING, 7/81- ..... Assistant Attorney General
M.A., J.D., University of Iowa, 1981
MERLE W. FLEMING, 7/80 ..... Assistant Attorney General
M.A., J.D., University of Iowa, 1980
THERESA O. WEEG, 10/81- ..... Assistant Attorney General
J.D., University of Iowa, 1981
JULIE F. POTTORFF, 7/79- ..... Assistant Attorney General
J.D., University of Iowa, 1978
SCOTT M. GALENBECK, 1/84- ..... Assistant Attorney General
J.D., University of Iowa, 1974
LYNDEN D. LYMAN, 1/84- ..... Assistant Attorney General
J.D., University of Iowa, 1983
PATRICIA J. McFARLAND, 7/79-7/83 ..... Assistant Attorney General
J.D., University of Iowa, 1979
PHILIP E. STOFFREGEN, 18/82-6/83 ..... Assistant Attorney General
J.D., University of Iowa, 1977
WILLIAM NASSIF, 7/82-1/84 ..... Assistant Attorney General
J.D., University of Iowa, 1982
F. ANN BAUSSERMAN, 1/79- ..... Administrative Assistant

AREA PROSECUTIONS

HAROLD A. YOUNG, 7/75- ..... Division Head
J.D., Drake, 1967
RICHARD A. WILLIAMS, 7/75- ..... Assistant Attorney General
J.D., University of Iowa, 1971
JAMES W. RAMEY, 10/81- ..... Assistant Attorney General
J.D., Drake, 1975
ROBERT J. BLINK, 8-83 ..... Assistant Attorney General
J.D., Drake, 1975
JAMES E. KIVI, 2/80- ..... Assistant Attorney General
J.D., University of Iowa, 1975,

DOUGLAS F. STASKAL, 9/82- ..... Assistant Attorney General
J.D., University of Iowa, 1979,
CHARLES N. THOMAN, 7/84- ..... Assistant Attorney General
J.D., Creighton University, 1976
MICHAEL E. WALLACE, 8/84- ..... Assistant Attorney General
J.D., University of Iowa, 1971,
SELWYN L. DALLYN, 3/80-8/83 ..... Assistant Attorney General
J.D. w/honors, University of Iowa, 1978
PAUL D. MILLER, 3/80-6/84 ..... Assistant Attorney General
J.D., University of Iowa, 1976,
MICHAEL E. SHEEHY, 10/81-3/84 ..... Assistant Attorney General
J.D., University of Iowa, 1973
ALFRED C. GRIER, 9/72 ..... Pilot
SCOTT D. NEWHARD, 3/79- ..... Investigator
BILLIE J. RAMEY, 11/79- ..... Legal Secretary

CIVIL RIGHTS

TERESA BAUSTIAN, 4/81- ..... Assistant Attorney General
J.D., University of Iowa, 1979,
STEVEN M. FORITANO, 8/81- ..... Assistant Attorney General
J.D., University of Iowa, 1981,
VICTORIA L. HERRING, 1/79-11/83 ..... Assistant Attorney General
J.D., Drake, 1976,
SCOTT H. NICHOLS, 1/80-9/83 ..... Assistant Attorney General
J.D., University of Iowa, 1979

CONSUMER PROTECTION

DOUGLAS R. CARLSON, 6/67-5/84 ..... Division Head
J.D., Drake, 1968
JAMES M. PETERS, 2/83- ..... Assistant Attorney General
J.D., University of Iowa, 1980,
DEAN A. LERNER, 2/83- ..... Assistant Attorney General
J.D., Drake, 1981,
TERRENCE M. TOBIN, 7/83- ..... Assistant Attorney General
J.D. University of Iowa, 1980
SUSAN BARNES BRAMMER, 4/84- .. Assistant Attorney General
J.D. William and Mary, 1978
LINDA T. LOWE, 8/79- ..... Assistant Attorney General
J.D., University of Iowa, 1979
KATHRYN L. GRAV, 2/78-1/83 ..... Assistant Attorney General
J.D., Drake, 1977
FRANK E. THOMAS, 3/79-3/84 ..... Assistant Attorney General
J.D., Indiana University, 1974
CYNTHIA WICKSTROM, 7/84- ..... Assistant Attorney General
J.D., University of Iowa, 1984
JOANNE L. MACKUSICK, 8/84- ..... Assistant Attorney General
J.D., University of Iowa, 1984
TERESA D. ABBOTT, 5/78- ..... Investigator
EUGENE R. BATTANI, 5/77- ..... Investigator
ELIZABETH A. STANTON, 1/79- ..... Investigator
DEBBIE A. O'LEARY, 1/82-12/84 ..... Investigator
MARJORIE A. LEEPER, 7/82- ..... Investigator
ONITA S. MOHR, 4/80-7/84 ..... Investigator
NORMAN NORLAND, 1/80- ..... Investigator

KATHLEEN C. BURDOCK, 10/84- ..... Investigator
DEBRA J. GILLIAM, 10/84- ..... Investigator
DEBRA A. MOORE, 12/84- ..... Investigator
CHERYL A. FREEMAN, 4/69- ..... Legal Secretary
JANICE M. BLOES, 3/78- ..... Legal Secretary
MARILYN W. RAND, 10/59- ..... Legal Secretary
KATHY M. ZAPF, 3/83- ..... Legal Secretary
DANELIA I. ROBINSON, 8/82- ..... Secretary/Receptionist
RUTH C. WALKER, 2/79- ..... Secretary/Receptionist
VALERIE L. TEED, 7/76-1/83 ..... Legal Secretary

CRIMINAL APPEALS

RICHARD L. CLELAND, 4/79- ..... Division Head
J.D., University of Iowa, 1978
THOMAS D. McGRANE, 6/71- ..... Assistant Attorney General
J.D., University of Iowa, 1971
LONA J. HANSEN, 7/77- ..... Assistant Attorney General
J.D., University of Iowa, 1976
JOHN P. MESSINA, 1/80-6/84 ..... Assistant Attorney General
J.D., Drake, 1979
ROXANN M. RYAN, 9/80- ..... Assistant Attorney General
J.D., University of Iowa, 1980
MARCIA E. MASON, 7/82- ..... Assistant Attorney General
J.D., University of Iowa, 1982
MICHAEL K. JORDAN, 1/81-6/83 ..... Assistant Attorney General
J.D., University of Iowa, 1980
JOSEPH P. WEEG, 10/81- ..... Assistant Attorney General
J.D., University of Iowa, 1981
MARY J. BLINK, 6/81-11/84 ..... Assistant Attorney General
J.D., Drake, 1981
SHERIE BARNETT, 7/83- ..... Assistant Attorney General
J.D., Drake, 1981
VALENCIA V. McCOWN, 6/83- ..... Assistant Attorney General
J.D., University of Iowa, 1983
REBECCA L. CLAYPOOL, 1/84- ..... Assistant Attorney General
J.D., University of Iowa, 1983
PAMELA S. GREENMAN, 7/84- ..... Assistant Attorney General
J.D., University of Iowa, 1984,
MICKEY W. GREENE, 8/84- ..... Assistant Attorney General
J.D., University of Iowa, 1984
STEVEN HANSEN, 2/84- ..... Assistant Attorney General
J.D., University of Iowa, 1983
CHRISTY J. FISHER, 1/67- ..... Legal Secretary
CONNIE L. ANDERSON LEE, 12/76- ..... Legal Secretary
SHONNA K. BURNS, 5/81- ..... Legal Secretary
DEBRA J. SASSMAN, 11/82-8/83 ..... Legal Secretary
CONNIE NOAH, 10/83-3/84 ..... Legal Secretary
KATHERINE SMITH, 3/84- ..... Secretary/Receptionist

ENVIRONMENTAL LAW

JOHN P. SARCONE, 3/79- ..... Division Head
J.D., Drake, 1975
CLIFFORD E. PETERSON, 10/68-1/84 ..... Assistant Attorney General
J.D., State University of Iowa, 1951

ELIZA J. OVROM, 7/79-.....Assistant Attorney General
J.D., University of Iowa, 1979
STEVEN G. NORBY, 11/79- .....Assistant Attorney General
J.D., University of Iowa, 1979
ELENA-MARIA HAMILTON, 7/84 .....Assistant Attorney General
J.D., Drake, 1984
MICHAEL H. SMITH, 9/84- .....Assistant Attorney General
J.D., University of Iowa, 1977
W. ALLAN KNIEP, 8/81-5/83 .....Assistant Attorney General
J.D., University of Iowa, 1980
FREDERICK W. GAY, 1/84-8/84 .....Assistant Attorney General
J.D., Drake, 1983
LAWRENCE M. McGRANE, 5/83-10/83 .....Assistant Attorney General
J.D., Drake, 1961
ROXANNE C. PETERSEN, 5/79-.....Legal Secretary
DONNA M. SUMMERS, 8/81-12/84.....Legal Secretary

FARM

TAM B. ORMISTON, 1/79-.....Division Head
J.D., University of Iowa, 1974
TIMOTHY D. BENTON, 7/77- .....Assistant Attorney General
J.D., University of Iowa, 1977
KEVIN M. KIRLIN, 7/84- .....Assistant Attorney General
J.D., University of Iowa, 1984
KIM M. OLSON, 7/82-2/84 .....Assistant Attorney General
J.D., Drake, 1982
CHARLES G. RUTENBECK, 12/73.....Investigator
MAUREEN E. LARSON, 11/77- .....Legal Secretary
NANCY A. MILLER, 9/73-8/84 .....Legal Secretary

HEALTH

ELIZABETH J. HART, 10/83-.....Assistant Attorney General
J.D., Drake, 1983
MAUREEN McGUIRE, 7/83- .....Assistant Attorney General
J.D., University of Iowa, 1983
JEANINE FREEMAN, 7/79-4/84.....Assistant Attorney General
J.D., University of Iowa, 1978
SUSAN BARNES BRAMMER, 7/81-10/83 .....Assistant Attorney General
J.D., William and Mary, 1978

HUMAN SERVICES

GORDON E. ALLEN, 8/82- .....Division Head
J.D., University of Iowa, 1972
SARAH J. COATS, 2/84-.....Assistant Attorney General
J.D., University of Iowa, 1983
JEAN L. DUNKLE, 10/75-.....Assistant Attorney General
J.D., University of Iowa, 1975
JONATHAN GOLDEN, 7/79-1/83.....Assistant Attorney General
J.D., University of Iowa, 1979

MARK A. HAVERKAMP, 6/78- ..... Assistant Attorney General
J.D., Creighton, 1976
BRENT D. HEGE, 9/80-7/84 ..... Assistant Attorney General
J.D., Drake, 1973
PATRICIA M. HEMPHILL, 2/83- ..... Assistant Attorney General
J.D., Drake, 1981
MARK HUNACEK, 7/82- ..... Assistant Attorney General
J.D., Drake, 1981
ROBERT R. HUIBREGTSE, 6/75- ..... Assistant Attorney General
L.L.B., Drake, 1963
PATRICIA M. HULTING, 1/81-1/84 ..... Assistant Attorney General
J.D., University of Iowa, 1975
LAYNE M. LINDEBAK, 7/78- ..... Assistant Attorney General
J.D., University of Iowa, 1979
BRUCE C. McDONALD, 7/78- ..... Assistant Attorney General
J.D., University of Iowa, 1978
JOHN R. MARTIN, 4/79-3/83 ..... Assistant Attorney General
J.D., University of Iowa, 1972
E. DEAN METZ, 5/78- ..... Assistant Attorney General
L.L.B., Drake, 1955
CANDY S. MORGAN, 9/79- ..... Assistant Attorney General
J.D., University of Iowa, 1973
JOHN M. PARMETER, 11/84- ..... Assistant Attorney General
J.D., Drake, 1982
DIANE C. MUNNS, 7/82-7/83 ..... Assistant Attorney General
J.D., Drake, 1982
STEPHEN C. ROBINSON, 8/73- ..... Assistant Attorney General
L.L.B., Drake, 1962
ELEANOR E. LYNN, 7/83- ..... Assistant Attorney General
J.D., University of Iowa, 1983
HECTOR RODRIQUEZ, 3/83-1/84 ..... Assistant Attorney General
J.D., Drake, 1982
JAY A. TENTINGER, 3/84- ..... Assistant Attorney General
J.D., Hamline University (St. Paul), 1976
MATTHEW W. WILLIAMS, 7/83- ..... Assistant Attorney General
J.D., University of Nebraska, 1983
JANE A. ARTHUR, 10/76- ..... Legal Secretary

INSURANCE

FRED M. HASKINS, 6/72- ..... Assistant Attorney General
J.D., University of Iowa, 1972

PROSECUTING ATTORNEYS TRAINING COUNCIL

DONALD R. MASON, 9/80- ..... Exec. Dir., Training Coordinator
J.D., University of Iowa, 1976
KRIS LISCHEFSKA, 10/83- ..... Admin. Asst.
CINDY S. WRIGHT, 5/82-12/83 ..... Legal Secretary

PUBLIC SAFETY

GARY L. HAYWARD, 6/76- ..... Assistant Attorney General
J.D., University of Iowa, 1976

REVENUE

HARRY M. GRIGER, 1/67-8/71, 12/71-.....Division Head
J.D., University of Iowa, 1966
THOMAS M. DONAHUE, 6/78- .....Assistant Attorney General
J.D., Drake, 1974
GERLAD A. KUEHN, 9/71-.....Assistant Attorney General
J.D., Drake, 1967
ELIZABETH A. NELSON, 8/84- .....Assistant Attorney General
J.D., Drake, 1980
MARK R. SCHULING, 10/80-8/84 .....Assistant Attorney General
J.D., University of Iowa, 1980

SPECIAL LITIGATION

JOHN R. PERKINS, 12/72- .....Division Head
J.D., University of Iowa, 1968
WILLIAM F. RAISCH, 7/74- .....Assistant Attorney General
J.D., Drake, 1974
WILLIAM R. NASSIF, 7/82-1/84 .....Assistant Attorney General
J.D., University of Iowa, 1982
ROBERT P. BRAMMER, 11/78-.....Investigator
DAVID H. MORSE, 3/78-.....Investigator
MARSHA A. RAISCH, 5/79-6/83 .....Legal Secretary
LAUREN N. MARRIOTT, 8/84-.....Legal Secretary

TORT CLAIMS

JOHN R. SCOTT, 9/80- .....Division Head
J.D., University of Iowa, 1969
PATRICK J. HOPKINS, 3/82- .....Assistant Attorney General
J.D., Creighton, 1975
SHIRLEY ANN STEFFE, 9/79-.....Assistant Attorney General
J.D., University of Iowa, 1979
CHARLES S. LAVORATO, 9/83- .....Assistant Attorney General
J.D., Drake, 1975
THOMAS A. EVANS, 6/77-2/83 .....Assistant Attorney General
J.D., Drake, 1977
ROBERT J. HUBER, 7/79-8/83 .....Assistant Attorney General
J.D., University of Iowa, 1979
KREG A. KAUFFMAN, 11/82-1/85 .....Assistant Attorney General
J.D., University of Iowa, 1977
IRIS J. POST, 6/81-9/84 .....Assistant Attorney General
J.D., University of Iowa, 1980
KAREN M. LIKENS, 8/77- .....Investigator
CATHLEEN L. ANTILL, 8/78-.....Investigator
MARCIA A. JACOBS, 8/82- .....Legal Secretary
CYNTHIA L. BAKER, 8/84-.....Legal Secretary

TRANSPORTATION

LESTER A. PAFF, 1/78- .....Division Head
J.D., St. Louis University, 1973
J. ERIC HEINTZ, 12/78-12/83 .....Division Head
J.D., University of Iowa, 1971

JOHN W. BATY, 9/72- ..... Assistant Attorney General
J.D., Drake, 1967
STEPHEN P. DUNDIS, 1/77-8/84 ..... Assistant Attorney General
J.D., University of Iowa, 1976
ROBERT P. EWALD, 2/81- ..... Assistant Attorney General
J.D., Washburn University, 1980
DAVID A. FERREE, 3/84- ..... Assistant Attorney General
J.D., University of Iowa, 1979
ROBIN FORMAKER, 4/84- ..... Assistant Attorney General
J.D., University of Iowa, 1979
CRAIG M. GREGERSEN, 2/79- ..... Assistant Attorney General
J.D., University of Iowa, 1978
MICHAEL C. FITZGERALD, 7/82-9/84 ..... Assistant Attorney General
J.D., University of Iowa, 1982
SUSAN E. LAMB, 10/81-11/83 ..... Assistant Attorney General
J.D., Gonzaga University, 1981
RICHARD E. MULL, 7/78- ..... Assistant Attorney General
J.D., University of Iowa, 1977
DANIEL W. PERKINS, 11/84- ..... Assistant Attorney General
J.D., University of Washington, 1982
MERRELL M. PETERS, 7/84- ..... Assistant Attorney General
J.D., Drake, 1984
KEVIN M. SOULE, 8/83-2/84 ..... Assistant Attorney General
J.D., University of Iowa, 1981
CATHERINE L. WINSLOW, 7/84- ..... Assistant Attorney General
J.D., University of Iowa, 1984
MARY S. McCONNELL, 7/82-4/84 ..... Paralegal
CARMEN C. MILLS, 7/82- ..... Paralegal
BRENDA M. SCHULTE, 4/83-1/85 ..... Paralegal
CAROLYN L. SHOJAAT, 4/83- ..... Paralegal
LYNN M. SCHULTE, 9/83- ..... Paralegal
KRISTI WOLTER, 5/84- ..... Paralegal

ATTORNEY GENERAL
OFFICE
ADMINISTRATIVE DIVISIONS

ADMINISTRATIVE LAW DIVISION

The Administrative Law Division of the Iowa Department of Justice was created in 1979. Responsibilities which had been undertaken by various staff members throughout the office and by the Finance, Education and Government sections 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, Iowa Code chapter 17A, upon all agency action has resulted in a need for expertise in the rapidly expanding area of administrative law.

The Administrative Law Division provides legal services to state agencies which include rendering legal advice, preparing opinions, preparing and reviewing legal documents, participating in administrative hearings, and defending or prosecuting litigated matters. The Division represents fifty-five state agencies, including such agencies as the Auditor, the Department of Banking, the Department of Public Instruction, Iowa Public Television, the State Board of Accountancy, the State Board of Medical Examiners, the State Board of Regents and the Treasurer.

Depending on the needs of the particular agency, legal representation ranges from advice on open meetings and administrative procedures to full participation in all stages of the hearing process. Attorneys from the Administrative Law Division appeared in 134 administrative hearings during the biennium. Throughout 1983-84, informal agency inquiries also increased as the Division increased its representation of clients.

Inquiries to the Attorney General's office regarding county and city government operations, estate and escheat matters, charitable trust and private foundations are referred to the Division for response. Responsibility for inquiries and interpretations concerning the state election laws and campaign finance are also assumed by the Division. Finally, the division head supervises generally the activities of the assistant attorneys general in the Health Division.

At the close of the 1983-84 biennium, there were 168 cases in litigation pending before the Iowa and United States District Courts and fifteen cases on appeal before the Iowa Supreme Court (or Court of Appeals) and the Eighth Circuit Court of Appeals. During 1983-84, 102 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 for judicial review of state agency action.

The Administrative Law Division is responsible for preparing 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, municipalities and elections.

During the 1983-84 biennium 106 opinions were issued by the Administrative Law Division.

Approximately 250 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, Iowa Code §633.303, the Division has been involved in several cases concerning 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 from the general public regarding charitable solicitations and estate and trust law are referred to the Division.

AREA PROSECUTIONS DIVISION

The primary purpose of the Area Prosecutions Division is to assist county attorneys in especially difficult or technical criminal cases, and in those cases where a conflict of interest precludes the county attorney from handling a prosecution.

The Division is staffed by six general trial attorneys, three specialist attorneys, one investigator and one secretary. The specialists include one attorney assigned to prosecute crimes in penal institutions, one assigned to state tax prosecutions and a training/legal advisor for the Department of Public Safety. The specialist positions are funded by the departments of Corrections, Revenue and Public Safety, respectively.

General requests from county attorneys, nearly all of a felony nature and including difficult homicide cases, constituted approximately sixty percent of caseload. Thirty-seven investigations involving allegations of misconduct by public officials were handled, resulting in charges being filed in five cases.

The Division also represents the Commission on Judicial Qualifications, and an increase in the number of cases referred by that agency is noted. Seventeen cases were investigated and five of those resulted in formal hearings.

Although not reflected in statistics, the Division was very active in charitable organization gambling during 1984. Legislation was recommended and passed, and approximately fifteen organizations lost their gambling licenses following audits or investigations.

CIVIL RIGHTS DIVISION

The Civil Rights Division of the Attorney General's office is comprised of two assistant attorneys general. The Division's primary duties are to provide legal advice and assistance to the staff of the Civil Rights Commission, prosecute complaints in contested case proceedings before the Commission's hearing officers, and litigate for the Commission in judicial review proceedings in the district court and upon appeal to the Iowa Supreme Court and Court of Appeals. In addition, the Division provides informal and formal Attorney General's opinions, participates in training sessions held by the Commission for its staff throughout the state, and serves as a general resource for citizens of Iowa who are concerned about a possible deprivation of their civil rights.

In 1983-84, the Division was chiefly involved with handling the docket of cases scheduled for public hearing. The Division was able to have cases heard or settled within two to three months of their being placed on the Attorney General's docket, despite a complete change in the staff of the Civil Rights Division during this period. In 1983 and 1984, seventeen of the cases pending public hearing were settled in the course of pre-trial preparation. Thirteen cases were taken to public hearing. Of the ten decisions rendered during this period, eight were successful. At the end of 1984, five cases remained in the Division's inventory awaiting public hearing.

The most significant trend in the hearings was the increase in size of awards for emotional distress by the Civil Rights Commission. Prior to 1984, the highest award for emotional distress was $2,500. In 1984, the Commission made awards of $5,000, $15,000 and $25,000.

The activity in the district and appellate courts was constant, as a result of appeals from Commission decisions. At the end of the biennium, fourteen cases were pending in the district court and four had been settled at that level over the previous two years. Twenty-seven cases were decided in the district courts throughout the state with the Commission succeeding in twenty-five (92%) of these cases. The cases in the district court include original actions for injunctions

pursuant to chapter 601A, as well as appeals from the administrative processes of the Commission. A significant portion of the Division's district court appeals were taken from no-probablecause or other administrative closure findings. In virtually all of these cases, the Division was successful in defending the Commission's exercise of its discretion to close the cases.

During the biennium, the Division represented the Commission in twelve appeals to the Iowa Supreme Court. These appeals concerned the interface between the Iowa Administrative Procedure Act and chapter 601A, and construction by the court of the meaning of various procedural requirements. Other cases involved matters of substantive import, calling for the court to construe chapter 601A and render its opinion as to significant matters of civil rights law. Nine of the cases were decided during the biennium and three remained pending before the appellate courts.

CONSUMER PROTECTION DIVISION

The Consumer Protection Division of the Attorney General's office enforces the Iowa Consumer Fraud Act, the Iowa Business Opportunity Sales Act, the Iowa Subdivided Land Sales Act, the Iowa Trade School Act, the Iowa Door-to-Door Sales Act, and the Iowa Consumer Credit Code. These statutes, and others enforced by the Consumer Protection Division, are designed to protect the buying public from misrepresentation, deception, and unfair trade and marketing practices.

The Consumer Protection staff consists of twenty full-time employees and three part-time employees. The staff consists of seven attorneys, seven investigators, two complaint specialists, five secretaries, and two receptionists. The Division, through its volunteer program, usually has between three and five volunteer or intern "complaint handlers" working for the Division handling non-fraud consumer complaints.

The Division's results for 1983 and 1984 were as follows:

1.	New Complaints Received	17,891
2.	Complaints Closed	18,763
3.	Complaints Pending at End of 1984	6,859
4.	New Lawsuits Filed	74
5.	Lawsuits Closed	34
6.	Lawsuits Pending at End of 1984	64
7.	Monies Saved and Recovered for Complainants	$2,108,132.32
8.	Costs and Expenses Recovered for State	$14,000.00
9.	Attorney General Opinions Issues	8
10.	Investigative Subpoenas Issued	90
11.	Official Demands for Information Issued	94
12.	Formal Assurances of Voluntary Compliance Filed	24

The Consumer Protection Division engages in many programs of preventative consumer protection designed to deter potential schemes and educate consumers. The Consumer Protection Division's involvement in mediating consumer problems, investigating complaints of deceptive advertising and sales practices, and filing lawsuits has a substantial 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 specific and common schemes of fraud through press releases, informational brochures, and public speaking engagements.

The Consumer Protection Division was engaged on several significant fronts during 1983 and 1984. Emphasis was placed on pursuing collection efforts

against defendants that were judged to have violated Iowa's consumer laws, but who attempted to avoid payment of damages. In other cases, the Division attempted to refine and clarify the protections available to Iowa's consumers under the Iowa Consumer Fraud Act. In 1984, a major interstate adoption fraud case was resolved when the Division obtained a default judgment and injunction against the perpetrators. Finally, in the last half of 1984, an odometer fraud unit was established to concentrate on odometer rollback fraud in the used car industry.

In the area of interpreting and enforcing the Iowa Consumer Credit Code, the Division handled 611 written complaints as well as several substantial investigations. The Division's investigations resulted in the exposure of the fraudulent practice of selling unnecessary and unwanted insurance coverage to applicants for consumer loans. One investigation was resolved when the loan company agreed to provide an estimated $450,000 in refunded premiums, interest and services to past customers.

During the calendar years 1983 and 1984, the top ten areas that Iowans complained about were:

1.	Automobile Sales and Repair Problems	4,563
2.	Mail Order Purchase and Refund Disputes	1,593
3.	Deceptive Advertising Complaints	1,418
4.	Services (General)	1,320
5.	Health Spas and Weight Salon Complaints	933
6.	Magazine Sales and Service Disputes	688
7.	Consumer Credit Code Complaints	611
8.	Business Opportunity Schemes	438
9.	Travel and Transportation Complaints	517
10.	Failure to Furnish Merchandise (other than mail order)	397

In 1983, the Division was able to assist two-thirds of those Iowans that complained to it while in 1984 the Division was able to assist eighty percent of complainants.

CRIMINAL APPEALS DIVISION

The primary responsibility of the Criminal Appeals Division is to represent the State of Iowa in direct appeals of criminal cases. County attorneys prosecute the cases in district court, and the Division prosecutes criminal appeals to the Iowa Supreme Court.

The work of the Division represents a major portion of the workload of the Supreme Court. The Division typically is involved in at least one-third of all the cases decided by the Court.

During the biennium, the Supreme Court and Court of Appeals affirmed the state's position argued by the Division in approximately seventy-five percent of the cases.

In 1983-84, 1,078 criminal appeals were taken to the Iowa Supreme Court and 573 defendant-appellant briefs were filed in those cases. The Division filed 601 briefs on behalf of the state.

Other criminal appeal and postconviction matters handled by the Division include: certiorari proceedings related to criminal cases (usually involving attorney fee cases or allegations that a trial judge acted illegally); appeals in postconviction relief cases under chapter 663A; applications for discretionary review by the defendant; all criminal appellate actions initiated by the state; and federal habeas corpus cases.

In 1983, the Division completed a major revision of its Criminal Law Handbook, a comprehensive digest of all aspects of criminal law in Iowa which is used by criminal law practitioners in the state. The Division also publishes the Criminal Law Bulletin, a periodic update on developments in criminal law in the Iowa Supreme Court and U.S. Supreme Court.

During the biennium, the Division also carried out a number of advisory and consultative duties with respect to the criminal law. It frequently provided advice and research to county attorneys in criminal matters. It advised the Governor's office on extradition cases. A Division attorney sat on the Iowa Liquor Control Hearing Board, and another attorney represented the Board of Parole, the Board of Pharmacy Examiners, and the Bureau of Labor. The Division head was a member of the Prosecuting Attorneys Training Council and the Supreme Court Advisory Committee on the Rules of Criminal Procedure.

The Criminal Appeals Division is comprised of twelve assistant attorneys general and four support staff.

ENVIRONMENTAL LAW DIVISION

The Environmental Division represents the state in issues affecting the environment. The Division has a staff of five attorneys and two secretaries and represents the State Conservation Commission, Department of Water, Air and Waste Management, Department of Soil Conservation, and Energy Policy Council. Prior to July of 1983, the Division also represented the Department of Environmental Quality and Natural Resources Council. These two agencies were combined in July of 1983 to form the Department of Water, Air and Waste Management.

As of January 1, 1983, the Division had sixty-four cases pending. During 1983, thirty-seven cases were opened and thirty-two were closed, leaving sixty-nine pending as of January 1, 1984. In 1984, forty-eight cases were opened and twenty-two were closed, leaving ninety-five cases pending at the end of the biennium. During the biennium the Division issued seventeen letter opinions regarding state environmental issues. In addition, the Division provided advice concerning administrative law, real property and drainage matters, and advised the Iowa Boundary Commission.

During 1983 and 1984, the Division handled fifty-seven lawsuits for the Conservation Commission. Thirty-two cases were officially closed during the biennium leaving thirty-five cases pending, including one in the Iowa Supreme Court. In January 1984, the United States District Court in the case of *United States v. Wilson*, 578 F.Supp. 1191 (N.D. Iowa W.D. 1984), ruled that the State was entitled to have title quieted in it to the land it claimed in Blackbird Bend. The decision concerned one part of a real property dispute involving title to approximately 2900 acres of land located in Monona County adjacent to the Missouri River. The Division successfully completed an appeal in the case of *Lakeside Boating and Bathing, Inc. v. State of Iowa*, 344 N.W.2d 217 (Iowa 1984). The Division also issued fifty-four title opinions and thirty-nine title vesting certificates and provided assistance in drafting administrative rules.

In July of 1983, the new Department of Water, Air and Waste Management was created by merger of the Department of Environmental Quality and the Natural Resources Council. The Division was involved in sixty-seven lawsuits involving these three agencies during the biennium concerning enforcement of chapters 455A and 455B. Among these, twenty involved water quality, sixteen were flood plain matters, eight concerned solid waste matters, six were air quality matters, four involved hazardous waste, and thirteen involved related matters. Twenty-seven cases were closed leaving forty cases pending. Some of the pending cases were resolved by court decree but remained open while monitoring continued of compliance schedules and injunctive provisions. Most notable among these lawsuits were *Martin v. Iowa Natural Resources Council*, 330 N.W.2d 790 (Iowa 1983), and *Osborne v. Iowa Natural Resources Council*, 336

N.W.2d 745 (Iowa 1983), which reaffirmed the state's regulatory authority over flood plain development; *State ex rel. Department of Water, Air and Waste Management v. Reeves*, a water pollution case in which a default judgment in the amount of $35,200 for civil penalties was entered against the defendant; and *State ex rel. Department of Water, Air and Waste Management v. Pester Marketing Company*, the first water pollution case to be tried in Iowa involving a leak from underground gasoline storage tanks. The district court, after trial, entered a judgment in the amount of $57,680 against Pester, ordered Pester to clean up pollution it caused and enjoined it from further discharges of gasoline into the groundwater. Two cases were pending in the Supreme Court at the end of 1984. *State ex rel. Department of Water, Air and Waste Management v. Grell*, involving solid waste violations, and *Polk County Drainage District 4 v. Iowa Natural Resources Council*, involving a channel straightening through a county wildlife area.

Nineteen cases involving the Department of Soil Conservation were handled during the biennium. Thirteen lawsuits were filed and five were closed leaving fourteen cases pending as of January 1, 1985. In *Brooner v. Dallas County Soil Conservation District*, the district court upheld the application of the Universal Soil Loss Equation as a valid means to measure soil loss. The Division also assisted the department in drafting rules and provided legal advice to the department in its activities, including an increase in issues concerning coal mining.

The Energy Policy Council was involved in two litigation matters during the biennium.

The Division also continued to work with attorneys general from the states of Missouri and Nebraska in litigation entitled *Missouri et al. v. Andrews et al.* This case involved complex questions concerning the role of federal officials in the marketing of water from the Oahe Reservoir on the Missouri River. The state's motion for summary judgment was granted and the case was pending in the Court of Appeals for the Eighth Circuit at the end of the biennium.

FARM DIVISION

The Farm Division, formed by Attorney General Miller in 1979, has a staff of three attorneys, one investigator and one secretary.

A major activity of the Farm Division is enforcement of the Iowa Consumer Fraud Act as it relates to agricultural transactions. In 1983, the Farm Division, in conjunction with the Minnesota Attorney General, obtained a $19 million rescission offer from the sale of an alternative crop called "Jerusalem artichokes." In two other actions, dealing with misrepresentations of alternative fuels, the Division recovered $428,000 for over 100 investors.

Because of the continuing farm crisis, the Farm Division continued to investigate and litigate matters relating to loan brokers who defrauded individuals out of millions of dollars. Fraud by livestock and chemical dealers also resulted in lawsuits.

During the biennium the Farm Division opened 739 new files, closed 559 files, and had 530 complaint files pending at the end of 1984. It saved or recovered $1,089,912.59.

In addition to the consumer fraud functions, the Division is legal counsel to the Iowa Department of Agriculture, the Iowa Family Farm Development Authority, and the Fair Board. The Division also works in conjunction with the Iowa Secretary of State in regulation under the Corporate or Partnership Farming Act and the Non-Resident Aliens Land Ownership Act.

Six Attorney General Opinions were issued in 1983-84. These included significant opinions on the Iowa Foreclosure Moratorium Law and other matters relating to agriculture.

The Farm Division plans to focus on and undertake litigation which will have an impact on illegal practices in agriculture. One of the primary problems in combating farm fraud has been the isolation of individual states. In 1982, Iowa was instrumental in organizing the Ag-Alert Network, a consortium of forty states dedicated to concentrating on agricultural fraud. During the biennium, the Network has organized and hosted national seminars. The organization continues to provide a warning system, a flow of information, and coordination on multi-state enforcement actions.

The number of complaints filed in various categories during 1983-84 were as follows:

Herbicides and Pesticides	37
Feeder Cattle	22
Other Cattle	28
Feeder Pigs	10
Other Swine	35
Other Livestock	13
Soil Conditioners	14
Fertilizer	12
Feed	11
Seed	209
Implements and Equipment	66
Land	10
Fences	2
Co-ops	16
Veterinarians	1
Railroads	3
Grain Sales	9
Bins and Buildings	60
Other	129
Money Finders	50
Drainage Districts	2
Total new complaints, 1983-84	739

HEALTH DIVISION

Two assistant attorneys general represent the Iowa State Department of Health. One attorney primarily represents the Division of Health Facilities and the other the Office for Health Planning and Development. The attorneys provide daily advice and counsel, meet in conferences to resolve disputes between the department and aggrieved persons, represent the department in administrative hearings and litigation, prepare orders and decisions for division heads and the Commissioner of Public Health where appropriate, and render assistance and advice in drafting administrative rules and legislation.

The assistant attorney general assigned to the Division of Health Facilities is responsible for representing this division in disputes arising out of the division's regulatory authority. Iowa Code chapter 135C vests the Health Department with the responsibility for licensing and investigating complaints against health care facilities in the state. These facilities include residential care, intermediate care and skilled nursing facilities. There are 729 such facilities in the state with a combined licensed bed capacity of 445,421. The Health Facilities Division performs annual inspection of these facilities and investigates complaints. The assistant attorney general assigned to Health Facilities renders advice concerning these activities and represents the department at informal and formal administrative hearings which may occur as a result of the department's power to issue citations and levy civil fines whenever facilities are found to be in noncompliance with statutory or regulatory provisions.

In 1983 and 1984, over 950 complaints were received by the Health Facilities Division, 586 formal citations were issued, and $39,200 in fines were assessed. In 1984, thirty-eight informal hearings were conducted, and six formal hearings were held. One petition for judicial review was filed arising from these hearings. In 1983-84, four cases were decided in Iowa District Court and one by the Iowa Court of Appeals.

The second Health Division assistant attorney general represents the Office for Health Planning and Development and handles all legal problems concerning implementation and enforcement of Iowa's Certificate of Need Law and related federal laws. The purpose of the laws is to provide adequate institutional health services while avoiding unnecessary duplication of services, so that health care costs are controlled.

The attorney serves as legal counsel to the Iowa Health Facilities Council, a five-member body which makes initial decisions on certificate of need and related federal reimbursements. In 1983-84, 182 projects were reviewed by the Council. Fourteen rehearings were heard before the Council, and five appeals were taken to the Health Commissioner. The assistant attorney general represents the Health Department in any court actions arising from the state and federal programs on certificate of need. In 1983-84, two cases in this area were decided in the Iowa Supreme Court, and three were decided in Iowa District Court. At the end of 1984, one case was pending in Federal District Court, and one in Iowa District Court.

The Health Division attorneys also advised and represented other divisions of the Health Department in administrative and court proceedings including the Iowa Women, Infants and Children program; Emergency Medical Services; Public Health Nursing; the Homemaker Health Aid Program and Central Administration.

In 1983-84, the Health Division attorneys also served as legal counsel to the Iowa Department of Substance Abuse and twelve health licensing boards, providing general advice and representation in administrative hearings and court litigation.

The Division attorneys also prepared formal Attorney General opinions and provided frequent informal written and oral advice to the public. The attorneys participated in conferences and panel discussions on health topics at the request of Health Department agencies and other groups or organizations.

HUMAN SERVICES/CORRECTIONS DIVISION

The Division performs legal services for the Departments of Human Services and Corrections. It is comprised of one special assistant attorney general, sixteen full-time and one half-time assistant attorneys general (five of whom are assigned to represent the Child Support Recovery Unit of the Department of Human Services), one administrative officer, and four secretaries.

The legal services which are provided include: (1) defending suits in state and federal courts (874 lawsuits were pending at the end of 1984), including prisoner civil rights litigation, juvenile appeals before the Iowa Court of Appeals and Supreme Court which had been handled by the county attorneys at the district court level, matters involving mental health and correctional state institutions, and appeals to district courts from administrative hearings; (2) providing consultation and advice with regard to statutes, judicial decisions, policy, state and federal regulations, proposed legislation, and rules; (3) inspecting and approving contracts and leases, and handling real estate matters; (4) researching and preparing opinions of the Attorney General; and (5) handling collections of welfare overpayments, fraud, and delinquent accounts.

Authority is vested in Iowa Code ch. 252B for the Attorney General to perform legal services for the Child Support Recovery Unit, Department of Human Services. Under the direction of the special assistant attorney general assigned to this Division, five assistant attorneys general are located throughout the state and assist in training the county attorneys and their assistants charged with prosecuting child support cases. This responsibility includes conducting training seminars, drafting form pleadings, overseeing all appeals, and prosecuting special cases. Child support collections principally were from absent parents of welfare recipients.

Summary of monies recovered and collected for the state by the Division during the biennium:

Welfare Overpayments	$82,832.68
Title XIX Medical Subrogation	677,979.40
Mental Health County Reimbursements	250,636.29
Miscellaneous Accounts	11,940.51
Child Support Collections for FY 1983	19,971,745.60
Child Support Collections for FY 1984	20,692,215.86

TOTAL RECOVERIES for state in biennium: $41,687,350.34.

INSURANCE DIVISION

The Insurance Division consists 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 span a wide range but mostly involve construction of the statutes in Title XX of the Iowa Code dealing with insurance. The Division also assists the Insurance Department in preparing and drafting administrative rules and handles litigation in which the department is a party. In the biennium, three cases carried-over from the previous biennium were resolved on terms favorable to the department, and seven new cases were filed. Three of the seven were disposed of with favorable outcomes, and four were pending at the end of the biennium.

The Insurance Division attorney also fulfills the statutorily-prescribed role of reviewing documents of insurance companies such as articles of incorporation and reinsurance treaties. The assistant attorney general reviewed at least fifty-six of those documents in the biennium. The attorney also advised the Commissioner of Insurance on legal questions relating to insurance company mergers, acquisitions, and reorganizations.

PROSECUTING ATTORNEYS COUNCIL

The Prosecuting Attorneys Council was established as an autonomous entity within the Department of Justice through the Prosecuting Attorneys Training Coordinator Act of 1975, now codified as Iowa Code chapter 13A.

The policy-making head of the agency is a Council whose membership of five is prescribed by law. The Council consists of the Attorney General or his or her 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 Association. The Council is required to meet at least four times each year and the members serve without receiving compensation other than their actual expenses to attend meetings and perform their duties.

The chief administrative officer for the agency is the Executive Director, who is appointed by and serves at the pleasure of the Council. All staff members are regular employees of the Department of Justice.

The Prosecuting Attorneys Council is charged with the responsibility of providing continuing legal education and training for Iowa prosecutors, speci-

fically, the ninety-nine county attorneys and their approximately 200 assistants. The agency's overall objectives encompass many support services for prosecuting attorneys. Thus, during the biennium, the agency: (1) provided research assistance to prosecuting attorneys and legislators; (2) published a newsletter to inform prosecutors and other agencies and organizations in the criminal justice system of developments in related areas of law, law enforcement and criminal justice programs; (3) maintained active liaison with the courts, Executive Department, General Assembly, Attorney General, law enforcement agencies and alternative justice agencies; (4) published and distributed specialized manuals and publications to assist county attorneys and assistant county attorneys in the execution of their duties; (5) conducted an annual county attorneys budget survey and disseminated the resulting data; (6) developed and implemented standards of conduct for prosecutors to help avoid conflicts of interest and encourage more uniform prosecutorial practices in all counties; (7) assisted prosecutors and the general public in resolving complaints and problems involving questions of ethical conduct; (8) maintained a video tape, audio tape and publications library; (9) monitored and relayed information that affected the criminal justice system, county government or county attorneys' functions and responsibilities; (10) coordinated the development of an Iowa organization for victim rights and served as a liaison with agencies and organizations involved in victim assistance programs; (11) coordinated the development of uniform court forms which comply with all requirements of the law; (12) planned and conducted seminars, training conferences and workshops to inform prosecuting attorneys of changes, innovations or ideas on matters relating to their duties, including a school for new prosecutors; (13) administered the dispute resolution program; and (14) participated 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 Public Safety Division provides legal counsel to the Iowa Department of Public Safety and the Iowa State Racing Commission. The Division is housed within the Department of Public Safety.

The Public Safety Division is involved in a wide range of activities providing Public Safety and the Racing Commission with counsel and representation in civil matters. It provided legal advice concerning the agencies' policies and practices. It reviewed and evaluated leases, contracts and real estate transactions involving the agencies. It represented the agencies and their employees in suits in federal and state court.

The Public Safety Division provided day-to-day advice on civil matters to line officers of the Department of Public Safety. It also occasionally provided advice in criminal matters in cooperation with the Area Prosecutions Division and county attorneys.

The Division also prosecuted administrative complaints before the Iowa Beer and Liquor Control Department and served as counsel to the Public Safety Peace Officers Retirement, Accident and Disability System.

REVENUE DIVISION

The Revenue Division advises and represents the Department of Revenue with respect to various taxes which are administered by the department, including income taxes, franchise tax imposed on financial institutions, sales and use taxes, cigarette and tobacco taxes, motor vehicle fuel taxes, inheritance and estate taxes, property taxes, hotel and motel local option taxes, railway mileage tax, railway vehicle fuel tax, real estate transfer tax, and grain-handling tax. The Division also represents the department in matters associated with the licensing of gambling. In addition, the Division drafts responses to tax opinion requests made to the Attorney General.

During the 1983-84 biennium, the Division participated in the resolution of informal proceedings for 222 protests filed by audited taxpayers, pursuant to Department of Revenue Rule 730 I.A.C. §7.11. The Division also handled fifty-seven contested case proceedings before a department hearing officer or the Director of Revenue. Of these, thirty were won, six were lost, nineteen were settled, and two were pending decision at the end of the biennium.

In the biennium, thirty-four contested cases were disposed of before the State Board of Tax Review in which twenty-four were won, one was lost, four were settled, and five were pending decision at the end of the biennium.

During the biennium, seventy-one Iowa District Court cases were resolved by the Division. Of these, twenty-nine were won, seven were lost, thirty-two were settled, and three were pending decision. In addition, three federal district court cases were disposed of in which one was dismissed and two were lost.

On the appellate court level, the Division received decisions in nine cases from the Iowa Supreme Court and one from the Iowa Court of Appeals. One appeal was taken to the United States Supreme Court, but that court declined to hear it. Of the Iowa cases decided, seven were won and three were lost. The most important of these cases were *Atchison, Topeka and Santa Fe Railway Company v. Bair*, 338 N.W.2d 338 (Iowa 1983), *cert. denied*, 79 L.Ed.2d 751 (1984); *Internorth, Inc. v. Iowa State Board of Tax Review*, 333 N.W.2d 471 (Iowa 1983); *Pruss v. Iowa Department of Revenue*, 330 N.W.2d 300 (Iowa 9183); *Hewett Wholesale, Inc. v. Iowa Department of Revenue*, 343 N.W.2d 487 (Iowa 1984).

In *Atchison, Topeka*, the United States Supreme Court refused to review the decision of the Iowa Supreme Court which held that the Iowa Code ch. 324A railway vehicle fuel tax violated 49 U.S.C. §11503(4-R Act) as applied to rail carriers. In *Internorth*, the court held that the state's net income apportionment sales factor formula, as applied to regulated interstate pipeline companies, was valid and, further, that the federal tax deduction allowed for corporations which filed federal consolidated income tax returns and separate Iowa income tax returns had to be prorated on the basis of the overall federal consolidated tax paid rather than on the basis as if separate federal returns had been filed. This decision saved the state millions of dollars of income taxes.

In *Pruss*, the court clarified the question of when exhaustion of administrative remedies required Department of Revenue agency action to be appealed to the State Board of Tax Review and when exhaustion was not required for purposes of Iowa Code §17A.19 judicial review. This clarification was needed to resolve conflicting views between various district courts and the Court of Appeals. In *Hewett Wholesale, Inc.*, the court upheld the constitutionality of the 1981 cigarette inventory tax.

A total of seventeen formal and letter Attorney General opinions were issued by the Division. An additional ten informal advice letters disposing of opinion requests were issued. The Division also assisted the Department of Revenue in disposing of twenty-one petitions for declaratory rulings, three concise statement requests, and one petition for rulemaking. In addition, 366 proposed rules of the department were reviewed for content and legality at the department's request.

In addition to the above activities, the Division rendered advice to Department of Revenue personnel and responded to questions from other state officials concerning the tax laws of Iowa.

As a result of the Division's activities on behalf of the Department of Revenue during the biennium, $15,549,874 of tax revenue was directly collected.

SPECIAL LITIGATION DIVISION

The Special Litigation Division is comprised of two attorneys, one legal assistant and one secretary. The Division enforces the Iowa Competition Law and provides primary prosecution for violations of the Iowa Uniform Securities Act. The Division also provides assistance to other divisions in the Attorney General's office for complex litigation and prosecutes actions involving areas of the law not specifically assigned to other divisions in the Attorney General's office.

The Division investigates and prosecutes civil and criminal violations of the Iowa Competition Law, Iowa Code chapter 553, and prosecutes certain types of civil actions for violations of the federal antitrust laws. These range from administrative actions to state civil, criminal and appellate actions to federal civil, bankruptcy and appellate actions. The Division also defends state officials named in antitrust or securities actions.

The Division has available for its antitrust enforcement a pre-petition discovery process, injunctive relief, civil penalties, criminal penalties and suits for damages on behalf of the state under chapter 553. It may also bring suits on behalf of the citizens of the state in federal court for violations of the federal Sherman Act (15 U.S.C. §§1-8). The primary areas of antitrust enforcement are price-fixing, bid-rigging, tying arrangements, requirement contracts, territorial and customer allocation, resale price maintenance and group boycotts. The Division also advises state agencies, the state legislature and Congress regarding laws and rules which may have an anticompetitive effect.

The Division prosecutes violations of the Iowa Uniform Securities Act, Iowa Code chapter 502, upon referral from the Securities Division of the Iowa Insurance Department. The Division generally conducts a cooperative investigation with the Securities Division which may lead to criminal prosecution or a civil action for injunctive relief and/or the appointment of a receiver.

In 1983-84, the Division had three criminal securities prosecutions, three civil securities actions, thirteen civil antitrust actions, three cases involving the defense of state officials, four federal petroleum overcharge cases, two bankruptcy matters, eleven miscellaneous litigations, and numerous investigations. In addition to these actions and investigations,the Division wrote opinions on antitrust matters and consulted with other state agencies concerning anticompetitive problems.

TORT CLAIMS DIVISION

The Tort Claims Division provides the state with legal representation in tort, workers' compensation and Second Injury Fund litigation. Additionally, the Division is charged with the investigation of all administrative claims made to the State Appeal Board under Iowa Code chapters 25 and 25A.

During 1983 and 1984, the legal staff, which is comprised of six attorneys, defended 159 tort lawsuits and 125 workers' compensation cases, as well as numerous Second Injury Fund cases. A large percentage of the caseload, approximately forty percent, involved representation of agencies and institutions that provide medical care and services.

Administrative claims handled by the Division fall into three categories: general, tort and county indemnification fund. In 1983 and 1984, a total of 2,611 claims were received from the State Appeal Board for investigation.

TRANSPORTATION DIVISION

Pursuant to Iowa Code §307.23, a special assistant attorney General serves as General Counsel to the Iowa Department of Transportation. Ten assistant attorneys general work under the special assistant's direct supervision. The Division provides legal services to the department, including litigation representation and agency advice. One attorney concentrates on motor carrier safety issues. Five legal assistants represent the department in administrative hearings relating to driver's license revocations under Iowa Code ch. 321B.

The three main areas of litigation activity are tort claims, judicial review proceedings, and condemnation appeals. The legal staff represents the department in tort claims which involve highway accidents or accidents on property owned or controlled by the DOT. During 1983 and 1984, forty-eight tort cases were opened and thirty-seven were closed, for a total savings of $14,983,937 (the difference between the total amount claimed and the amount paid). The legal staff also represents the department when judicial review is sought of department action involving, for example, driver's license revocation or suspension, dealer's license revocation or suspension and certain tax matters. During 1983 and 1984, 234 judicial review proceedings were opened and 224 were closed. The legal staff also represents the department in judicial condemnation actions. During 1983 and 1984, twenty-five condemnation appeals were filed and thirty-eight were closed, representing a savings of nearly $3,751,246 (the difference between the total amount claimed and the amount paid).

In addition to the three main areas of litigation, the Department of Transportation is engaged, either as plaintiff or defendant, in extensive miscellaneous litigation, all of which is handled by the Transportation Division. Such litigation, at the trial and appellate level in both federal and state court, involves, for example, breach of contract disputes, employment discrimination claims, constitutional challenges, environmental issues, railroad issues and certain tax matters.

The legal staff also provides non-litigation services to the department. Consultation routinely occurs with respect to statutes, court decisions, state and federal regulations, and policy matters. Department contracts, easements, and other agreements are inspected and approved. The legal staff is also consulted with regard to proposed legislation and administrative rules. Additionally, the legal staff is responsible for researching and drafting Attorney General opinions regarding transportation-related matters.

ATTORNEY GENERAL OPINIONS

JANUARY 1983
TO
DECEMBER 1984

JANUARY 1983

January 10, 1983

TAXATION: Determination of Property Classifications. Iowa Code §427A.1(3) (1981). Equipment attached to leased buildings or structures should be taxed as real property unless it is of the kind of property ordinarily removed when the owner of the equipment moves to another location. (Schuling to Avenson, State Representative, 1-10-83) #83-1-1(L)

January 17, 1983

PODIATRISTS: Scope of Practice. Iowa Code §§149.1(2), .5 (1981). A licensed podiatrist is authorized to amputate a human toe. (Brammer to Smalley, State Representative, 1-17-83) #83-1-2(L)

January 17, 1983

LIQUOR LICENSES: GAMBLING: Chapter 123, §§ 99B.6, 99B.12, 725.12, (1981). Discounting the purchase price of drinks in a licensed establishment with the amount of the discount determined by chance is illegal gambling. (McGrane to Anderson, Dickinson County Attorney, 1-17-83) #83-1-3(L)

January 18, 1983

COUNTY; CLERK OF COURT; Fees for mailing child support checks. Iowa Code §§331.702(86), 598.22 (1981). A county may not assess the cost of postage incurred by the county in mailing out support checks pursuant to Iowa Code §598.22. (Weeg to Richter, Pottawattamie County Attorney, 1-18-83) #83-1-4(L)

January 25, 1983

COUNTIES; County Public Hospitals. Iowa Code Ch. 347 (1981); Iowa Code §§252.22, 252.27, 347.14, 347.16(2), and 347.16(3) (1981). The county may, pursuant to home rule authority, decide whether the expenses incurred for treating indigent patients at a county hospital pursuant to Iowa Code §347.16(2) (1981) should be paid from the county hospital's budget, from the county poor fund, or from both. The county hospital board of trustees may exercise their discretion pursuant to Iowa Code §347.14(14) (1981) to determine whether, and upon what terms, the county hospital will provide services to nonresidents. (Weeg to Kenyon, Union County Attorney, 1-25-83) #83-1-5(L)

January 25, 1983

ELECTIONS: ELECTION BOARD; ELECTIONEERING. Iowa Code Ch. 49: §§49.12, 49.13, 49.15, 49.16, 49.107, 49.108. A member of a candidate's committee is not statutorily prohibited from serving on an election board. A candidate transporting voters to the polls does not constitute electioneering. (Pottorff to Norland, Worth County Attorney, 1-25-83) #83-1-6(L)

January 27, 1983

MUNICIPALITIES; SUBDIVISION PLATS; HOME RULE. Iowa Code §§409.14, 409.4-409.7, 414.12, 306.21, 558.65 (1981). A city under twenty-five thousand population which seeks to regulate subdivision platting in the two-mile area outside city limits under §409.14 should pass an ordinance which specifically adopts the restrictions of that section. Subdivision ordinances may contain exceptions or provide for variances if they are consistent with or more stringent than those in state law. (Ovrom to Stanek, Director, Office for Planning & Programming, 1-27-83) #83-1-7(L)

January 27, 1983

SCHOOLS: Offsetting Tax: Establishment Clause. U.S. Constitution, First Amendment; Iowa Code §§257.26, 282.1, 282.2, 282.6, 442.4(1). The benefit provided to qualifying taxpayers by Iowa Code §282.2 is available to offset tuition charged to nonresident pupils who receive shared-time instruction pursuant to a relationship between a public and an approved nonpublic school. (Fleming to Priebe, 1-27-83) #83-1-8(L)

February 1983

February 4, 1983

CRIMINAL LAW: Garnishment of Cash Bond deposited by a third party. Iowa Code Chapter 811. Cash Bail deposited by a third party is not subject to garnishment by the State in order to pay court costs. (Blink to Robbins, Boone County Attorney, 2-4-83) #83-2-1(L)

February 4, 1983

TAXATION: Permanent Real Estate Tax Index Number System. Iowa Code §441.29 (1981). A treasurer, auditor and assessor may use a permanent real estate tax number system adopted pursuant to Iowa Code §441.29 (1981), in lieu of legal descriptions of real estate for tax administration purposes, including tax administration purposes involving members of the public. (Schuling to Short, Lee County Attorney, 2-4-83) #83-2-2(L)

February 4, 1983

STATUTES: DELEGATION OF RULEMAKING AUTHORITY. Ch. 19A; §19A.9(2). 1981 Session, 69 G.A. Ch. 9 §19. House File 875 authorizes the Merit Employment Commission to eliminate steps within grades for professional and managerial employees. The statutory provisions of House File 875, moreover, supercede existing rules which were premised on the administration of a pay plan for professional and managerial employees structured by salary steps. (Pottorff to Schroeder, State Representative, 2-4-83) #83-2-3(L)

February 7, 1983

COUNTY OFFICERS: COUNTY ATTORNEY. Iowa Code §§135C.24 and 222.18 (1981), Acts of the 69th G.A., 1981 Session, Ch. 117, §756. The responsibility of the county attorney under Code of Iowa §222.18 (1981) extends only to opening guardianships. There is no responsibility for continued handling after appointment proceedings have been completed. (Munns to Anstey, Appanoose County Attorney, 2-7-83) #83-2-4(L)

February 9, 1983

COUNTIES; Land Use—Agricultural Areas. 1982 Iowa Acts, Ch. 1245. 1) The supervisors must strictly comply with the statutory time provisions for notice and hearing on a proposal for an agricultural area and cannot postpone consideration of the proposal until a county land preservation and use plan is adopted; 2) the supervisors cannot reject a proposal for an agricultural area for any reason, including the fact that a land use plan has not been adopted, unless the proposal is inconsistent with the purposes of the Act; 3) a spouse's consent is required on proposals for agricultural areas; 4) both the contract purchaser and contract seller must consent to a proposal for an agricultural area, absent contrary language in the contract itself; 5) the consent to a proposal for an agricultural area by all owners of land must be in writing; 6) the supervisors are not required to verify ownership and check the legal description of land to be included in an agricultural area, but such verification would be the better practice; 7) the supervisors may, pursuant to home rule authority, pass on to the owners of land in an agricultural area those filing and recording fees authorized by statute; 8) in the event of a conflict between county zoning provisions and the provisions of Ch. 1245 relating to agricultural areas, Ch. 1245 would prevail; 9) the supervisors may consider the county's comprehensive zoning plan in deciding whether to adopt a proposal for an agricultural area to the extent that the county plan is consistent with the express purposes of Ch. 1245; 10) the supervisors have no statutory duty to enforce the use restrictions on agricultural areas; 11) numerous methods are available to the county if it chooses to enforce those use restrictions; 12) the county should not be held liable for failure to enforce the use restrictions of Ch. 1245; 13) Ch. 1245 provides the exclusive means for withdrawal from an agricultural area, and therefore withdrawal prior to the expiration of the minimum three year period specified in Ch. 1245 is impossible. (Weeg to Beine, Cedar County Attorney, 2-9-83) #83-2-5

Mr. Lee Beine, Cedar County Attorney: You have requested an opinion of the Attorney General on numerous questions relating to the interpretation of 1982 Iowa Acts, Ch. 1245, the new agricultural land preservation act ("Act"). We shall address each question in turn.

I.

Your first question has two parts.

In the first, you ask:

(A)

> If the Board of Supervisors receives a proposal for the creation of an agricultural area pursuant to Section 7 of the Act prior to the time that a County Land Preservation and Use Plan has been completed and adopted pursuant to Section 6 of the Act, must the Board give notice and hearing on the proposal and consider it on its merits as required by Section 8 of the Act, or could such consideration be delayed until such future time as the County Land Preservation Use Plan is completed and adopted?

It is our opinion that the supervisors must act upon a petition for the creation of an agricultural area within the time designated by statute, regardless of whether a county land preservation and use plan has been adopted. Our reasons for this conclusion are as follows.

Section 7 of the Act authorizes a farm land owner to submit a proposal to the county board of supervisors for the creation of an agricultural area in a county. Section 8 of the Act then provides:

> 1. Within thirty days of receipt of a proposal for an agricultural area which meets the statutory requirements, the county board shall provide notice of the proposal by publishing notice in a newspaper of general circulation in the county. *Within forty-five days after receipt, the county board shall hold a public hearing on the proposal.*
>
> 2. Within sixty days after receipt, the county board shall adopt the proposal or any modification of the proposal it deems appropriate, unless to do so would be inconsistent with the purposes of this chapter. (emphasis added)

Nowhere in the Act's provisions relating to agricultural areas is there included a requirement that consideration of a proposal for such an area be postponed until a county land preservation and use plan ("plan") is adopted. Further, there are no other statutory exceptions to the requirement that a public hearing be held by the supervisors within forty-five days of receiving the proposal. Consequently, we conclude that the forty-five day requirement of §8.1 is absolute.

As further support for our conclusion, we look to the provisions of §§3, 5, and 6 of the Act relating to the plan. Our review of these provisions leads us to conclude that they are independent of the provisions relating to the agricultural areas. Indeed, the only reference to agricultural areas is found in §6.1, which provides that the Commission is to consider and make written findings on several factors, including:

> g. Methods of encouraging the voluntary formation of agricultural areas by the owners of farm land.

This lone reference cannot be construed to require the Commission to postpone a decision on a proposal for an agricultural area until the county plan is adopted.

Further, it is our opinion that language contained in §2 of the Act, the purpose clause, expressly allows for the creation of agricultural areas entirely apart from the adoption of a land preservation plan. That language is as follows:

* * *

> It is the intent of the general assembly to provide local citizens and local governments the means by which agricultural land may be protected from nonagricultural development pressures. This may be accomplished by the creation of county land preservation and use plans and policies, adoption of an agricultural land preservation ordinance *or* establishment of agricul-

> tural areas in which substantial activities are encouraged, so that land inside these areas or subject to those ordinances is conserved for the production of food, fiber, and livestock, thus assuring the preservation of agriculture as a major factor in the economy of this state. (emphasis added)

The use of the disjunctive in §2 affirms the independence of the county plan or ordinance and agricultural areas, and authorizes the creation of agricultural areas even in the event a county plan is not adopted.

Finally, Ch. 1245 was passed in the 1982 Session of the 69th General Assembly, and therefore became effective on July 1, 1982. It has thus been possible for landowners to submit proposals for agricultural areas to the supervisors since that July 1st date. On the other hand, §5 of the Act does not require the county land use inventory to be compiled until January 1, 1984, and §6 does not require the county commission to submit its proposed plan to the supervisors until September 1, 1984. Had the legislature intended to make the creation of agricultural areas dependent on the adoption of a county plan, it would not have created this statutory incongruity.

In sum, for the above-stated reasons, it is our opinion that the county board of supervisors must give notice of a proposal for an agricultural area within thirty days from receipt of that proposal, and hold a public hearing on that proposal within forty-five days of its receipt, regardless of whether the supervisors have adopted a county land preservation plan pursuant to §6 of Ch. 1245.

Your second question asks:

> (B)
>
> If the Board must hold a hearing and consider the proposed agricultural area prior to the completion and adoption of the County Land Preservation and Use Plan, would it be permissible to reject the proposal for the sole reason that the plan contemplated by Section 6 of the Act has not yet been completed?

The Act's language is minimal with regard to the procedures to be followed by the supervisors when deciding whether to adopt a proposal for an agricultural area, and the standards to be used in reaching that decision. As set forth above, §8.1 requires the supervisors to hold a public hearing on such a proposal, at which time the proponents and opponents of the proposal would presumably be allowed to present their positions. Section 8.2 then provides that the supervisors "shall adopt the proposal or any modification of the proposal it deems appropriate, unless to do so would be inconsistent with the purposes of this chapter." We believe this language requires the supervisors to either adopt the proposal as submitted, to adopt the proposal with any modifications the supervisors deem appropriate, or to reject the proposal if the supervisors believe it to be contrary to the expressly stated purposes of the Act found in §2.

Thus, the only reason for which the supervisors may reject a proposal for an agricultural area is if the proposal is contrary to the purposes of the Act. These purposes are set forth in §2 of the Act, which provides as follows:

> It is the intent of the general assembly and the policy of this state to provide for the orderly use and development of land and related natural resources in Iowa for residential, commercial, industrial, and recreational purposes, preserve private property rights, protect natural and historic resources and fragile ecosystems of this state including forests, wetlands, rivers, streams, lakes and their shorelines, aquifers, prairies, and recreational areas to promote the efficient use and conservation of energy resources, to promote the creation and maintenance of wildlife habitat, to consider the protection of soil from wind and water erosion and preserve the availability and use of agricultural land for agricultural production, through processes that emphasize the participation of citizens and local governments.
>
> The general assembly recognizes the importance of preserving the state's finite supply of agricultural land. Conversion of farmland to urban development, and other nonfarm uses, reduces future food production

> capabilities and may ultimately undermine agriculture as a major economic activity in Iowa.
>
> It is the intent of the general assembly to provide local citizens and local governments the means by which agricultural land may be protected from nonagricultural development pressures. This may be accomplished by the creation of county land preservation and use plans and policies, adoption of an agricultural land preservation ordinance, or establishment of agricultural areas in which substantial agricultural activities are encouraged, so that land inside these areas or subject to those ordinances is conserved for the production of food, fiber, and livestock, thus assuring the preservation of agriculture as a major factor in the economy of this state.

Thus, §2 does express a strong policy in favor of preservation of agricultural land, a policy which is generally promoted by creation of agricultural areas. However, §8.2 of the Act would permit the supervisors to reject a proposal for an agricultural area if in their discretion the supervisors believe, and make a specific finding, that the policy in favor of agricultural land preservation is in a given case outweighed by other policy considerations set forth in the Act. This is the only situation in which the Act authorizes the supervisors to completely reject a proposal for an agricultural area. In brief, the supervisors may reject a proposal for an agricultural area only if that proposal conflicts with the express purposes of the Act. Accordingly, it is our opinion that the supervisors may not reject such a proposal just because a land preservation and use plan has not been completed.

An additional rationale supports this same result. In part A we concluded for several reasons, including the fact that the disjunctive language in §2 established the independence of county land preservation plans and agricultural areas, that the supervisors could not delay a hearing on an agricultural area proposal on the ground that a county plan had not been adopted. For these same reasons, we conclude that it would be impermissible for the county to reject such a proposal for the sole reason that a county land preservation plan had not been completed. In particular, while §2 of the Act would seem to promote consideration of the policy in favor of agricultural land preservation as a factor in deciding whether to adopt a proposal for an agricultural area, §2 in no way makes approval of an agricultural area contingent on adoption of a county land preservation plan. Instead, §2 fosters the notion that agricultural areas and land preservation plans and ordinances are two separate methods of promoting agricultural land preservation.

II.

Your second question contains five parts. First, you ask:

(A)

> Section 7 of the Act provides that an "owner" of farm land may submit a proposal for the creation of an agricultural area within a county. If land to be included in an agricultural area is owned in one name only, must that person's spouse join in the proposal?

Iowa law both creates and protects a spouse's interest in real property owned by the other spouse. First, Iowa Code §§633.211 and 633.212 (1981) provides that a surviving spouse is to receive a certain share of the deceased spouse's property if the property passes through intestate succession or the spouse elects to take against the will. If the decedent dies intestate and leaves issue, or the spouse elects to take against the will, the spouse's share includes:

> One-third in value of all the legal or equitable estates in real property possessed by the decedent at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the surviving spouse has made no relinquishment of his right.

Sections 633.211(1) and 633.238(1). If the decedent leaves no issue, §633.212(1) increases the spouse's share of real property to one-half.

Second, Iowa Code § 561.13 (1981) provides in part:

> No conveyance or encumbrance of, or contract to convey or encumber the homestead, if the owner is married, is valid, unless the husband and wife

> join in the execution of the same joint instrument, and the instrument sets out the legal description of the homestead. . .

This section requires a spouse to join in the execution of an instrument *conveying* or *encumbering* the *homestead*. As an initial matter, Black's Law Dictionary, 5th ed., defines "conveyance" as ". . . a transfer of title to land from one person, or class of persons, to another by deed. . . ." "Encumbrance" is defined as:

> Any right to, or interest in, land which may subsist in another *to diminution of its value*, but consistent with the passing of the fee . . . A claim, lien, charge, or liability attached to and binding real property; e.g., a mortgage; judgment lien; mechanic's lien; lease; security interest; easement or right of way; accrued and unpaid taxes. (emphasis added)

It is our opinion that creation of an agricultural area imposes restrictions on land which are in the nature of an encumbrance on land. Sections 7.1(a) and (b) of the Act restrict use of land within an agricultural area to certain uses. Section 10 imposes limitations on when, and under what circumstances, an owner may withdraw land from an agricultural area. These restrictions could be analogized to restrictions imposed by a negative easement, and this latter restriction clearly falls within the definition of encumbrance set forth above.

We previously concluded that the code sections cited above establish a spouse's interest in land owned by the other spouse. Because the restrictions and limitations on land within agricultural areas effectively encumber that land to a degree, and because the spouse's interest in the land is thereby affected, we believe the county should require the consent of a spouse to a proposal for an agricultural area before that proposal is acted on by the supervisors.

Second, you ask:

(B)

> In cases where land is being sold on contract must both the contract purchaser and contract seller join in the proposal?

The legislature provided in §7 of the Act that an agricultural area may be created only upon request of an "owner" of farmland, and with the request of each "owner" in the Act, but Black's Law Dictionary, 5th ed., generally defines "owner" as:

> The person in whom is vested the ownership, dominion, or title of property . . . He who has dominion of a thing, real or personal, corporal or incorporal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits . . .

In the case of a sale of property on contract, we conclude that both the contract buyer and seller fall within this broad definition of "owner," and therefore the consent of both is required in order to submit a proposal for an agricultural area.

Under Iowa property law, a contract buyer is viewed as the equitable owner off the land while the contract seller is viewed as holding only bare legal title to the property. Section 20.1, Marshall's Iowa Title Opinions and Standards, 2nd ed. Although this distinction is significant in some contexts, we do not believe it significant here. As we concluded above in response to Question 2(A), creation of an agricultural area imposes certain restrictions on the use of land within the area. These restrictions could potentially affect the interests of the contract seller as well as that of the contract buyer. For example, if the contract buyer defaults on the contract and/or the highest and best use of the land changes after the agricultural area is established, the contract seller's interest in the land is significantly affected because the land remains within the agricultural area until the statutory period for withdrawal is expired. Consequently, it is our opinion that the contract seller does have an interest in the property that could be affected by creation of an agricultural area. Of course, the contract seller could waive his or her right to approve a proposal for an agricultural area by express language in the contract.

For these reasons, we conclude that both the contract seller and the contract buyer are owners within the meaning of §7 of the Act, and absent contrary

language in the contract itself, the consent of both must be obtained in order to include that land within agricultural area.[1]

Third, you ask:

(C)

> May the Board of Supervisors require that the consent of all owners of land to be included within an agricultural area be in writing?

Section 7 of the Act, which provides for the creation of agricultural areas, states in part:

> ... Land shall not be included in an agricultural area without the consent of the owner ....

Consent of each owner of land within a proposed agricultural area therefore must be secured, but the Act sets forth no requirement that such consent be written. However, we believe that the Iowa statute of frauds, Iowa Code §622.32 (1981), applies in this situation. This statute provides in relevant part as follows:

> Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by his authorized agent:
>
> * * *
>
> 3. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year.
>
> * * *

This section expresses a preference that agreements for the creation of an interest in land be in writing. We believe that strong policy considerations support this preference: creation of an agricultural area substantially affects the interests of the landowners and the rights of other persons in the region. *See, e.g.*, §§12.1 and 2. Securing written consent to a proposal for the creation of an agricultural area would assist in resolving many questions that may later arise out of the existence of a particular agricultural area. Therefore, we conclude that the county must require written consent to the creation of an agricultural area.

Further, you ask:

(D)

> If the board of Supervisors receives a proposal for the creation of an agricultural area, what duty, if any, does the Board have to check and confirm that the ownership and legal description of the land to be included is correct as set forth in the proposal?

The Act's provisions relating to creation of agricultural areas impose no requirement that the supervisors confirm the ownership and legal description of property to be included in an agricultural area is correct. Section 7 provides in part that a proposal for an agricultural area "shall include a description of the proposed area, including its boundaries. . . ." Thus, *some* description is required; we believe the determination of what particular description is needed is left to the county. The county has authority, pursuant to its home rule powers, to "set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise." Iowa Code §331.301(6) (1981). We therefore conclude that in the absence of statutory authority to the contrary, the county may, pursuant to home rule authority, require verifications of ownership and a check of the legal description of the land before approving a proposal for an agricultural area. However, while such verification is not required, we believe that the better practice would be for the

[1] We recognize that our answers to questions 2(A) and (B) may create consent requirements that are at the least, burdensome, and at the most, an effective bar to creation of an agricultural area in a given situation. We therefore suggest that any confusion or complication in this area which is viewed as contrary to the legislative intent of the Act be clarified by the legislature.

county to require verification and thus avoid any mistakes in unverified descriptions contained in proposals for agricultural areas.

Fifth, you ask:

(E)

> May a fee be charged by the Board to the owners seeking establishment of an agricultural area to cover the filing and recording fees and other expenses, if any, involved in the creation of the area?

Section 9 of the Act provides that:

> Upon the creation of an agricultural area, its description shall be filed by the county board with the county auditor and placed on record in the office of the county recorder.

This section clearly imposes the duty of actually filing and recording a description of an agricultural area on the supervisors, but does not discuss liability for the filing and recording fees incurred. Therefore, it is our opinion that in the absence of any statutory language, the supervisors may act pursuant to home rule authority and pass these filing and recording fees on to the ultimate beneficiaries, i.e., the owners of land in the agricultural area.

We note that, regardless of whether the supervisors or landowners pay these fees, the only fees that may be assessed by the county are those fees expressly authorized by statute. Numerous filing, recording, and other fees are expressly authorized by the legislature and contained in various provisions throughout the Code. *See, e.g.*, Iowa Code §§331.604, 331.605, and 331.705 (1981). Consequently, we believe that the area of filing, recording, and related fees for performance of specific statutory duties has been preempted by the legislature, and the county therefore has no authority to impose fees not expressly authorized by statute. *See* Op.Att'yGen. #83-1-4(L) (a county may not assess the cost of postage incurred in mailing support checks pursuant to statutory requirement where no fee is specified); #81-5-5(L) (in the absence of express statutory authorization, a county may not assess a service charge for processing employee payroll deductions). *Cf.* 1980 Op.Att'yGen. 154 (a county may collect a permit fee for quarry operations).

III.

Your third question contains two parts. First, you ask:

(A)

> In Counties that have Zoning, if land is zoned under a classification that would allow uses other than agricultural and that land is also within the boundaries of an agricultural area established pursuant to Sections 7 and 8 of the Act, which classification controls? For example, is the land restricted to those uses set forth in Section 7 of this Act or would any use allowed by the Zoning ordinance be permitted?

Section 7 of the Act expressly states that agricultural areas may be created in a county which has adopted zoning ordinances. We believe this language reflects the legislature's intent that agricultural areas exist in conjunction with county zoning. Indeed, the likelihood of conflict between agricultural areas and county zoning ordinances is not great given the fact that agricultural land while used for farm purposes is exempt from zoning requirements pursuant to Iowa Code §358A.1 (1981). However, it is our opinion that in those situations where land within an agricultural area is or has been zoned by the county for purposes other than those permitted in agricultural areas by §7, the more specific provisions of the Act requiring the land to be used only for agricultural purposes prevail.

It is a well-accepted rule of statutory construction that:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect be given to both. *If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision.* (emphasis added)

Iowa Code §4.7 (1981). Indeed, §358A.24 itself expressly provides in relevant part that:

> Wherever the provisions of any other statute . . . impose other higher standards than are required by the regulations made under the authority of this chapter, the provisions of such statute . . . shall govern.

While the county zoning provisions of Ch. 358A discuss agricultural land to the extent of exempting it from zoning ordinances, the more recent provisions of the Act are particularly designed to protect agricultural land by setting it aside and imposing restrictions on its use. Accordingly, we conclude that the provisions of the Act are more specific than those of Ch. 358A and impose higher standards on agricultural land than does Ch. 358A. Applying the principles set forth in §§4.7 and 358A.24, above, it is our opinion that the statutory provisions relating to agricultural areas and county zoning should be reconciled to the extent possible but in the event of a conflict, the more recent and specific provisions of the Act would prevail.

Second, you ask:

(B)

> In determining whether to adopt a proposal for the establishment of an agricultural area may the Board of Supervisors consider the Comprehensive Plan adopted pursuant to Section 358A of the Code as well as the purpose of this Act set forth in Section 2 of Chapter 1245? To the extent that the Comprehensive Plan and Section 2 of Chapter 1245 may conflict, which would control?

As discussed in response to Question 1(B), above, the only statutory provisions in the Act relating to the supervisors' consideration of a proposal for an agricultural area are found in §8 of the Act. In particular, §8.2 provides that within sixty days from the receipt of a proposal for an agricultural area:

> . . . The county board [of supervisors] shall adopt the proposal or any modification of the proposal it deems appropriate, unless to do so would be inconsistent with the purposes of this chapter.

We stated in 1(B) that this language requires the supervisors to either adopt the proposal as submitted, to adopt the proposal with any modifications the supervisors deem appropriate, or to reject the proposal if the supervisors believe it to be contrary to the expressly stated purposes of the Act found in §2. We stated that, while in many cases creation of an agricultural area would tend to promote one of the purposes of the Act, i.e., agricultural land preservation, there may be situations where the supervisors find that other policy considerations expressed in §2 outweigh the policy in favor of agricultural land preservation. For example, one of the expressly stated purposes of the Act is:

> the orderly use and development of land and related natural resources in Iowa for residential, commercial, industrial, and recreational purposes...

A county's comprehensive zoning plan presumably expresses the county's intent with regard to the orderly use and development of land in the county, and as such may be a relevant factor for the supervisors to consider in weighing the purposes of the Act and deciding whether creation of an agricultural area in a given situation would be appropriate. Accordingly, we believe the supervisors may consider the county's comprehensive zoning plan in deciding whether to adopt a proposal for an agricultural area to the extent that this plan is consistent with the purposes of the Act.

However, we note that in response to question 3(A), above, we concluded that in the event creation of an agricultural area conflicts with the county's zoning ordinances, the more specific provisions of the Act would prevail. This response may initially appear to conflict with this conclusion, but here we only conclude that a county's comprehensive zoning plan may be considered as one factor in determining whether creation of an agricultural area would serve the purposes of the Act. In the event that the supervisors adopt a proposal for an agricultural area and that area conflicts with the county's comprehensive plan, the more specific provisions of the Act would prevail, a result consistent with part A, above.

Your fourth question contains three parts. First, you ask:

(A)

What duty, if any, does the Board of Supervisors have for enforcing the use restrictions in an established agricultural area? For example, if an owner of land that is within an established agricultural area begins to use the land in a manner not permitted by Section 7 of the Act, does the Board have a duty to attempt to enforce the use restrictions?

Before addressing your next two questions, we believe that it is appropriate at this point to note that a landowner's failure to comply with the statutory requirements relating to use of land in an agricultural area would prohibit that owner from then invoking the provisions of §§11, 12, 13, and 19 of the Act relating to incentives for that land. This fact may in many cases be sufficient to ensure compliance with the Act. We turn now to your specific question.

Under the new Act, the county board of supervisors has the responsibility for accepting proposals for agricultural areas (§7), publishing notice of these proposals (§8.1), holding public hearings on the proposals (§8.2), and approving or denying certain requests for withdrawal from an agricultural area (§10). No provision exists relating to the county's authority to enforce agricultural areas, unlike the Act's provisions relating to the county land preservation and use plan, where a specific section makes enforcement of the plan by the county mandatory (§6.3). Thus the county board of supervisors has no statutory duty to enforce the use restrictions on agricultural areas.[2]

Your second question asks:

(B)

If the Board does have an affirmative duty to enforce the use restrictions on land in an agricultural area what methods are available to do so?

We stated above in part (A) that the county has no specific mandatory duty to enforce the Act's provisions relating to agricultural areas. However, if the county does choose to pursue such action, the county could pursue an informal resolution of the matter or take formal legal action against a particular violator in the form of an injunctive proceeding or other civil action. In addition, counties which have adopted zoning ordinances could take action against violations of any relevant ordinances (§358A.23) or take any other appropriate action pursuant to its zoning authority. Finally, as previously noted, in the event land in an agricultural area was no longer being used for agricultural purposes, the landowner could not invoke the protections afforded to agricultural areas by the Act.

Third, you ask:

(C)

Would failure of the Board to take affirmative steps to enforce the use restrictions in an agricultural area result in potential liability for a County?

We stated in part (A), above, that the county is not expressly required to enforce the provisions in the Act relating to agricultural areas. Consequently, because there is no mandatory duty of enforcement, we do not believe the county would be liable for failure to seek enforcement of the Act in this area.

Iowa Code Ch. 613A (1981) generally provides that every municipality, including a county, is subject to liability for its torts. Section 613A.2. Section 613A.4 enumerates exceptions to the county's tort liability. This section was recently amended by 1982 Iowa Acts, Ch. 1018; a municipality's failure to exercise or perform a discretionary function or duty is now an express exception to tort liability. In brief, a county cannot be held liable in tort for failure to perform a discretionary duty. Because enforcement of the agricultural area provisions of the Act is discretionary, §613A.4 as amended precludes county

[2] The question concerns solely the duties of the board. We therefore do not discuss any duties or authority of other entities, such as the county attorney, to enforce this statute.

liability for failure to enforce these provisions.

Consequently, we conclude that the county should not be held liable for failure to enforce the provisions of the Act relating to agricultural areas.

V.

Your fifth and final question asks:

> Once a parcel of land is included in an established agricultural area can the owner, or his heirs and/or assigns, in any manner withdraw the land from the agricultural area prior to the expiration of the three year period specified in Section 10 of the Act?

The only provisions for withdrawal from an agricultural area are contained in §10 of the Act, which provides in relevant part:

> At any time after three years from the date of creation of an agricultural area, an owner may withdraw from an agricultural area by filing with the county board a request for withdrawal containing a legal description of the land to be withdrawn and a statement of the reasons for the withdrawal.... At any time after six years from the date of creation of an agricultural area, an owner may withdraw from an agricultural area by filing with the county board a notice of withdrawal containing a legal description of the land to be withdrawn....

The legislature expressly states in §10 what specific procedures are to be followed in withdrawing from an agricultural area, and at what specific times an owner may withdraw. It is therefore our opinion that §10 provides the exclusive means for withdrawal from an agricultural area, and withdrawal prior to the expiration of the minimum three year period specified in §10 is impossible.

February 11, 1983

MERIT EMPLOYMENT: CONSTITUTIONAL LAW: ELECTION LEAVE: Availability of leave without pay to legislator during term. Iowa Constitution, Art. III, §22; Iowa Code Sections 19A.9(18), 19A.18(1981); I.A.C. 770—14.6, 14.13, 16.1. No administrative rule, statute or constitutional provision prohibits or requires approval of the requested leave without pay status to a Department of Social Services employee elected to the legislator. Only continued active status is prohibited. (Allen to Reagen, 2-11-83) #83-2-6(L)

February 11, 1983

STATE OFFICERS AND DEPARTMENTS; COMMERCE COMMISSION; Grain Dealer and Warehouse Inspections. Iowa Code §§542.3(4)(b), 542.5, 542.9, 542.10, 543.2, 543.6(4)(b), 543.10, 543.37, Ch. 180, Acts 69th G.A. (1981). The required inspections by the Commerce Commission for each twelve-month period as required by Iowa Code sections 542.3(4)(b), and 543.6(4)(b), as amended, Ch. 180, Acts 69th G.A. (1981), are to be done on a fiscal year basis. (Post to Harbor, State Representative, 2-11-83) #83-2-7(L)

February 11, 1983

MUNICIPALITIES. Airport Commissions. Removal of members. Iowa Code Chapter 330; Iowa Code §§330.17. 330.20, 330.21, 330.22, 362.2(3), 362.2(8), 362.2(23), and 372.15 (1981); Iowa Code §330.20 (1975); Acts, 1982 Session, 69th G.A., Ch. 1104, §10, Acts, 1981 Session, 69th G.A., Ch. 117, §1054, Acts, 1981 Session, 69th G.A., Ch. 117, §1057 and Acts, 1972 Session, 64th G.A., Ch. 1088, §275. A member of an airport commission is subject to removal under Iowa Code §372.15 (1981), upon proper compliance with the requirements of that section. The authority to remove an airport commissioner under that section is vested in the city council. (Walding to Goodwin, State Senator, 2-11-83) #83-2-8(L)

February 17, 1983

COUNTIES: Township Trustees. Conflict of Interest. U.S. Const. amend XIV; Iowa Code Sections 17A.17(3), 17A.17(4), 66.1, 66.19, 69.8(7), 113.3, 113.4, 113.23, 331.322(2), 331.322(3), 359.17, 359.30, 359.31, 359.37, 362.5, 403.16 (1981); Iowa Code of Judicial Conduct Canon 3 Part C. A township cemetery is properly within the fence viewers' jurisdiction under Iowa Code Chapter 113

(1981). The dual role of township trustees as managers of township cemeteries and adjudicators of fence disputes creates, in a dispute involving a township cemetery, a conflict of interest implicating the due process and common law proscriptions against bias in adjudicative bodies as well as the Iowa Code of Judicial Conduct. However, given that there is no substitute tribunal available to decide the controversy and that the fence viewers' decision is reviewable de novo in the district court, the doctrine of necessity should be employed to allow the trustees to act as fence viewers in this dispute involving a township cemetery. (Benton to Schroeder, Keokuk County Attorney, 2-17-83) #83-2-9

Mr. John E. Schroeder, Assistant Keokuk County Attorney: This is in response to your request for advice concerning the fence-viewing responsibilities of township trustees who also manage a township cemetery. Iowa Code Chapter 359 (1981) imposes upon township trustees both the duty to act as fence viewers pursuant to Iowa Code Chapter 113 (1981) in partition fence disputes and a responsibility to manage township cemeteries. In Keokuk County a fence dispute has arisen between the township as the owner of a cemetery, and an adjoining landowner.

This dispute has prompted your letter in which you ask whether, under these circumstances, the township trustees who manage the cemetery also should conduct the fence viewing duties and responsibilities required by Iowa Code Chapter 113. Your letter suggests that this would appear to be a conflict of interest and you ask, if that is the case, who should act as fence viewer in this dispute. To determine whether this situation creates a conflict of interest requires initially a more detailed examination of the statutory duties imposed upon the trustees in this context.

In addition to their duties as fence viewers, township trustees are explicitly given, in Iowa Code Section 359.31 (1981), the authority to manage cemeteries owned by the township.

Under Iowa Code Section 359.30 (1981), the trustees are required also to levy a tax sufficient to pay for the acquisition of cemetery property or for the necessary maintenance of the township cemeteries. Co-extensive with this general duty to maintain township cemeteries is the specific authority given the trustees in Iowa Code Section 359.37 (1981), to "... enclose, improve, and adorn the ground of such cemetery ...."

Iowa law thus imposes a duty upon township trustees to maintain township cemeteries, with those expenses financed by a tax levied presumably upon all property owners within the township.

In addition to their stewardship of the township's cemeteries, the trustees are required also by Iowa Code Section 359.17 (198) to serve as fence viewers in partition fence disputes.

Iowa Code Chapter 113 sets forth the procedure under which the fence viewers are to determine controversies between adjoining landowners as to their respective fencing responsibilities. More specifically, the fence viewers' township trustees' authority to determine these disputes is set forth in Iowa Code Section 113.3 (1981) which provides in part:

> 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.

After notice is given under Iowa Code Section 113.4 (1981) the fence viewers must meet and determine by written order the obligations, rights, and duties of the respective parties concerning the maintenance and repair of the fence.

Under the terms of Iowa Code Section 113.23 (1981), any person affected by an order or decision of the fence viewers may appeal to the district court by filing a notice of appeal with the clerk of court within twenty days after the decision is rendered.

An appeal under this section is considered to be a special proceeding and is triable at law. *Laughlin v. Franc*, 247 Iowa 345, 347, 73 N.W.2d 750 (1956). Upon

appeal, the jury is neither bound by the trustees' decision, nor required to give that decision any particular weight. *Smith v. Ellyson*, 137 Iowa 391, 394, 115 N.W. 40 (1908).

As your letter notes, our office in 1965 issued an opinion holding that under Iowa Code Sections 359.37 and 113.1 township land used as a cemetery can be subject to the requirements of Iowa Code Chapter 113. 1966 Op.Att'y.Gen. 146. The opinion noted that under the former provision the township trustees have the power to fence a township cemetery, but did not state specifically whether the trustees could also serve as fence viewers in a dispute with an adjoining property owner. Our conclusion in the 1965 opinion that Iowa Code Chapter 113 applies to township cemeteries seems correct in light of subsequent opinions from our office. For example, in 1970 Op.Att'y.Gen. 649, 650, we found that the duties imposed upon adjoining landowners under Iowa Code Chapter 113 are not conditioned upon the size of the parcels of land involved nor upon the uses to which the property is put. In 1976 Op.Att'y.Gen. 433, we were asked whether city-owned property could be subject to the fence viewing law, in response to which we stated:

> There is nothing in Chapter 113 that specifically exempts cities. Nor can anything so exempting be found in any other chapter. Accordingly, we are of the opinion that cities are not exempt from the requirements of Chapter 113 of the Code. This means that requests may not only be made of them for partition fences, but also that they may request such fences from adjoining landowners.

Moreover, the Iowa Supreme Court in *State v. Dvorak*, 261 N.W.2d 486, 489 (1978) decided that when the state itself becomes a property owner, its lands are subject to the fence viewers' jurisdiction. Under the language of Iowa Code Chapter 113 and the rationale of these decisions it is apparent that a township cemetery is subject to the fence viewing statute.

The legislature in Iowa Code Chapters 359 and 113 has given township trustees the dual power to maintain and thus fence township cemeteries and to adjudicate partition fence disputes. Your letter asks whether a conflict of interest is created when the trustees must act as fence viewers in a dispute involving township property, and if there is a conflict of interest disqualifying the trustees, who should act in their stead. While the Iowa Code contains various provisions which proscribe conflicts of interest by governmental officials in different contexts, none of these statutes seem applicable to your question. For example, there are no provisions within Iowa Code Chapters 68B or 331 (1981), which would apply to this situation. Iowa Code Section 362.5 (1981) prohibits city officers and employees from having any direct or indirect interest in any contracts performed for that city. Iowa Code Section 403.16 (1981) likewise prohibits public officials of municipalities and urban renewal agencies from acquiring a personal interest in any property within an urban renewal project. Neither of these provisions is apposite to the instant case. Similarly, Iowa Code Section 17A.17(3) (1981) also does not seem applicable to the trustees. There are no statutory provisions which would preclude the township trustees from acting as fence viewers in this dispute.

The dual functioning of the trustees as both managers of the township cemetery and fence viewers in a dispute involving that cemetery implicates more, however, than any statute proscribing conflicts of interest. Due Process, U.S. Const. amend XIV, requires a fair trial in an impartial tribunal, a principle which extends to administrative bodies which adjudicate rights as well as the courts. *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S. Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975). Consequently, when an adjudicative body has a bias sufficient to deny a litigant a fair hearing, due process demands that the tribunal be disqualified. The types of bias which may render a body incapable of a fair decision range from a prejudgment concerning the facts of a particular dispute to a financial interest in the controversy which makes the adjudicator not only a judge but a party in the case. 3 K. Davis, *Administrative Law Treatise*, §19.1, pp. 371-72 (2d Ed. 1980); B. Schwartz, *Administrative Law*, §106, p. 304 (1976). As the Court stated in *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S. Ct. 1689, 1698, 36 L.Ed.2d 488, 500:

> It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.

It is clear also that a financial interest sufficient to invoke due process may arise when the adjudicator serves two governmental functions as is the case here. For example, in *Ward v. Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L.Ed.2d 267 (1972), the Court considered an Ohio statutory system which authorized mayors to sit as judges in traffic offense trials, while the mayors were also responsible for the administration of their city finances, a large portion of which derived from traffic fines and forfeitures. The Court in *Ward* held that a person convicted of a traffic offense in such a court was denied a trial before a disinterested judicial body as required by due process. *Ward*, 489 U.S. at 60, 53 S. Ct. at 283, 34 L.Ed.2d at 270-71. In reaching this result, the Court explicitly found that the prohibition against a financial interest in a proceeding was not confined to a personal financial interest, but included interests arising from one's governmental capacity, such as the desire to augment or protect the public treasury. *Ward*, 409 U.S. at 60, 93 S. Ct. at 83, 34 L.Ed.2d at 270-71. Consequently, due process was violated by the mayor's dual, inconsistent positions as judge and advocate, where he faced the temptation to maintain a high level of contribution towards the city's finances from the traffic court. *Ward*, 409 U.S. at 60, 93 S. Ct. at 83, 34 L.Ed.2d at 270-71.

The trustees' dual position as managers of township property and referees in fence disputes appears to fall squarely within the *Ward* principle. Here the property involved in the dispute is owned by township, not the individual trustees, and the costs of fence repair would be borne by all township residents through the tax levied under Iowa Code Section 359.30. The trustees do not have a personal financial interest in this controversy, distinguishable from other township residents. However, *Ward* makes clear that a personal financial interest is not the only such interest which can implicate due process. The bias in this case arises not from the personal financial interest of the trustees, but from their interest in conserving the township's funds and minimizing any taxation which might be required to pay for the fencing responsibilities. The trustees' role as managers of township property therefore is inconsistent with their role as fence adjudicators, and their interest in the economical management of township property may affect their allocation of fencing responsibilities under Iowa Code Chapter 113. The principle of disqualification must be applied even when, as here, the pecuniary interest may only be an indirect outgrowth of a public official's desire to protect public funds. *Meyer v. Niles Tp. Ill.*, 477 F. Supp. 357, 362 (N.D. Ill. 1979).

Closely related to the due process proscription against bias in adjudicative bodies are the common law rules which likewise prohibit such bodies acting in disputes when they are tainted with bias. Although we have noted that there are no conflict of interest statutes directly bearing on this issue, the Iowa Supreme Court has held that statutes prohibiting conflicts of interest are merely declaratory of the common law, and accordingly the common law rules against such conflicts should be applied even in the absence of any specific statute. *Stahl v. Board of Supervisors*, 187 Iowa 1342, 1345, 175 N.W. 772 (1920); *Wilson v. Iowa City*, 165 N.W.2d 813, 822 (1969). In *Stahl*, the Court considered a challenge to a vote cast by a member of the Ringgold County Board of Supervisors to establish a drainage district, when the board member owned property within the proposed district and consequently stood to benefit from its establishment. Although the Court noted that no statute forbade such conduct, it went on to find that such statutes are merely declaratory of the common law, and that the latter proscribed such a vote where the possibility existed that the board member could act in his own interest. *Stahl*, 187 Iowa at 1352-53. The court stated that no man may judge his own cause under the common law, a principle which if extended to this case, would prohibit the trustees from deciding a fence dispute involving property which they manage. *Stahl*, 187 Iowa at 1353.

The Court in *Wilson* also applied the common law when it considered whether a conflict of interest was created when certain members of the Iowa City council voted on an urban renewal project. One councilman who voted on the project was

an employee of the University of Iowa which owned land within the proposed project. *Wilson, 165 N.W.2d at 821. Although the employee owned no property personally which could be affected by the project, the Court found that the employer-employee relationship itself created a conflict of duties by placing the council member in a position where the interests of his employer and his public office could conflict, and thus subject the member to pressures to which no public servant should be subject. Wilson*, 165 N.W.2d at 823. The Court emphasized that there need be no actual showing of a financial gain by the official placed in the conflicting roles, since the common law's concern was to avoid the potential conflict of interest. *Wilson*, 165 N.W.2d at 822. Under the factual situation raised by your letter, the trustees are also placed in an untenable position by their conflicting duties, a situation analogous to the employer-employee relationship described in *Wilson*. The township trustees are in a position where the duties to manage township property could conflict with their duties to act as fence viewers and adjudicate a dispute involving that property which they also manage. Even conceding that the trustees will not benefit personally from their decision in this dispute, it seems clear that the common law prohibits their acting in this dual capacity as litigant and adjudicator. As noted in *Wilson*, it is the potential for conflict of interest which the common law desires to avoid, and the conflicting duties of the trustees in this situation implicate that common law standard should they act as fence viewers in this dispute.

The general duties of township trustees, except for levying taxes, are quasi-judicial in nature. *Theulen v. Viola Tp. of Audubon County*, 139 Iowa 61, 62, 117 N.W. 26 (1908). Similarly, when the trustees function as fence viewers their duties are essentially judicial. *Scott v. Nesper*, 194 Iowa 538, 545, 188 N.W. 889 (1922). In addition to the due process and common law standards we have discussed, the Iowa Supreme Court has expressly made the Iowa Code of Judicial Conduct applicable both to judges and administrative officials exercising a judicial function. *Anstey v. Iowa State Commerce Commission*, 292 N.W.2d 380 (Iowa 1980) involved an appeal from a Commerce Commission order granting a utility a franchise to erect a power line. The party appealing from the Commission's order alleged that the Commission was tainted by bias due in part to certain statements attributed to the agency's chairman. In citing Canon 2 of the Code of Judicial Conduct which provides that: "[a] judge should avoid impropriety and the appearance of impropriety in all his activities.," the Court expressly stated that:

> We believe that agency personnel charged with making decisions of great import, as in this case, should be guided by the rationale of that canon. *Anstey* at 390.

The Court went on to find that since the chairman's remarks expressed a general view regarding the desirability of extending electrical transmission lines and were not directed towards the particular issue in controversy, there was no basis for disqualifying the Commission on grounds of bias. *Anstey*, 292 N.W.2d at 391. We might note that here, the bias *is* more particularized since the trustees are involved with a specific controversy. Under the rule of *Anstey*, township trustees are subject to the Code of Judicial Conduct since in resolving fence disputes they function in a judicial capacity. The Iowa Code of Judicial Conduct Canon 3 Part C addresses those situations in which a judge should disqualify himself, and one provision seems particularly apposite here:

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

* * *

* * *

* * *

(d) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (I)Is a party to the proceeding, or an officer, director, or trustee of a party;

* * *

* * *

Subsection (d)(I) seems directly on point with the trustees' position in this case. This language requires that a judge disqualify himself if he is an ". . . officer, director, or trustee of a party . . . ." In this dispute the trustees would serve as both "judges" of the fence controversy and trustees of a party, the township which owns the cemetery. Consequently, the Iowa Code of Judicial Conduct, if applied by analogy, would lead to the trustees' disqualification.

All of the foregoing analysis leads to the conclusion that the trustees are disqualified to act as fence viewers in this case. However, as your letter notes, this does not end the inquiry, for if the trustees should be disqualified, we must consider who should act in their stead. There are no provisions within the Code which address this situation. Iowa Code Chapters 359 and 113 are silent on this point.

Iowa Code Sections 331.322(2) and (3) (1981) empower county boards of supervisors to make temporary appointments when county officers are suspended under Iowa Code Chapter 66 (1981), and are empowered to fill vacancies in county offices in accordance with Iowa Code Sections 69.8 to 69.13 (1981). However, neither of those contingencies seems applicable to this situation. Iowa Code Chapter 66 deals with the removal from office of county officials for reasons specified in Iowa Code Section 66.1 (1981). Upon the suspension of an official for any of the enumerated reasons, the board may temporarily fill the office by appointment. Iowa Code Section 66.19 (1981). However, bias is not listed as a reason for which a trustee may be removed from office. Similarly, Iowa Code Chapter 69 (1981) sets out the procedures through which vacancies in public offices should be filled. Under Iowa Code Section 69.8(7) (1981) vacancies in township offices may be filled by the county board of supervisors. As in the removal statutes however, bias or disqualification to decide a matter within their jurisdiction is not listed as creating a vacancy so that the board may fill the positions to decide this dispute. The disqualification of the trustees to decide this controversy essentially would remove the only panel statutorily qualified to render a decision under Iowa Code Chapter 113.

Under such circumstances, the law has created an exception to the rule that adjudicative bodies tainted with bias must be disqualified. The "doctrine of necessity" has been stated in the following terms:

> When the disqualification removes the only tribunal that has jurisdiction over the case, the tribunal may continue to sit, even though its members would otherwise be disqualified by bias; in such a case the right of the individual gives way to the public interest in having the law enforced. B. Schwartz, *Administrative Law*, §109 p. 314 (1976).

The central criterion leading to the invocation of the doctrine is that the disqualification must remove the only body empowered to resolve the dispute. For example in *FTC v. Cement Institute*, 333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1009 (1948), the Supreme Court considered a challenge to an FTC cease and desist order on the grounds of bias. In passing on the bias question, the Court stated:

> Had the entire membership of the Commission disqualified in the proceedings against these respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has not provided for substitute commissions should any of its members disqualify, and has not authorized any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices. 333 U.S. at 701, 68 S. Ct. at 803, 92 L. Ed. at 1034.

Essentially, the disqualification of the FTC would have removed the only agency empowered to perform this function. By the same token, the courts have not invoked the doctrine when there would be other adjudicative bodies or judges capable of resolving the controversy if the original body is disqualified. *Stahl v. Board of Supervisors*, 187 Iowa 1342, 1354, 175 N.W. 772 (1920); *Payne v. Lee*, 222

Minn. 269, 24 N.W.2d 259, 265 (1946).

The courts have similarly found, perhaps as a component of the doctrine of necessity, that a bias need not disqualify a tribunal when the litigant will have an opportunity for a full de novo review before a higher body. The Minnesota Supreme Court in *Lenz v. Coon Creek Watershed District*, 278 Minn. 1, 153 N.W.2d 209 (1967) rejected a bias challenge to a decision rendered by the managers of a watershed district, when their decision was subject to de novo review by the full board where the parties could present additional evidence, and the board's decision could also be reviewed in the courts. *Lenz*, 153 N.W.2d at 220. The Iowa Supreme Court in *Stahl*, 187 Iowa at 1347, found this "de novo review" exception inapplicable to that instance of bias because the board's decision to establish the drainage district was not in fact subject to de novo review. The Court, in dicta, however, did recognize that:

> . . . where the appeal may be tried to a jury, unembarrassed by the decision appealed from, it has led the courts to hold that the members of the board were not disqualified. *Stahl*, 187 Iowa at 1347.

Under the facts of this case we conclude that the doctrine of necessity should be applied and the trustees, despite the inconsistencies of their positions, should proceed under Iowa Code Chapter 113 to determine this fencing controversy. There is no substitute tribunal legally authorized to hear the dispute, and there are no statutes enabling the board to appoint another body to determine the controversy. Thus, the central criterion of the necessity doctrine, the lack of a substitute tribunal, is satisfied. We are persuaded also that the necessity doctrine should be employed here because of the scope of review given the fence viewers' decision on appeal. The trier of fact upon appeal may take additional evidence and is not bound in any fashion by the fence viewers' order. *Smith v. Ellyson*, 137 Iowa 391, 394, 115 N.W. 40 (1908). *See also*, Note, *Iowa Agricultural Fencing Law*, 34 Iowa L. Rev. 330, 336-337 (1949). The bias issue itself should be reviewable de novo. Iowa Code Section 17A.17(4) (1981). The basic scope of the review may also create an incentive for the fence viewers to act impartially since, if their order is set aside on appeal, the township may be liable for a larger portion of the fencing responsibilities as well as the costs of the appeal. *Smith*, 137 Iowa at 396; *C.f. Ward*, 409 U.S. at 61-62, 93 S. Ct. at 84, 34 L.Ed.2d at 271-72, where the Court found the possibility of reversal on appeal would not diminish the incentive to convict in the first instance. This case is distinguishable from *Ward* on the additional ground that here the conflict is confined to these particular circumstances involving property managed by the trustees, while in *Ward* the bias inherent in the mayor's two functions would exist in every case.

In sum, township property such as a cemetery is properly within the fence viewers' jurisdiction under Iowa Code Chapter 113. The dual function of the trustees as managers of township property and adjudicators of fence disputes creates a conflict of interest implicating the due process and common law proscriptions against bias in adjudicative bodies as well as the Iowa Code of Judicial Conduct. All considered, however, we find that the doctrine of necessity should be employed in this instance to allow the trustees to act as fence viewers despite the bias inherent in their dual roles, a conclusion buttressed by the litigants' opportunity for a full review in the district court.

February 18, 1983

CONSTITUTION, MEDICAID, ADVANCE TRANSPORTATION COSTS. Art. VII, §1, Iowa Constitution; 42 U.S.C. §1396a; 42 C.F.R. 431.53; 770 I.A.C. 78.13(9). Art. VII, §1 of the Iowa Constitution does not prohibit payment to Medicaid recipients of transportation costs in advance. The provision of such payments in advance or by reimbursement only is within the administrative discretion of the Medicaid agency, the Department of Social Services. (Allen to Administrative Rules Review Committee, 2-18-83) #83-2-10(L)

February 18, 1983

SCHOOLS: SCHOOLHOUSE FUND: Leases. Iowa Code §§278.1(7), 279.26, 297.6, 297.12 (1981). Funds raised by Iowa Code §297.5 levies may be used to improve a site owned by the district for use as a football field, a track and a

softball field. The terms "improvement of sites" and "major building repairs" as defined in §297.5, do not apply to moving bleachers or installing lights. Section 297.5 funds may not be used to improve a leased site. School districts may accept gifts of materials and services as well as money. (Fleming to Hultman, State Senator, 2-18-83) #83-2-11(L)

February 18, 1983

COUNTIES; Sanitary sewer districts; Indebtedness limitation construed. Iowa Code Chs. 28E and 358 (1981); Iowa Code §§28E.3 and 358.21. The indebtedness limitation of §358.21 applies to *all* types of indebtedness and to the *entire* debt of a sanitary district, but the amount of indebtedness does not include interest that will accrue. The county board of supervisors may not sell general obligation bonds using the taxable value of the whole county as the tax base with those bonds retired by a tax levied only on property in the sanitary district. A county and a sanitary sewer district may enter into a Ch. 28E agreement to issue general obligation or other bonds for the construction of a sanitary sewer system. (Weeg to Harbor, State Representative, 2-18-83) #83-2-12(L)

MARCH 1983

March 1, 1983

COUNTIES; Disaster Services; Responsibility for providing services. Iowa Code Ch. 29C (1981); §29C.9. The county would be required to provide bookkeeping and other accounting services to the extent necessary to comply with the requirement of §29C.9 that a disaster services fund, if created, must be established in the county treasurer's office. However, apart from this requirement, the county is not *required* to provide support services to a joint county-municipal disaster services and emergency planning administration, though § 29C.12 does express a preference that a county provide existing services to a joint administration "to the maximum extent practicable." (Weeg to Pavich, State Representative, 3-1-83) #83-3-1(L)

March 1, 1983

CRIMINAL LAW: OPERATING WHILE INTOXICATED: ENHANCED PENALTY FOR MULTIPLE OFFENDERS: Iowa Code §321.281 (1981) as amended 1982 Iowa Acts, Ch. 1167, §5. The enhanced penalty provisions of §321.281(2) are limited to those defendants whose prior offenses have occurred in the State of Iowa. (Foritano to Sandy, Dickinson County Attorney, 3-1-83) #83-3-2(L)

March 3, 1983

LICENSEE DISCIPLINE; INVESTIGATIVE FILES; HEARINGS; CONFIDENTIALITY. Iowa Code Ch. 258A: §§258A.1, 258A.3, 258A.6; Ch. 507B: §§507B.2, 507B.6, 507B.7; Ch. 522: §522.3 (1981). Investigative files which are in the possession of the Insurance Commissioner pursuant to a disciplinary investigation of a licensee subject to Chapter 258A are confidential prior to commencement of a disciplinary proceeding. Disciplinary hearings against licensees who are subject to Chapter 258A, furthermore, are open to the public at the discretion of the licensee. (Pottorff to Foudree, Commissioner of Insurance, 3-3-83) #83-3-3(L)

March 4, 1983

CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION/"CREED" AND "RELIGION": Iowa Code §601A.6(1)(a) (1981) prohibits employment discrimination based on "creed" and "religion." The legislature intended that "creed" would connote its usual, customary meaning in which the term refers to beliefs of a religious nature. The legislature did not intend that the term "creed" would embrace secular political, social, or economic beliefs. (Nichols to Reis, Executive Director, Iowa Civil Rights Commission, 3-4-83) #83-3-4

Ms. Artis I. Reis, Executive Director, Iowa Civil Rights Commission: You have submitted a question to this office concerning the meaning of "creed" in Iowa Code §601A.6(1)(a) (1981).

Iowa Code §601A.6(1)(a) (1981) reads in relevant part as follows:

> It shall be an unfair or discriminatory practice for any:
>
> Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the . . . creed [or] religion . . . of such applicant or employee. . . .

The Iowa Civil Rights Act also prohibits discrimination based on "creed" or "religion" in public accommodations, §601A.7, housing, §601A.8, and credit, §601A.10.

You have specifically inquired whether "creed" should be distinguished from "religion" and, if so, whether "creed" encompasses any sincerely held set of fundamental beliefs, including such secular belief systems as communism or socialism.

Determining whether "creed" and "religion" carry the same meaning under Iowa Code §601A.6(1)(a) (1981) is an exercise in statutory construction. "[T]he polestar of all statutory construction [is the] search for the true intention of the

legislature." *Loras College v. Iowa Civil Rights Commission*, 285 N.W.2d 143, 147 (Iowa 1979), quoting *Iowa National Industrial Loan Co. v. Iowa State Department of Revenue*, 224 N.W.2d 437, 439 (Iowa 1974). The first question to be addressed is whether the legislature intended to distinguish "creed" from "religion."

In enacting the Iowa Civil Rights Act, the legislature expressly prohibited discrimination in employment and public accommodations based on "creed" and "religion." 1965 Iowa Acts, ch. 121, §§6, 7. When facing the necessity of construing terms of a statute, "the first recourse to decide the applicable law in a particular case is to the plain words of the statute enacted by the legislative body to control the situation." Clinton, *Judges Must Make Law: A realistic Appraisal of the Judicial Function in a Democratic Society*, 67 Iowa L. Rev. 711, 717 (1982); Iowa Code §4.1(2) (1981); *Loras College*, 285 N.W.2d at 147.

Black's Law Dictionary (5th Ed. 1979) defines "creed" as follows:

> The word "creed" has been defined as "confession or articles of faith," "formal declaration of religious belief," "any formula or confession of religious faith," and "a system of religious belief."

Webster's Third New International Dictionary (1961) attributes the following meanings to "creed":

> 1. a brief authoritative doctrinal formula... intended to define what is held by a Christian congregation, synod, or church to be true and essential and exclude what is held to be false belief; 2. that portion of a Christian liturgy in which a profession of faith is corporately recited; 3(a) a formulation or system of religious faith; 3(b) a religion or religious sect; 3(c) a formulation or epitome of principles, rules, opinions, and precepts formally expressed and seriously adhered to and maintained.

Several courts have addressed whether "creed," within the meaning of their state's anti-discrimination laws, encompasses secular political, ideological, moral, or social beliefs. This is a matter of first impression in Iowa. Nevertheless, the overwhelming weight of authority from foreign jurisdictions regard "creed" as virtually synonymous with "religion." While not necessarily controlling, there is no question that this heavy weight of authority is persuasive in determining the definition of "creed" for purposes of Iowa Code §601A.6(1)(a) (1981). *See, e.g., Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 296 (Iowa 1982); *Foods, Inc. v. Iowa Civil Rights Commission*, 318 N.W.2d 162, 167 (Iowa 1982).

The leading case on point is *Shuchter v. Division on Civil Rights*, 117 N.J.Super. 405, 285 A.2d 42 (App. Div. 1971). There an organization opposed to the Vietnam War was allegedly denied a rental opportunity because of the owner's opposition to the organization's secular beliefs. The New Jersey "Law Against Discrimination," N.J.S.A. 10:-5-1 *et seq.* prohibited discrimination based upon "creed." The state division on civil rights refused to exercise jurisdiction over the organization's complaint. 117 N.J.Super. at 407, 285 A.2d at 42. On judicial review of the agency's ruling, the court acknowledged that Webster's Third New International Dictionary gave some modicum of support to the organization's expansive definition of "creed" to include political beliefs. 117 N.J.Super. at 408, 285 A.2d at 42. The court, however, adhered to the traditional, religiously-oriented meaning of "creed":

> We do not believe... that it is our function as a reviewing court to expand a legislative enactment because of new trends in the definition of a word. Whether discrimination on the basis of moral, philosophical, social or political values should be condemned or permitted among the citizens of this State is a question most properly answerable by the legislature.

117 N.J.Super. at 408, 285 A.2d at 42.

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[1] It should be noted that the Iowa Supreme Court has approvingly cited a Wisconsin Supreme Court construction of that State's disability discrimination statute in a case controlled by Iowa Code §601A.6(1)(a) (1977). *See Foods, Inc. v. Iowa Civil Rights Commission*, 318 N.W.2d 162, 167 (Iowa 1982).

Shuchter was cited as persuasive authority by the Wisconsin Supreme Court in *Augustine v. Anti-Defamation League of B'Nai B'Rith*, 75 Wis.2d, 207, 249 N.W.2d 547 (1977).[1] The Wisconsin Fair Employment Act prohibited employment discrimination based on "creed" but not "religion." Wis.Stat. §111.32(5)(a) (1977). Here, too, the court noted the Webster's definition of creed *qua* secular belief-system. 75 Wis. at 214, 249 N.W.2d at 551. But the court adhered to the *Shuchter* rationale:

> "creed" in its commonly accepted sense and in the preferred dictionary definition does . . . refer to religion. It seems abundantly clear, therefore, that the term, "creed," as used in the Wisconsin statute means not a system of political philosophy or beliefs but a system of religious beliefs . . ..

75 Wis. at 215, 249 N.W.2d at 551-552. *See also American Motors Corp. v. Department of Industry*, 101 Wis.2d 337, 305 N.W.2d 62 (1981).

It would appear that the Iowa legislature, in prohibiting employment discrimination based on "creed" as well as "religion," intended to accord protection to non-traditional or unorthodox religious beliefs. It has been noted that the meaning of "creed" has recently been expanded to include non-religious systems of belief. *Shuchter*, 117 N.J.Super. at 408, 285 A.2d 42. However, every court which has construed the meaning of "creed" for purposes of civil rights legislation has declined to depart from the usual, religious connotation of the term. *See Shuchter, supra; Augustine v. Anti-Defamation League of B'Nai B'Rith*, 75 Wis.2d 207, 249 N.W.2d 547 (1977); *see also Cummings v. Weinfeld*, 177 Misc. 129, 30 N.Y.S.2d, 36 (N.Y. Sup. Ct. 1941). There is no indication that the Iowa legislature intended a different course.

You have asked whether the term "creed" encompasses such secular beliefs as communism or socialism. We have concluded that secular political, economic, or sociological beliefs are beyond the ambit of "creed" as that term is used in Iowa Code §601A.6(1)(a) (1981). We cannot in an opinion define the exact boundaries of the beliefs which could constitute a "creed" or "religion." *See, e.g., Welsh v. United States*, 398 U.S. 333, 340, 26 L.Ed.2d 308, 90 S. Ct. 1792 (1970) (holding certain ethical or moral beliefs could entitle one to "religious" conscientious objector status). The application of the statutory terms to specific factual situations is entrusted in the first instance to the Civil Rights Commission by adjudication or rulemaking.

Conclusion

In summation, the legislature's use of the term "creed" in Iowa Code §601A.6(1)(a) (1981) was not intended to prohibit employment discrimination based on secular political, social, or economic beliefs. Instead, the legislature intended that "creed" would connote its usual, customary meaning in which the term refers to beliefs of a religious nature.

March 4, 1983

COUNTIES: HEALTH CENTERS: TAX LEVIES. §§346A.1 and 346A.2, Iowa Code (1983); Ch. 117, §421(21), Acts of the 69th G.A., 1981 Session; Ch. 1156, Acts of the 69th G.A., 1982 Session. The levy authorized by §346A.2, Iowa Code (1983), may be used to fund the provision of services at county health centers. It is not limited to the provision of physical space for a county health center. (Willits to Johnson, Chairman, State Appeal Board, 3-4-83) #83-3-5(L)

March 4, 1983

TAXATION: Self-Supported Municipal Improvement Districts. Property subject to taxation. Iowa Code Chapter 386 and 427A (1981); Iowa Code §§4.1(8), 386.1(7), 386.8, 386.9, 396.10, 427A.1 and 427.1(1)(h) (1981). Machinery and equipment may be property subject to taxation under Iowa Code Chapter 386 depending on whether their attachment to the land is of a permanent nature and whether the attachment is used as a part of the freehold. Operating property of utilities and personal property are not property subject to taxation under that Chapter. (Walding to Tinker, Webster County Attorney, 3-4-83) #83-3-6(L)

March 8, 1983

STATE OFFICERS AND DEPARTMENTS. Department of Substance Abuse. Involuntary Commitment of Substance Abusers. Iowa Code §§125.75, 125.82, 613A.4 (1983). A county attorney who brings an action for involuntary commitment or treatment of a substance abuser must file a verified application with the clerk of court. The county attorney has no duty to appear at a commitment hearing involving an application for commitment or treatment filed by an interested person other than the county attorney and not joined in by the county attorney. Principles of law governing county attorney immunity, as well as the provisions of Iowa Code Chapter 613A, especially §613A.4, apply to actions filed by a county attorney for the involuntary commitment or treatment of a substance abuser. Neither legislative history nor language in the new Iowa Code provisions governing the involuntary commitment or treatment of substance abusers provides guidance on when a county attorney should consider the filing of an application for involuntary commitment or treatment of a substance abuser. (Freeman to Andersen, Audubon County Attorney, 3-8-83) #83-3-7(L)

March 8, 1983

TRADEMARK REGISTRATION: Iowa Code Section 548.2 (1981). When a statute is susceptible to two constructions, it is proper to consider legislative history as an extrinsic aid to determining legislative intent. Since the Legislature used the phrase "except nothing in this paragraph . . ." when it could have used language requiring a broader application, the phrase applies only to the lettered part in which it is found. (McFarland to Odell, Secretary of State, 3-8-83) #83-3-8(L)

March 11, 1983

CRIMINAL LAW, EXTORTION: Iowa Code §711.4 (1981). Promises by police officers to exchange favorable charging treatment for information concerning criminal activity do not constitute extortion, under Iowa Code section 711.4 (1981), so long as the officers have a reasonable good faith belief of the "right to make such threats." (Cleland-Mason to Martens, Emmet County Attorney, 3-11-83) #83-3-9(L)

March 11, 1983

LIQUOR, BEER AND CIGARETTES: Beer Brand Advertising Signs. Iowa Code §123.51(3) (1983); 1975 Iowa Acts, Chapter 117, §1. Iowa Code §123.51(3) (1983), as amended by 1975 Iowa Acts, Chapter 117, §1, does not prohibit the erection or placement of a sign or other matter advertising any brand of beer inside a fence or similar enclosure which at least partially surrounds a licensed premise, provided the beer brand advertisement is not plainly visible from the public way. No prohibition is contained in that subsection against advertising the price of beer. A fence or similar enclosure, regardless of its height or construction, which does not permit a beer brand advertisement to be plainly visible from the public way would extend the permissible area for signs or other matter advertising any brand of beer beyond the inside of a licensed premise. Finally, a fence or similar enclosure, inside of which a beer brand advertisement is erected or placed, need not entirely surround the licensed premise. (Walding to Neighbor, Jasper County Attorney, 3-11-83) #83-3-10(L)

March 11, 1983

HIGHWAYS: Trailer Lengths: Public Law 97-424, the Surface Transportation Assistance Act of 1982, Title IV, Part - B, Sections 411(a)(b). Chapter 321.457(5)(8) as amended by 1982 Iowa Acts Chapter 1056, Section 3 (69 G.A.). Section 411(a), P.L. 97-424, requires States to permit truck trailers of at least 48 feet and "double-bottom" trailers of at least 28 feet on interstates and designated federally aided highways. Iowa cannot prohibit double combinations on those highways. Iowa cannot adopt overall length limitations on single and double combinations on those highways. Under the current Federal Highway Administration interpretation, Iowa could adopt overall length limitations on other roads. The federal legislation permits Iowa to adopt a 48-foot maximum length for single trailers and a 28-foot maximum length for double trailers so long as Iowa also permits existing and future

single trailers which could comply with Iowa Code § 321.457(8) (1983) in the current overall length limitations and also "grandfathers in" existing doubles trailers of up to 28 ½ feet actually operating on those highways in Iowa where 65-foot "double bottom" combinations were lawful on December 1, 1982. (Osenbaugh and Paff to Drake, 3-11-83) #83-3-11(L)

March 18, 1983

CONFLICT OF INTEREST: A conflict of interest does not exist merely because one spouse is a member of a school board while the other spouse serves as city assessor. (Weeg to Spear, State Representative, 3-18-83) #83-3-12(L)

March 18, 1983

MUNICIPALITIES: Police and Fire Retirement Systems; Ordinary Death Benefits. Iowa Code §§411.1(10), 411.2, 411.6(8), and 411.6(3)(a) through (3) (1983); 1978 Iowa Acts, Ch. 1060, §42. A surviving spouse who receives an ordinary death benefit under Iowa Code §411.6(8) (1983) loses eligibility for pension benefits upon entry into a valid common-law marriage. The Iowa law of common-law marriage should not govern eligibility for continued pension benefits where the factors upon which the existence of the common-law marriage depend occurred in another jurisdiction. (Walding to Noah, Floyd County Attorney, 3-18-83) #83-3-13(L)

March 21, 1983

CRIMINAL LAW: Criminal Penalty Surcharge; Fines. 1982 Iowa Acts, Ch. 1258, §§1, 2; Iowa Code §903.1(3) (1981); Iowa Const. Art. I, §11 (1857). The criminal penalty surcharge has no effect on the maximum dollar amount that a court can fine under §903.1(3) and also has no effect on the jurisdictional limit established by Iowa Cost. Art. I, §11. (Foritano to Horn, Judicial Magistrate, 3-21-83) #83-3-14(L)

March 22, 1983

TAXATION: Discretion Granted to a City Regarding Property Tax Exemptions for Urban Revitalization. Iowa Code §§404.2 and 404.3 (1981). The governing body of a city cannot give preferential treatment to a particular type of property within an assessment class. Such a result occurs if the governing body (1) grants a property tax exemption to certain types of property while omitting others within the assessment class, or (2) provides different tax exemption schedules for certain types of property within an assessment class. Furthermore, a city has no authority to give preferential treatment through property tax exemptions to certain types of new construction or rehabilitation and additions to existing buildings. (Kuehn to Tuel, Administrator, City Development Board, 3-22-83) #83-3-15

Larry Tuel, Administrator, City Development Board, Office for Planning & Programming: You have requested the opinion of the Attorney General concerning several matters pertaining to Iowa Code ch. 404 (1981). The questions you have posed follow.

1. Does the language "applicable to residential, agricultural, commercial or industrial property within the designated area or a combination thereof . . ." contained in Iowa Code §404.2(2)(f) (1981) require a city to make its urban revitalization plan applicable to *all* property within the designated area that falls within a specific assessment class?[1]

2. Will different treatment of property within the same assessment classification violate the provisions of Iowa Code §404.2(2)(h) (1981), which requires the same tax exemption schedule to be used for all property within the same classification located in an existing urban revitalization area?

3. In conjunction with question two, does Iowa Code §404.2(2)(d) require an urban revitalization plan to include the existing zoning classifications and boundaries and existing and proposed land uses within the urban revitalization area, or may this requirement be interpreted to imply that the city may use subclassification(s) to encourage revitalization of specific types of land uses?

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[1] Assessment classes or classifications are discussed in Iowa Code §§441.21 and 441.47 (1981).

4. If the city may, pursuant to Iowa Code ch. 404 (1981), treat properties within the same assessment classification in different manners, what permissable system of subclassification of assessment classes could be used by cities?

5. Does the language of Iowa Code §404.2(2)(f) (1981), which states "the revitalization is for rehabilitation and additions to existing buildings or new construction or both . . ." require that all rehabilitation and additions or new constructions that meet the value added requirements of Section 404.3(7) and 404.5 as determined by the local assessor, be eligible for the tax exemptions set out in the plan?

6. May a city designate an urban revitalization area that consists of a parcel of property or a group of parcels of property upon which there is or will be structures occupied solely by one single commercial concern or occupied by one residential structure?

The answers to your questions are dependent upon the authority granted to cities by Iowa Code ch. 404 (1981). 1980 Op.Att'yGen.639. The sections of Iowa Code ch. 404 pertaining to the authority granted to cities by the legislature are as follows:

> 404.1 Area established by city. The governing body of a city may, by ordinance, designate an area of the city as a revitalization area. . . .
>
> 404.2 Conditions mandatory. A city may only exercise the authority conferred upon it in this chapter after the following conditions have been met:
>
> 1. The governing body has adopted a resolution finding that the rehabilitation, conservation, redevelopment, or a combination thereof of the area is necessary in the interest of the public health, safety, or welfare of the residents of the city and the area meets the criteria of section 404.1.
>
> 2. The city has prepared a proposed plan for the designated revitalization area. The proposed plan shall include all of the following:
>
> a. A legal description of the real estate forming the boundaries of the proposed area along with a map dipicting the existing parcels of real estate.
>
> b. The existing assessed valuation of the real estate in the proposed area, listing the land and building values separately.
>
> c. A list of names and addresses of the owners of record of real estate within the area.
>
> d. The existing zoning classifications and district boundaries and the existing and proposed land uses within the area.
>
> e. Any proposals for improving or expanding city services within the area including but not limited to transportation facilities, sewage, garbage collection, street maintenance, park facilities and police and fire protection.
>
> f. A statement specifying whether the revitalization is applicable to residential, agricultural, commercial or industrial property within the designated area or a combination thereof and whether the revitalization is for rehabilitation and additions to existing buildings or new construction or both. . . .
>
> * * *
>
> h. Any tax exemption schedule that shall be used in lieu of the schedule set out in section 404.3, subsection 1, 2, 3 or 4. This schedule shall not allow a greater exemption, but may allow a smaller exemption, than allowed in the schedule specified in the corresponding subsection of section 404.3 and shall be the same schedule used for all property of the same classification located in an existing revitalization area.
>
> 404.3 Basis of tax exemption.
>
> 1. All qualified real estate assessed as residential property is eligible to

receive an exemption from taxation based on the actual value added by the improvements. The exemption is for a period of ten years. The amount of the exemption is equal to a percent of the actual value added by the improvements, determined as follows: One hundred fifteen percent of the value added by the improvements. . . .

2. All qualified real estate is eligible to receive a partial exemption from taxation on the actual value added by the improvements. The exemption is for a period of ten years. The amount of the partial exemption is equal to a percent of the actual value added by the improvements, determined as follows:

a. For the first year, eighty percent.

b. For the second year, seventy percent.

* * *

3. All qualified real estate is eligible to receive a one hundred percent exemption from taxation on the actual value added by the improvements. The exemption is for a period of three years.

4. All qualified real estate assessed as commercial property, consisting of three or more separate living quarters with at least seventy-five percent of the space used for residential purposes, is eligible to receive a one hundred percent exemption from taxation on the actual value added by the improvements. The exemption is for a period of ten years.

5. The owners of qualified real estate eligible for the exemption provided in this section shall elect to take the applicable exemption provided in subsection 1, 2, 3 or 4 or provided in the different schedule adopted in the city plan if a different schedule has been adopted. Once the election has been made and the exemption granted, the owner is not permitted to change the method of exemption.

6. The tax exemption schedule specified in subsection 1, 2, 3 or 4 shall apply to every revitalization area within a city unless a different schedule is adopted in the city plan as provided in section 404.2. However, a city plan shall not adopt a different schedule unless every revitalization area within the city has the same schedule applied to it and the schedule adopted does not provide for a larger tax exemption in a particular year than is provided for that year in the schedule specified in the corresponding subsection of this section.

7. "Qualified real estate" as used in this chapter . . . means real property . . . which is located in a designated revitalization area. . . .

An examination of Iowa Code ch. 404 discloses that the obvious legislative intent was to permit a city to grant certain defined tax exemptions to qualified real estate in a class designated by Iowa Code §404.2(2)(f). The exemptions provide an incentive to encourage urban revitalization. The statute proceeds to set forth a scheme whereby the governing body of a city has the discretion to adopt an urban revitalization tax exemption plan.

Section 404.2(2)(f) authorizes the governing body of a city authority to provide urban revitalization tax exemption incentives to *all* classes of real estate in accordance with the schedules set forth in Iowa Code §404.3. Section 404.2(2)(f) gives a city authority to limit the urban revitalization tax exemption incentives to a particular class of property or properties, but it does not give the city authority to limit the tax exemption incentives to a particular type of property within a class. Therefore, with reference to question one, the city has no authority to enact an ordinance which would grant a tax exemption to only a particular type of property within an assessment class. The governing body of a city must provide the tax exemption uniformly to property within the same assessment class.

Question two queries whether or not a city may give preferential treatment to a particular type of property within the same assessment class by providing different tax exemption schedules. Iowa Code §§404.2(2)(h) and 404.3(6) clearly requires that cities provide the same exemption schedules for all types of property within the same assessment classification. Therefore, with reference to

question two, the governing body of a city cannot enact an ordinance which would allow different tax exemption schedules for property within the same assessment class.

Given the aforementioned discussion regarding Iowa Code §§404.2 and 404.3, it also follows that question three must be answered in the negative. Iowa Code §404.2(2)(d) must be interpreted as setting forth one of several informational requirements that a proposed urban revitalization plan must contain. Where the language of the statute is clear and plain, there is no room for construction. *Iowa Nat'l Indus. Loan Co. v. Iowa State Dep't of Revenue*, 224 N.W.2d 437, 440 (Iowa 1974). The provision may not be interpreted to provide for expansion by subclassification.

Question five requires a similar result to that reached in question one. Section 404.2(2)(f) authorizes the governing body of a city authority to provide urban revitalization tax exemption incentives to projects involving (1) rehabilitation and additions to existing buildings, (2) new construction, or (3) both. Therefore, while §303.2(2)(f) authorizes a city authority to limit the urban revitalization tax exemption incentives to projects involving either rehabilitation and additions to existing buildings or new construction, it provides no authority to enact an ordinance which would make a tax exemption applicable to only certain types of new construction or rehabilitation and additions to existing buildings.

The answers to questions one, two and three render question four moot. Question six has been answered by a prior opinion of the Attorney General. *See* 1980 Op.Att'yGen. 786.

Based upon the foregoing, it is the opinion of the Attorney General that the governing body of a city which has adopted an urban revitalization tax exemption plan, cannot give preferential treatment to a particular type of property within an assessment class. Such a result occurs if the governing body (1) grants a property tax exemption to certain types of property while omitting others within the assessment class, or (2) provides different tax exemption schedules for certain types of property within an assessment class. Furthermore, a city has no authority to give preferential treatment through property tax exemptions to certain types of new construction or rehabilitation and additions to existing buildings.

March 21, 1983

COUNTIES: County Attorney; County Compensation Board; County Board of Supervisors. Change in status of county attorney; Authority to set initial salary. Iowa Code §§331.752; 331.752(4); 331.907; 331.907(2) (1981). When a resolution to change the status of the county attorney is adopted pursuant to §331.752, §331.752(3) requires the board of supervisors to set the county attorney's initial annual salary. That salary then remains in effect until the county compensation board's next scheduled annual salary recommendations become effective pursuant to §331.907(2). (Weeg to Noonan, Benton County Attorney, 3-21-83) #83-3-16(L)

March 21, 1983

COUNTIES: Nepotism. Iowa Code Ch. 71 (1983). (1) The six hundred dollar per year limitation of Iowa Code §71.1 (1983) refers to the twelve-month period immediately following the date an appointee begins work; (2) a limitation on compensation to be paid to a county employee appointed pursuant to §71.1 must be specified by the supervisors when they approve that appointment, otherwise any such limitation is left to the discretion of the appointing officer; (3) §72.2 specifies that any person who pays public money to a person unlawfully appointed or employed pursuant to §71.1 is liable for all money so paid, together with his or her bondsmen; and (4) the question of what constitutes "approval" for the purposes of a §71.1 appointment is a factual question to be determined on a case-by-case basis. (Weeg to Greenley, Hamilton County Attorney, 3-21-83) #83-3-17(L)

March 23, 1983

COUNTIES: Sheriff — Fees' Mileage Expense. Iowa Code §331.655 (1983). There is no provision in Iowa Code §331.655 for a sheriff to collect fees or

mileage expense for notices returned unserved after a diligent search. (Nassif to Lee, Humboldt County Attorney, 3-23-83) #83-3-18(L)

March 23, 1983

ENVIRONMENTAL: Hazardous Wastes. Iowa Code §§455B.420, 455B.411-.421, 455B.186, 455B.304, 455B.386 (1983); 400 I.A.C. §§17.9, 28; 42 U.S.C. 6929; 40 C.F.R. 122, 123, 127, 264. Consistency requirement in §455B.420 does not allow DEQ to adopt hazardous waste management rules stricter than federal regulations merely because federal regulations authorize states to impose more stringent requirements. However, §455B.420 applies only to rules adopted under §§455B.411 to 455B.421 and not to rules adopted under other Code sections. Sections 455B.411 to 455B.421 do not require the agency to adopt a rule which would be in direct conflict with another provision of Ch. 455B. (Ovrom to Ballou, Executive Director, Department of Environmental Quality, 3-23-83) #83-3-19(L)

March 23, 1983

COUNTIES: Land Use — Agricultural Areas. Iowa Code Ch. 93A (1983); Iowa Code §§93A.6 and 93A.7. 1) The county board of supervisors may not reject a proposal for an agricultural area for the *sole* reason that there are technical mistakes in the proposal which could be modified; 2) §93A.6 does not require that mortgage holders consent to an agricultural area; and 3) §93A.6 does not preclude inclusion of land in an agricultural area which is not strictly adjacent, but the ultimate determination of whether land meets the §93A.6 "as nearly adjacent as feasible" requirement is left to the discretion of the board of supervisors. (Weeg to Osterberg, State Representative, 3-23-83) #83-3-20(L)

March 29, 1983

COUNTIES; COUNTY COMPENSATION BOARD; Authority to decrease salaries. Iowa Code §§331.905 to 331.907 (1983). The county compensation board has the authority to authorize a salary decrease for members of the county board of supervisors. (Weeg to Smalley, 3-29-83) #83-3-21(L)

APRIL 1983

April 5, 1983

TAXATION: Bracket System to Implement Retailer Collection of Sales Tax. Iowa Code §§422.48 and 422.68 (1983). The department of revenue's sales tax bracket system, as set forth in its rule 730 I.A.C. §14.2, is established in accordance with statutory authority, is reasonable, and is designed so that, when practicable, retailers will, in averaging total sales, collect the approximate amount of tax required to be remitted to the State. In addition, the system eliminates the collection of fractions of one cent. (Griger to Priebe, State Senator, 4-5-83) #83-4-1(L)

April 5, 1983

AREA SCHOOLS: Superintendents: Certification. Iowa Code ch. 260 (1983); Iowa Code §§280A.23, 280A.33, 260.9 (1983). Area community college and area vocational school superintendents are not required to hold teacher's certificates. (Fleming to Poncy, State Representative, 4-5-83) #83-4-2(L)

April 5, 1983

JUVENILE LAW: Detention costs. Iowa Code §§232.141, 232.142, 356.3, 356.15 (1983). Costs of detention are to be assumed by the county in which the detention takes place. This cost may not be billed to the state or to the county of legal settlement. (Munns to Reagen, Social Services, 4-5-83) #83-4-3(L)

April 6, 1983

OFFICIAL NEWSPAPERS: Requirements. Iowa Code §§618.3 and 618.14 (1983). I. A newspaper, to be eligible for designation for mandatory publication of notices and reports of proceedings, must: (1) be a newspaper of general circulation that has been established and published regularly and mailed through the local post office for more than two years, and (2) have had a second class postal permit for an equal period of time. A newspaper which does not satisfy both requirements of Iowa Code §618.3 is ineligible for that designation. II. Optional publication of any matter of general public importance must be in a newspaper which satisfies the requirements of Iowa Code §618.3. A newspaper having general circulation in a municipality or political subdivision, however, need not be published in the affected municipality or political subdivision to be designated for optional publications in the event there is no eligible newspaper published in the municipality or political subdivision or in the event publication in more than one newspaper is desired. (Walding to Holt, State Senator, 4-6-83) #83-4-4(L)

April 6, 1983

LAW ENFORCEMENT: POLICEMEN AND FIREMEN: IOWA LAW ENFORCEMENT ACADEMY: Academy Certificates. Sections 80B.2 and 80B.11, Iowa Code (1981). The Iowa Law Enforcement Academy does not have the authority, upon the promulgation of appropriate rules, to revoke the certification of a law enforcement officer when subsequent information demonstrates that the officer no longer meets the minimum standards for such certification. (Hayward to Yarrington, Acting Director, Iowa Law Enforcement Academy, 4-6-83) #83-4-5-(L)

April 7, 1983

MORTGAGES: CONSTITUTIONAL LAW: The Iowa mortgage foreclosure moratorium statute. U.S. Const. At. I §10 cl. 1, Art. VI, Amend. 5, Amend. 14; Iowa Const. Art. I §6, Art. I §9, Art. I §18, Art. I §21, Art. III §1; Iowa Code Sections 467A.47, 628.3, 628.5 (1983); Iowa Code Chapter 654 (1983); 1933 Iowa Acts, chapters 179, 182; 1935 Iowa Acts chapters 110, 115; 1937 Iowa Acts chapters 78, 80; 1939 Iowa Acts chapter 245; Iowa R.App. P. 4, 14(e)(5). Iowa Code Section 654.15 (1983) providing for the continuation under certain circumstances of mortgage foreclosure proceedings is on its face a legitimate exercise of the state's police power and is therefore constitutionally valid. The statute does not result in an unconstitutional impairment of the contractual relationship between the parties to mortgage instruments, nor does it contravene equal protection or due process. The authority delegated to the

Governor to declare an emergency premised upon a finding of depression does not violate Iowa Const. Art. III §1 providing for the separation of legislative, executive and judicial functions. However, as to those federal lending programs where federal law encompasses the procedure for the foreclosure of such loans, federal law controls and preempts application of the Iowa moratorium statute. (Miller and Benton to Anderson, Lt. Governor, 4-7-83) #83-4-6

The Honorable Robert T. Anderson, Lieutenant Governor of Iowa: Your letter to this office of February 10th asks that we review the constitutionality of Iowa Code Section 654.15 (1983). This statute provides for the continuation, under certain circumstances, of the foreclosure of real estate mortgages, deeds of trust of real property and contracts for the purchase of real estate. The present moratorium law, enacted by the General Assembly in 1939, was preceded by a succession of legislative attempts to provide relief for mortgage debtors during the Great Depression of the 1930's. Although the courts during this period scrutinized the constitutionality of the earlier legislation, the constitutionality of the present statute has never been reviewed by a court. We deal therefore with a question of first impression.

The scope of our review is limited to an examination of the validity of Iowa Code Section 654.15 on its face. Unlike a court, our office can make no factual findings in passing upon the validity of certain laws, nor can we apply the statute to a factual situation to determine whether it would be constitutional under those facts. Moreover, we cannot substitute our discretion for that of the courts or the Governor in those situations in which the judiciary and executive must exercise their discretion. Our review must begin with an analysis of the statute itself.

Iowa Code Section 654.15 reads in its entirety as follows:

> In all actions for the foreclosure of real estate mortgages, deeds of trust of real property, and contracts for the purchase of real estate, when the owner or owners enter appearance and file answer admitting some indebtedness and breach of the terms of the above-designated instrument (which admissions cannot after a continuance is granted hereunder, be withdrawn or denied) such owner or owners may apply for a continuance of the foreclosure action when and where the default or inability of such party or parties to pay or perform is mainly due or brought about by reason of drought, flood, heat, hail, storm, or other climatic conditions or by reason of the infestation of pests which affect the land in controversy, or when the governor of the State of Iowa by reason of a depression shall have by proclamation declared a state of emergency to exist within this state. Said applications must be in writing and filed at or before final decree. Upon the filing of such application the court shall set a day for hearing of the same and provide by order for notice, to be given to plaintiff, of the time fixed for said hearing. If the court shall on said hearing find that the application is made in good faith, and the same is supported by competent evidence showing that default in payment or inability to pay is due to drought, flood, heat, hail, storm, or other climatic conditions or due to infestation of pests or when the governor of the State of Iowa by reason of a depression shall have by proclamation declared a state of emergency to exist within this state, the court may in its discretion continue said foreclosure proceeding or proceedings as follows:
>
> 1. If the default or breach of terms of the written instrument or instruments on which the action is based occur on or before the first day of March of any year by reason of any of the causes hereinbefore specified, causing the loss and failure of crops on the land involved in the previous year, then the continuance shall end on the first day of March of the succeeding year.
>
> 2. If the default or breach of terms of said written instrument occur after the first day of March, but during that crop year and that year's crop fails by reason of any of the causes hereinbefore set out, then the continuance shall end on the first day of March of the second succeeding year.

3. Only one such continuance shall be granted, except upon a showing of extraordinary circumstances in which event the court may in its discretion grant a second continuance for such further period as to the court may seem just and equitable, not to exceed one year.

4. The order shall provide for the appointment of a receiver to take charge of the property and to rent the same and the owner or party in possession shall be given preference in the occupancy thereof and the receiver shall collect the rents and income and distribute the proceeds as follows:

a. For the payment of the costs of receivership.

b. For the payment of taxes due or becoming due during the period of receivership.

c. For the payment of insurance on the buildings on the premises.

d. The balance remaining shall be paid to the owner of the written instrument upon which the foreclosure is based, to be credited thereon.

I. OPERATION OF THE STATUTE

The moratorium statute is a part of Iowa Code Chapter 654 (1983) which provides the procedure for the foreclosure of real estate mortgages and those transactions treated under the law as mortgages. Actions for the foreclosure of mortgages are equitable proceedings brought in the county in which the property is located. Sections 654.1 and 654.3 (1983). The mortgagee must elect, under §654.4, which to proceed on the note itself or the mortgage which secures it. When a mortgage is foreclosed the court renders judgment for the entire amount due the mortgagee, and directs that the mortgaged property be sold at a sheriff's sale to satisfy the judgment. Section 654.5. At the execution sale the property sold must be only sufficient to satisfy the mortgage; however, if the mortgaged property does not sell for a sufficient amount to satisfy the execution, a general execution may be issued against the mortgagor's other property. Sections 654.10 and 654.6. The property sold at the execution sale is subject to redemption by the mortgagor under §654.5. Redemption refers generally to payment of the debt so that title to the mortgaged property is restored to the debtor free and clear of the mortgage lien. Osborne, *Handbook on the Law of Mortgages*, §302, p. 624 (2d ed. 1970). The period of redemption extends for one year from the date of sale during which time the mortgagor is entitled to possession of the property. Section 628.3. During the first six months the mortgagor's power to redeem the property is exclusive; after that time the property may be redeemed by other creditors including a mortgagee. Sections 628.3, 628.5.

The moratorium statute is triggered only after a foreclosure action has been commenced. To invoke the statute, the mortgagor/ defendant first must appear and answer admitting the indebtedness and breach of the particular instrument involved. The statute then provides several grounds upon which the mortgagor may apply to the court for a continuance of the foreclosure proceeding. Most of these refer to natural conditions beyond the mortgagor's control which could impair the mortgagor's ability to perform the terms of the mortgage. Specifically, the statute provides that the owner or owners may apply for a continuance of the foreclosure when the inability to pay is mainly due or brought about by drought, flood, heat, hail, storm, other climatic conditions or the infestation of pests. In addition to these grounds, §654.15 also provides that, when the governor by reason of a depression has by proclamation declared a state of emergency to exist within the state, that may be utilized by the mortgagor as a basis upon which to apply for a continuance.

The application for continuance, in writing, must be filed at or before the final decree. The court then sets a day for hearing and gives notice to the plaintiff/mortgagee. At the hearing, if the court finds that the application is in good faith and supported by competent evidence, it may in its discretion continue the foreclosure proceeding. The order of continuance delays the entry of judgment and execution sale. Since the period of redemption runs from the day of sale, and the sale itself

follows the entry of judgment, the statute in essence extends the mortgagor's redemption period as well.

The burden of proof at the continuance hearing rests upon the applicant/mortgagor. In Iowa, the burden of proof on an issue rests upon the party who would suffer loss if the issue were not established. Iowa R.App.P. 14(e)(5). The statute specifies as grounds for a continuance certain climatic conditions such as drought, hail or flood, and a Governor's proclamation of economic emergency premised upon a finding of depression. As to the former grounds, the mortgagor must in good faith prove by competent evidence that his inability to pay has been mainly due or brought about by these catastrophic natural conditions. As to the Governor's proclamation, we do not believe that the mortgagor has a similar burden to prove causation, that is, that his failure to perform has resulted from a depression. However, the mortgagor must still demonstrate good faith.

If the mortgagor's default occurs on or before March 1st, the continuance under §654.15(1) shall end on the first day of March of the following year. Should the default occur after March 1, §654.15(2) provides that the continuance shall end on the first day of March of the second succeeding year. The mortgagor is entitled to only one continuance except upon extraordinary circumstances in which case the court may in its discretion under §654.15(3) extend the continuance for a period it deems just and equitable not to exceed one year.

It is provided in §654.15(4) that the order granting the continuance shall provide in addition, for the appointment of a receiver to take charge of the mortgagor's property and to rent that property, collect the rents and income, and distribute the proceeds according to a schedule provided in the statute. The rents and other proceeds are distributed first for payment of the costs of receivership, then the payment of taxes and insurance. Any balance remaining shall be paid to the mortgagee holding the instrument upon which the foreclosure is based. The mortgagor is given preference in the occupancy of the premises during the receivership.

II. LEGISLATIVE HISTORY

To adequately consider the constitutionality of the moratorium statute in its present form requires at least a brief review of both the statutes which preceded Iowa Code Section 654.15 and the conditions which gave rise to them. By the enactment on February 8, 1933 of the first moratorium provision, the Iowa legislature clearly perceived a need to provide relief for mortgage debtors.[1] In fact, the enactment of this measure marked the first significant use in the nation during the Great Depression of a moratorium statute for the relief of mortgagors. *See* Osborne, *Handbook on the Law of Mortgages*, §331, p. 695 (2d ed. 1970).

The initial bill, 1933 Iowa Acts, chapter 182, section 1, noted that the Governor had already declared a state of emergency and that the general assembly had also determined that an emergency existed which endangered the future welfare of the state. In section 2 the bill provided that upon application by the mortgagor, the court issue an order continuing the foreclosure proceeding until March 1, 1935, unless upon hearing good cause was shown to the contrary. In section 2 the bill also stated that the order for continuance provide for the possession of the real estate, determine fair rental terms, and provide for the distribution of rents, income and profits. The legislature also enacted a companion bill, 1933 Iowa Acts, chapter 179, which extended, upon application in real estate foreclosure proceedings after the decree had been entered but before the expiration of the redemption period, the period in which a mortgagor could redeem the property involved until March 1, 1935. Both statutes were retroactive, that is, they were applicable to all foreclosure actions then pending and thus applied to mortgage instruments entered prior to the bill's passage.

[1] During a period between 1926 and 1931, one Iowa farmer in seven lost his land through foreclosure. These foreclosures affected 33,000 farms and more than 5 million acres. Mills, *Years of Shame, Days of Madness*, Des Moines Sunday Register, Picture magazine, February 8, 1979 at 4.

In 1935, the legislature met and determined that the conditions which had required their passage of mortgage relief legislation in 1933 still existed within the state. In 1935 Iowa Acts, chapter 115 section 1, the legislature declared that the emergency which existed at the time that the 1933 continuance bill was enacted still existed and that this emergency endangered the state's welfare. The 1935 bill noted also that the Governor had, in his inaugural address to the 46th General Assembly, stated in substance that an emergency continued to exist and that there was a further need to continue mortgage foreclosure actions. Accordingly, section 2 of the bill continued mortgage foreclosure proceedings until March 1, 1937 along terms virtually identical to those within the prior legislation, that is unless good cause was shown to the contrary. This continuance bill was made applicable to foreclosure actions then pending in which decrees had not been entered. The bill stated in section 4 that the act was not applicable to mortgages executed subsequent to January 1, 1934. The legislature in 1935 Iowa Acts, chapter 110 also extended, in those cases where a decree had been entered but the redemption period not expired, the redemption period for mortgage debtors until March 1, 1937. Like the continuance bill, this legislation noted the continuing emergency conditions which required that the redemption period be extended.

Again in 1937, the General Assembly determined that mortgage foreclosure proceedings be continued due both to the same emergency conditions which had prompted passage of the earlier bills, and to new conditions which also created an emergency. The bill, 1937 Iowa Acts, chapter 80 section 1, noted that since the enactment of the previous chapters, the same emergency existed, aggravated by new and distressing conditions. The Governor had also, prior to the bill's passage, proclaimed that a drought and other circumstances had created a new and additional emergency. In section 2 of the bill, the legislature continued mortgage foreclosure proceedings then pending until March 1, 1939 unless good cause was shown to the contrary. The act stated in section 5 that it should not apply to mortgages executed after January 1, 1936. Based upon the same findings of a continuing economic emergency worsened by the drought and other new conditions, the legislature also extended the redemption period in those actions where that period had not expired for mortgagors until March 1, 1939 in 1937 Iowa Acts, chapter 78, section 2.

On April 26, 1939, the General Assembly enacted 1939 Iowa Acts, chapter 245, the present Iowa Code Section 654.15. The bill stated that the safety and future welfare of the people would be endangered whenever a real estate mortgage is foreclosed due to the mortgagor's inability to pay brought about by drought, flood or other climatic conditions. In section 1 of the act, the legislature therefore listed those conditions upon which the mortgagor could apply for a continuance including a proclamation by the Governor of a state of emergency. The legislature removed the language making the continuance automatic unless good cause to the contrary was shown, and instead left the granting of the continuance to the court's discretion.

The 1939 legislation differed significantly from its predecessors. First, it altered the burden of proof, shifting that burden from the mortgagee to the mortgagor. Under the earlier moratoria legislation, the continuance was automatic unless "good cause is shown to the contrary." The burden at that point was upon the mortgagee to demonstrate that the debtor should not qualify for the continuance. *Mudra v. Brown*, 219 Iowa 867, 868, 259 N.W. 773 (1935). The General Assembly in 1939 deleted this language, creating the inference that the mortgagor thereafter had to prove that the inability to pay resulted from a statutory cause.

Secondly, the statutory predecessors to Iowa Code Section 654.15 were limited in scope to foreclosure proceedings, then pending, and the 1935 and 1937 legislation specifically provided that the acts were not to apply to mortgages entered after certain dates. By implication therefore, these statutes applied to transactions entered before their enactment only, and were therefore retroactive. Unlike its predecessors Iowa Code Section 654.15 applies to "all" actions for foreclosures, that is, those pending and those which would arise thereafter. The

1939 act was intended apparently to reach mortgages entered both before and after its enactment. Ordinarily, a statute will be given a prospective application only unless a contrary legislative intent appears. *State Ex Rel Leas In Interest of O'Neal*, 303 N.W.2d 414, 419 (Iowa 1981). *See also, Women Aware v. Reagen*, (Ia.SupCt. No. 18-67743) (filed March 16, 1983). When a statute relates solely to remedy or procedure however, it will be applied both prospectively and retrospectively. *State Ex Rel. Leas*, 303 N.W.2d at 419. Iowa Code Section 654.15 is a part of the procedure for the foreclosure of mortgages, and therefore we conclude that it should be applied both prospectively and retrospectively. *See, United States v. Security Industrial Park*, 74 L.Ed.2d 235, 245 (1983), holding that certain provisions of the bankruptcy laws should not be construed retroactively so as to impair established property rights. The statute should apply to mortgages entered prior to its enactment in 1939, as well as transactions entered after its passage and foreclosure proceedings initiated subsequent to that time.

III. CONSTITUTIONALITY

In considering whether the moratorium law offends either the federal or state constitution, we can be guided by several familiar principles. There is first a strong presumption of constitutionality afforded to regularly enacted statutes and mere doubt as to their validity is insufficient to hold them unconstitutional. *Chicago Title Ins. Co. v. Huff*, 256 N.W.2d 17, 25 (Iowa 1977). In accordance with this presumption, a statute will not be held invalid unless it is clear, plain and palpable that it contravenes a constitutional provision. *City of Waterloo v. Selden*, 251 N.W.2d 506, 508 (Iowa 1977). Against the background of the statute's history and with these principles in mind, we can turn now to an examination of its constitutionality. It should be noted also that, for purposes of this opinion, we will assume facts exist to invoke the statute, however we cannot here decide those facts.

A. IMPAIRMENT OF CONTRACTS

The present moratorium statute, like its predecessors, is a regulation of private contractual relationships, whether real estate mortgages, deeds of trust, or contracts for the purchase of real estate. Therefore our first inquiry must be to determine whether Iowa Code Section 654.15 offends any constitutional provisions which restrain governmental interference with such relationships. Both the Federal and Iowa Constitutions contain provisions which are implicated by the moratorium statute. U.S. Const., Art. I, §10, cl. 1 prohibits any state law, ". . . impairing the Obligation of Contracts . . .." Iowa Const. Art. I, §21 expressly states also that:

> No bill of attainder, ex post facto law, or law impairing the obligation of contracts, shall ever be passed.

In determining whether the moratorium statute unconstitutionally impairs the obligation of contracts, our construction of the two clauses will be the same, given their similarity in language and scope. *Des Moines Joint Stock Land Bank v. Nordholm*, 217 Iowa 1319, 1335, 253 N.W. 701 (1934). (But see, *Bierkamp v. Rogers*, 293 N.W.2d 577, 579 (Iowa 1980), where the Iowa Supreme Court noted that the result reached by the United States Supreme Court in construing the federal constitution is persuasive but not binding upon it in the construction of analogous provisions in Iowa's constitution.)

As we noted earlier, moratoria legislation such as Iowa Code Section 654.14 arose as protection for mortgage debtors during the economic crisis precipitated by the Great Depression. The seminal case in the application of the contracts clause to the moratoria legislation of the 1930's is *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934). In *Blaisdell*, the court considered the constitutional validity under the Contract Clause of the Minnesota Mortgage Moratorium statute. The Minnesota statute declared that an economic emergency existed within the state, and that accordingly mortgage debtors could apply for an extension of their redemption period upon such terms as the district court found just and equitable. *Blaisdell*, 290 U.S. at 416, 54 S.Ct. at 232, 78 L.Ed. at 417. During the period of the extended

redemption, the mortgagor was to pay all or a reasonable part of the property's income or rental value towards taxes, insurance and the mortgage indebtedness. *Blaisdell*, 290 U.S. at 417, 54 S.Ct. at 232, 78 L.Ed. at 417.

In considering whether the Minnesota law was repugnant to the Contracts Clause, the court first noted that despite the absolute language of U.S. Const., Art. I, §10, cl. 1, contracts are subject to the state's police power, even if the exercise of that power impacts upon private contractual relations. *Blaisdell*, 290 U.S. at 437, 54 S.Ct. at 239, 78 L.Ed. at 428. The issue, according to the court, in determining whether an economic regulation unconstitutionally impairs the obligation of contract, is not whether the legislation is addressed to a legitimate end and whether the measures taken are reasonable and appropriate to that end. *Blaisdell*, 290 U.S. at 438, 54 S.Ct. at 240, 78 L.Ed. at 429. The court then applied this test, noting that an economic emergency existed within Minnesota as declared by the legislature, so that the statute was addressed to a legitimate end. *Blaisdell*, 290 U.S. at 444, 54 S.Ct. at 242, 78 L.Ed. at 432. Moreover, the court found that the measure adopted, the extension of the mortgage redemption period, was reasonable in that the integrity of the mortgage indebtedness was not impaired and the mortgagee was not left without compensation during the extension. *Blaisdell*, 290 U.S. at 445, 545 S.Ct. at 242, 78 L.Ed. at 433. Accordingly, the court in *Blaisdell* held that the Minnesota Moratorium statute did not violate the contracts clause. *Blaisdell*, 290 U.S. at 447, 54 S.Ct. at 243, 78 L.Ed. at 434.

The Iowa Supreme Court in *Des Moines Joint Stock Land Bank v. Nordholm*, 217 Iowa 1319, 253 N.W. 701 (1934), followed *Blaisdell* in upholding Iowa's first moratorium statute against a challenge under Iowa Const. Art. I, §21. The Iowa Court essentially employed the same test in construing Iowa's constitutional provision, noting first that all contracts are subject to the state's police power and that the test to be invoked is whether the legislation impacting upon the contract is addressed to a legitimate end and the measures taken are reasonable to that end. *Nordholm*, 217 Iowa at 1339. Applying this legitimate ends/reasonable measures test, the court in *Nordholm* sustained the legislation under the Iowa Contract Clause. *Nordholm*, 217 Iowa at 1342.

Both *Blaisdell* and *Nordholm* premised their view that the moratoria legislation involved was a proper exercise of the State's police power upon a finding of emergency, perhaps as a component of the legitimate ends test. In Iowa, when the Supreme Court found that the facts would no longer sustain a finding of emergency, it struck down a moratorium bill as violative of the Contract Clause. In *First Tr. J. S. L. Bk. v. Arp*, 225 Iowa 1331, 283 N.W. 441 (1939), the Iowa court struck down 1937 Iowa Acts, chapter 80 as violative of U.S. Const. Art. I, §10 and Iowa Const. Art I, §21. In *Arp* there was no discussion of the impact of that particular legislation upon private contracts, nor whether the statute was itself reasonable. Absent an emergency, there was no justification for the exercise of the State's police power and therefore any impact upon mortgage contracts was invalid. *Arp*, 225 Iowa at 1334.

Since *Blaisdell*, the U.S. Supreme Court has considered challenges to state legislation under the Contract Clause in a variety of contexts, which has in turn led to a variety of tests being employed by the Court to determine the validity of those statutes. *See, City of El Paso v. Simmons*, 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446 (1965), *reh. den.* 380 U.S. 526, 85 S.Ct. 879, 13 L.Ed.2d 813 (1965); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977);[2] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978). The cases which construed the clause since *Blaisdell* thus left the appropriate standard to be employed uncertain. *See*, Noted, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L.J. 1623 (1980).

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[2] In *New Jersey*, the Court considered a case in which the State itself was a party to the contract affected by the repeal of a statute. The Court invoked a test of necessity and reasonableness which will apparently be applicable where State is one of the contracting parties. *New Jersey*, 431 U.S. at 29, 97 S.Ct. at 152 L.Ed.2d at 114. Here the State of Iowa is not a party to the contracts affected by the statute under review, accordingly the *New Jersey* criteria is inapposite.

In January of this year, the Supreme Court decided *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 74 L.Ed.2d 569 (1983) involving a Contract Clause challenge to a Kansas statute which established a maximum price on the sale of intrastate gas, effectively contravening price escalation clauses within private contracts. The Court's analysis distilled several approaches to Contract Clause cases and delineated an analysis applicable to our own statute. According to the Court, the threshold inquiry is to determine whether the state law has in fact resulted in a substantial impairment of a contractual relationship. *Kansas Power*, 74 L.Ed.2d at 580. The severity of the impairment will increase the level of scrutiny to which the legislature will be subjected. *Kansas Power*, 74 L.Ed.2d at 580. In determining the extent of the impairment, the courts will consider whether the agreements arise in an industry which is traditionally subject to state regulation. *Kansas Power*, 74 L.Ed.2d at 580.

If the court finds that the statute results in a substantial impairment, the State must have a significant and legitimate public purpose such as the remedying of a broad and general social or economic problem. 74 L.Ed.2d at 581.[3] Having identified the State's public purpose, which is required to insure that the State is acting pursuant to its police power rather than for the benefit of private interests, the final test is to determine whether the statue is reasonable and appropriately tailored to the accomplishment of the public purpose. *Kansas Power*, U.S. at , 103 S.Ct. at 705, 74 L.Ed.2d at 581. Although *First Tr. S. S. L. Bk. v. Arp*, 225 Iowa 1331, 283 N.W. 441 (1939) struck down the 1937 Iowa moratorium on the grounds that an emergency justifying the statute no longer existed, we do not believe that an emergency remains an essential element of the public purpose requirement under the Contract Clause analysis. Of course, a state of emergency is an essential basis for the Governor's issuance of a proclamation under Iowa Code section 654.15.

In determing whether Iowa Code Section 654.15 is violative of the Contract Clause we must analyze the statute under the three-tiered approach employed by the Court in *Kansas Power*. Given that the statute should be applied both prospectively and restrospectively, we must examine the statute's impact upon mortgage agreements entered both before and after its enactment.

As to those contracts entered after the enactment of Iowa Code Section 654.15, the statute itself does not impair existing obligations but instead in effect limits the remedies for future contracts. First, contracting parties are assumed to be aware of the applicable law when such agreements are reached, and in fact state law in effect at the time the contract is entered is subsumed into and becomes a part of the agreement itself. *See, Home Building & Loan Association v. Blaisdell*, 290 U.S. at 429-430, 54 S.Ct. at 237, 78 L.Ed. at 424; *United States Trust Co. v. New Jersey*, 431 U.S. at 19, 97 S.Ct. at 1516, 52 L.Ed.2d at 108 n.17. Accordingly, the terms of the Iowa moratorium statute are a part of all mortgage instruments entered after the law's passage. Secondly, mortgage transactions and their foreclosure are obviously subject to state regulation. *See generally*, Iowa Code Chapters 654 and 628. Those who have entered mortgage agreements after 1939 have done so with the understanding that their respective rights and duties are subject to that regulation. A continuance granted under Iowa Code Section 654.15 would not impair the mortgagee's reasonable expectations, nor impose a new and unexpected liability. *Kansas Power*, 74 L.Ed.2d at 584; *Allied Structural Steel Co. v. Spannaus*, 438 U.S. at 247, 98 S.Ct. at 2724, 57 L.Ed.2d at 738. The impact upon mortgages entered after 1939 seems confined to the delay which the stay would impose upon the mortgagee's opportunity to obtain title, and the proceeds of the sheriff's sale. During the period of this continuance, the property's value may decline thereby decreasing the amount which the mortgagee would receive upon the sheriff's sale. However, given that this delay is not an unexpected burden, but a part of the law which is a part of each mortgage contract, we cannot conclude that the statute works an impairment of mortgage instruments entered after 1939.

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3 The Court in *Kansas Power*, 74 L.Ed.2d at 581 wrote that:

> Furthermore, since *Blaisdell*, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation.

The impact upon contracts entered before 1939 likewise does not seem substantial. As we have noted in our discussion of the statute's legislative history, mortgage foreclosures have since 1933 been subject to regulation in Iowa. Consequently, it cannot be said that the possibility of a stay under the present moratorium statute is a totally unexpected liability. The mortgagee whose contract pre-dates the statute's passage will be protected by the appointment of a receiver if the stay is granted, and the mortgagee is entitled to receive under §654.15(4)(d) a portion of the income or rents which the mortgaged property may generate. In contrast, to permit a mortgagee to foreclose after receiving payments for over forty years when the inability to pay has resulted from a catastrophe such as drought, flood or economic emergency would grant the mortgagee a windfall. The Iowa moratorium statute does not cause a substantial impairment upon mortgage instruments entered before 1939.

Even to the extent that the statute impacts upon the contractual relationship involved, we believe that the legislation is supported by a significant state interest. The State of Iowa, in this law, has exercised its police power to shelter mortgage debtors from foreclosure when their inability to pay results from a cause outside their control such as economic depression, drought or other climatic emergency. The protection of mortgage debtors in such circumstances serves a broad societal purpose. For example, as to farm foreclosures, there is a clear public purpose in continuing foreclosures to grant the farmer/mortgagor an opportunity to remain on his land. Encouraging farm owners to remain on their property would maintain diversity in agriculture and encourage competition by preventing the acquisition of land by larger farmers. Moreover, keeping farm owners on their property could restrain their movement to the cities where problems of unemployment could be aggravated. This societal purpose extends as well to the foreclosures of non-farm property. There is we believe a legitimate public interest served in promoting stability in property ownership, and those who retain ownership of their property are more likely to stay in the state rather than leave for more hospitable economic conditions. There is finally a societal interest in preventing the windfall to a mortgagee which would result if, after years of payment, default is caused by circumstances outside the debtor's control. *See, Kansas Light and Power*, 74 L.Ed.2d at 581. There is a legitimate public purpose behind the statute. *See, Howe Building & Loan Association v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934).

It seems to us that the means adopted to achieve this purpose are reasonable and adequately tailored. The continuance is granted by the court if it finds in its discretion that a reason exists as specified in the statute. The mortgagee may appear at the hearing and resist the application, and the burden of proof rests upon the mortgagor. Since the action is brought in equity, the court's findings are subject to de novo review. Iowa R.App.P. 4. Finally, the provision does not automatically alter the contractual rights of the mortgagee, but merely modifies the procedure through which the foreclosure is enforced. *Amana Soc. v. Colony Inn Inc.*, 315 N1, 112 (Iowa 1982). As to the gubernatorial proclamation of emergency, the legislature obviously concluded that the state's chief executive was best suited to make the determination that such broad economic crisis existed. This function seems reasonably tailored to the statute's purpose. We cannot say that Iowa Code Section 654.15 is either unreasonable or inappropriate to serve the legislature's goal.

Our analysis of Iowa Code Section 654.15 under this three-tiered approach compels us to conclude that, on its face, Iowa Code Section 654.15 violates neither U.S. Const. Art. I, §10, ch. 1 nor Iowa Const. Art. I, §21.

B. EQUAL PROTECTION

By placing the foreclosure of real estate mortgages, deeds of trust of real property, and contracts for the purchase of real estate within its ambit, §654.15 classifies these transactions and their parties differently than other contractual relationships. For constitutional purposes, legislative classifications are examined under U.S. Const. Amend. 14 which in pertinent part provides that no state shall, "... deny to any person within its jurisdiction the equal protection of

the laws." The Iowa Constitution contains the equivalent of the federal equal protection clause in Iowa Const. Art. I, §6 which 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.

This Iowa constitutional provision places essentially the same limitation upon state legislation as does the equal protection clause of the 14th Amendment, although the Iowa Supreme Court is not bound by the U.S. Supreme Court's construction of an analogous Federal Constitutional provision. *City of Waterloo v. Selden*, 251 N.W.2d 506, 509 (Iowa 1977); *Bierkamp v. Rogers*, 293 N.W.2d 577, 579 (Iowa 1980). We must decide in this context whether the classifications within Iowa Code Section 654.15 are violative of equal protection.

The classifications drawn within the moratorium statute are not suspect, nor does the statute by providing a continuance in foreclosure proceedings, infringe upon any fundamental rights of the mortgagee. *See, State v. Kramer*, 235 N.W.2d 114, 116 (Iowa 1975); *Lunday v. Vogelman*, 213 N.W.2d 904, 907 (Iowa 1973). Accordingly, we will examine the statute under the traditional equal protection standard. *Bierkamp*, 293 N.W.2d at 579. This test generally requires that the classification bear a rational relationship to a legitimate governmental purpose to be sustained. *Hawkins v. Preisser*, 264 N.W.2d 726, 729 (Iowa 1978). Under this test, equal protection is affected only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective and the statute will not be set aside if any set of facts may be reasonably conceived to support it. *Rudolph v. Iowa Methodist Medical Ctr.*, 293 N.W.2d 550, 557 (Iowa 1980). Under Iowa Const. Art. I, §6, the legal classification must be reasonable, based on some substantial distinction, and there must be a reasonable relationship between the purpose of the legislature and the basis of the classification. *Bierkamp*, 293 N.W.2d at 580.

The state's purpose in enacting Iowa Code section 654.15 was obviously to protect mortgage debtors when their inability to make payments has resulted from a cause outside their control. As we discussed in the previous section, this rationale is supported by a broader public interest. The needs to preserve stability in property ownership, and diversity and competitiveness in the agricultural community are all served by the moratorium statute. The statute's classifications moreover, seem rationally related to the legislature's purpose in protecting the mortgagor when his inability to pay is occasioned by one of the grounds specified in the provision. The grounds are all events beyond the control of the mortgage debtor and are events likely to affect a significant number of debtors. As such, the classifications appear reasonable and are clearly related to the statute's purpose. We believe, therefore, that a court would sustain Iowa Code section 654.15 if challenged under the equal protection clause.

C. DUE PROCESS

The requirements of due process dovetail with those of equal protection when considering state legislation which regulates private economic conduct. *See Chicago Title Ins. Co. v. Huff*, 256 N.W.2d 17, 27 (Iowa 1977). In construing Iowa Const., Art. I, §9 which provides that no person shall be deprived of property in the state without due process of law, the Iowa Court has stated that due process does not limit the state's police power unless the legislation is arbitrary, unreasonable or improper. *John R. Grubb, Inc. v. Iowa Housing Finance*, 255 N.W.2d 89, 97 (Iowa 1977). The test under due process is therefore, like the rational basis test under equal protection, whether the statute has a reasonable relationship to legitimate state goals. *Huff*, 256 N.W.2d at 27. Having concluded that Iowa Code section 654.15 advances a legitimate public purpose and that the statute's terms are rationally related to the accomplishment of that purpose, we believe that the moratorium law, properly applied, does not violate the due process clause.

Closely related to the requirements of due process, are the constitutional provisions providing that private property may not be taken for public use without just compensation. *See* U.S. Const. amend V and Iowa Const., Art. I, §18.

The United States Supreme Court has held that valid contracts are property and are therefore within the constitutional restriction forbidding their taking without compensation. *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434, 1440 (1933). We must consider in this context whether the regulation of private mortgage contracts provided in Iowa Code section 654.15 amounts to an appropriation for which compensation must be paid.

In its broadest terms this issue is whether the moratorium law imposes a burden upon the contracting parties so onerous as to amount to a taking or whether the statute is a regulation of economic activity under the state's police power. However, even the exercise of a governmental unit's 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). *See also, United States v. Security Industrial Park*, 74 L.Ed.2d 235, 240, noting that the federal bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation.

The test whether a police power regulation is so oppressive as to amount to a taking is generally a balancing process measuring the public benefit against the nature of the restraint imposed upon private property. *Woodbury Cty. Soil Conservation Dist. v. Ortner*, 279 N.W.2d 276, 278 (Iowa 1979). Factors to be considered in this balancing process include the economic impact of the regulation upon those affected, the extent to which the regulation interferes with distinct investment backed expectations, and the character of the governmental action. *Ortner*, 279 N.W.2d at 278. The latter refers presumably to the nature of public interest supporting the regulation.

We have discussed previously the broad public purpose supporting Iowa's moratorium statute. Under *Ortner* we must balance this purpose against the law's impact upon the parties to mortgage instruments to determine whether the stay provision amounts to a taking of these contracts. The economic impact upon the mortgagee seems largely confined, as we have noted, to the delay which will ensue if the stay is granted. During the period of the continuance the value of the mortgaged property may decline decreasing the amount which the mortgagee would receive upon the sheriff's sale. However, as to mortgage contracts entered both before and after 1939, the mortgagee is protected by Iowa Code section 654.15(4) which provides for the appointment of a receiver and the application of certain proceeds towards payment of the debt. There is, moreover, no disruption of contractual expectations. Those who have entered mortgage agreements after 1939 have done so with knowledge of the statute's existence and the possibility of a stay resulting from its invocation. As to those contracts entered before the enactment of the provision, they too were subject to regulation since passage of the first moratorium in 1933. On balance, we believe that the broad public purposes behind the moratorium law outweigh the restraints imposed upon the contracting parties. Accordingly, we conclude that Iowa Code section 654.15 does not amount to taking of property without just compensation.

D. DELEGATION

The continuance law provides as one ground upon which a mortgagor may seek a continuance, ". . . when the governor of the State of Iowa by reason of a depression shall have by proclamation declared a state of emergency to exist within this state." This language raises an issue as to whether the legislature has improperly delegated a legislative function in contravention of Iowa Const. Art. III, §1.

Iowa Const. Art. III, §1 provides for the distribution of Iowa's governmental functions in the following terms:

> The powers of the government of Iowa shall be divided into three separate departments — the Legislature, 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.

In scrutinizing whether the statute offends the delegation provision, we must first determine whether its language pertaining to the proclamation of an

emergency involves the delegation of a legislative function, and if so, whether that delegation has been accompanied by sufficient standards. Delegations of such authority are not per se violative of the constitution. *Warren County v. Judges of Fifth Jud. Dist.*, 243 N.W.2d 894, 898 (Iowa 1976). The appropriate test as recently described in *Polk County et al. v. Iowa State Appeal Board et al.*, (Ia.Sup.Ct. No. 1-67094) (filed February 16, 1983) is whether the delegation of authority is accompanied by adequate procedural safeguards. The determination whether procedural safeguards are adequate turns on the function that the delegated body will serve on behalf of the legislature, and the safeguards must both advance that purpose and preclude arbitrary, capricious or illegal conduct on the part of the delegated body. *Iowa State Appeal Board* at 13.

The function delegated to the Governor in this statute is essentially one of a triggering mechanism. The statute does not provide that the Governor's proclamation in and of itself operate to continue foreclosure proceedings. Rather, the gubernatorial proclamation may serve as a basis upon which a mortgagor in default may seek the statutory continuance. This authority is analogous to the soil conservation complaint procedure, which under Iowa Code section 467A.7 (1983) is triggered by the complaint of an adjoining landowner. *See Woodbury Cty. Soil Conservation Dist. v. Ortner*, 277 N.W.2d 276, 277 (Iowa 1979). This delegated authority is accompanied by procedural safeguards to assure that the proclamation advances the legislature's purpose. First, as we have noted, the Governor's proclamation alone does not effectively stay foreclosure proceedings. The mortgagor under the statute must apply in good faith to the district court for the continuance, and the granting of the stay rests in the court's discretion. This would prevent a blanket issuance of stays to include mortgagors whose default has resulted from their own mismanagement. The legislature could reasonably conclude that a determination of economic emergency should not be made, in the first instance, on a case-by-case basis but should instead be decided on a statewide basis, and as we have noted the Governor would seem best suited to make that determination. Thus, the legislative purpose in restraining the foreclosure of mortgagors whose default results from economic calamity has been served.

Secondly, there are adequate procedural safeguards to insure that the Governor's proclamation is not arbitrary or otherwise based on insufficient grounds. This safeguard stems from the court's authority to review the basis of the proclamation as well as its applicability to a specific mortgagor. In *First Tr. J. S. L. Bk. v. Arp*, 225 Iowa 1331, 283 N.W. 441 (1939), the Iowa Supreme Court struck down 1937 Iowa Acts chapter 80 after finding that no emergency existed which in the court's view justified the continuance statute. *Arp*, 225 Iowa at 1335. The court in *Arp* stated that:

> While declaration of the executive and pronouncement of the legislature are entitled to great weight and should be carefully considered, yet, the fact question still exists, and this can be determined by record facts, history of current events, and common knowledge and information. In other words, a court, in determining the existence of an emergency may and should take judicial notice of conditions existing at the time the emergency or its continued existence is questioned. *Arp*, 225 Iowa at 1334-35.

The court thus reviewed both the legislative and gubernatorial finding that an emergency existed. We would conclude therefore that a Governor's proclamation under the present statute premised upon a finding of depression would be subject to judicial scrutiny. In passing on the statute, a court could review whether a depression in fact exists and whether that depression impacted upon the mortgagor's ability to pay. Statutes are to be construed as constitutional. We therefore assume that the Governor's power to declare an emergency is limited to those emergencies which would constitutionally justify the continuance provided by the statute. Although the legislature has not defined the term emergency within the provision, by so construing the statute to confine the Governor's proclamation to emergencies which are constitutionally justified, the court would have guidance in reviewing the proclamation. It would be undoubtedly helpful for the proclamation to include a statement of reasons as the basis for the Governor's finding of emergency. *See* 1980 Op.Att'yGen. 194, 195. With the

procedural safeguards present in the statute, we believe that the triggering authority granted to the Governor does not offend Iowa Const. Art. III, §1.

IV. APPLICABILITY TO FEDERAL LOANS

The Supremacy Clause of the Federal Constitution, U.S. Const. Art. VI, provides that the Constitution and laws of the United States shall be the supreme law of the land. This provision requires that we determine whether Iowa Code Section 654.15 has been superseded by Federal law.

The question of the relationship between the Iowa statute and Federal law arises from the various federal programs which extend loans to private borrowers. The Secretary of Agriculture for example, through the Farmers Home Administration, is empowered under 7 U.S.C. §1923(a) to make or insure loans for a variety of purposes including the acquisition of farms for buildings, land and water development and conservation enterprises needed to supplement farm income and to refinance existing indebtedness. Under 42 U.S.C. §1471 the Secretary, through the Farmers Home Administration, may make loans to farm owners for the construction of houses and other buildings. The Secretary may in addition to the making of direct loans, insure and guarantee certain loans pursuant to 7 U.S.C. §1929. In executing these loans the Secretary may take mortgages as security for the obligation, and such security instruments constitute liens running to the United States notwithstanding the fact that notes may be held by lenders other than the United States. 7 U.S.C. §1927(c). The United States in those instances becomes the mortgagee.

There are also available at the federal level statutes which allow a delay in the repayment of loans to the federal government. 42 U.S.C. §1475, for example, authorizes the Secretary to grant a continuance in the payment of interest and principal on rural housing loans granted under 7 U.S.C. §1471. The procedure for the granting of the moratorium is found in 7 CFR §1951.313 which provides that the moratorium be granted upon a determination that, due to circumstances beyond the borrower's control, the borrower is unable to continue making scheduled payments without unduly impairing his or her standard of living. Authority is also granted to the Secretary in 7 U.S.C. §1981(a) to defer upon the borrower's request the payment of principal and interest on "... any outstanding loan made, insured, or held by the Secretary under this title, or under any provision of any other law administered by the Farmer's Home Administration... ..." The statute goes on to provide that the Secretary may forego foreclosure on such a loan upon the borrowers showing that due to circumstances beyond the borrower's control the borrower is temporarily unable to make payments on the loan. The Supremacy Clause requires us to consider whether these federal statutes would preempt the application of Iowa Code Section 654.15 to those federal loans.

Federal supremacy in a field occupied by both federal and state regulation is not favored in the absence of persuasive reasons, either that the nature of the regulated subject permits no other conclusion, or that the Congress has unmistakably so ordained. *Alessi v. Raybestos-Manhatten, Inc.*, 451 U.S. 504, 522, 101 S.Ct. 1895, 1905, 68 L.Ed.2d 402, 416 (1981). There is no need to inquire into the Congressional intent where compliance with both federal and state regulations is impossible. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248, 257 (1963). The Iowa statute explicitly states that it applies to "all" actions for the foreclosure of real estate mortgages. By the same token, 42 U.S.C. §1475 states that it is applicable to "any" rural housing loan. Similarly, 7 U.S.C. §1981(a) expressly encompasses "any outstanding loan" administered under the chapter. The federal government may also be a mortgagee when it takes a mortgage as security for one of its loans under 7 U.S.C. §1927(c). Given that the Iowa statute would cover "all" real estate foreclosure action, it conceivably could on its face encompass the United States as a mortgagee, unless the federal provisions control.

Despite the broad language of Iowa's moratorium statute, it seems apparent that federal not state law controls the rights and obligations of the parties in federal or insured loans, when the authorizing statute or regulations provide that

federal law should apply. That federal law is to be applied in the enforcement of Farmers Home Adm. loans is stated explicitly in 7 C.F.R. 1900.102 which provides in part that:

> (a)Instruments evidencing or securing a loan payable to or held by the Farmers Home Administration, such as promissory notes, bonds, guaranty agreements, mortgages, deeds of trust, financing statements, security agreements, and other evidences of debt or security shall be construed and enforced in accordance with applicable Federal law.
>
> * * *
>
> (d)Any person, corporation, or organization that applies for and receives any benefit or assistance from FmHA that offers any assurance or security upon which FmHA relies for the granting of such benefit or assistance, shall not be entitled to claim or assert any local immunity, privilege, or exemption to defeat the obligation such party incurred in obtaining or assuring such Federal benefit or assistance.
>
> * * *

In holding that a state statutory period of mortgage redemption did not apply to the foreclosure of a loan under the Natural Housing Act, 12 U.S.C. §1701 *et seq.* the Eighth Circuit stated that:

> . . . federal law, not Minnesota law governs the rights and liabilities of the parties in cases dealing with the remedies available upon default of a federally held or insured loan.

United States v. Victory Highway Village Inc., 662 F.2d 488, 497 (9th Cir. 1981). *See John Hancock Mut. Life Ins. Co. v. Breunary Etc.*, 537 F.Supp. 936, 938 (N.D. Iowa 1982). *See also, United States v. Kimbell Foods Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979). The general principle emerging from these authorities is that where the authorizing statute or regulations encompass the foreclosure of the federal loan, federal law governs the rights and duties of the respective parties. Accordingly, we are of the view that as to those programs, federal law preempts, under the Supremacy Clause, the Iowa moratorium statute.

CONCLUSION

It may be useful to here briefly summarize our conclusions regarding the facial constitutionality of Iowa Code Section 654.15. We believe first that it does not result in an unconstitutional impairment of the contractual relationship between mortgagee and mortgagor. The actual impact upon the affected contracts seems minimal in that there is no imposition of a new onerous obligation upon the mortgagee in contravention of the parties' reasonable expectations. The societal interest which the legislature sought to serve in providing that foreclosures be continued upon a showing that the default has resulted from a cause outside the debtor's control is a legitimate concern of the legislature and the statute itself is reasonably drafted to serve that interest. On its face, the statute offends neither equal protection nor due process. There is, within its terms, no unconstitutional delegation of the legislature's authority in the language which concerns the Governor's declaration of an emergency premised upon a finding of depression. This conclusion is buttressed by the fact that courts may review that proclamation to determine if such an emergency exists. We conclude finally that as to federal lending programs, where there are statutes or regulations encompassing the procedure for foreclosure, the federal statutes preempt the Iowa provision.

Iowa Code Section 654.15 is in sum a valid exercise of the state's police power and we believe its constitutional validity should be upheld.

April 21, 1983

MILITARY: Military Leave; Health Insurance and Other Benefits. Iowa Code §§29A.28 and 29A.43 (1983). An employee on military leave from a position in state or local government is entitled to receive full compensation, including all health insurance benefits, for the first thirty days of that leave. After the expiration of that thirty-day period, that employee is not entitled to continue to receive compensation, including health insurance and other benefits,

except to the extent allowed other employees on furlough or leave of absence. An employee on military leave is further entitled to return to his or her position of employment at the conclusion of military leave and assume the status he or she would have held as though no military leave had been taken. Thus, an employee returning from military leave is entitled to renew health insurance coverage and other benefits as though his or her period of employment had been uninterrupted. (Weeg to Martens, Emmet County Attorney, 4-21-83) #83-4-7(L)

April 21, 1983

STATE OFFICERS AND DEPARTMENTS. Department of Substance Abuse. Funding Costs of Substance Abuse Treatment: Counties' Share. Iowa Code §§125.1, 125.44, 125.45, 331.401(1)(c), 331.425(13) (1983). Section 125.45(1), requiring county boards of supervisors to approve amounts in excess of five hundred dollars for one year for the treatment provided to any one substance abuser, does not give to the boards the authority to disapprove said properly-expended excess amounts. The "one year" period referred to in §125.45(1) is directly related to the care and treatment of any one substance abuser and, thus, that twelve-month period of time runs from the date of admission of a substance abuser unable to pay the cost of his or her care and treatment into a licensed facility. (Freeman to Walters, Department of Substance Abuse, 4-21-83) #83-4-8(L)

April 27, 1983

SCHOOLS: Transportation to Nonpublic Schools. Iowa Code §§285.1(2), (14), (16) (1983). In order for the use of the alternative in §285.1(16)(1) to relieve the district of residence of the duty to provide transportation to a student who attends a nonpublic school outside the district of residence, the student must be able to reach the nonpublic school from that point either because it is located close by or because transportation is provided to the nonpublic school from an accessible pickup location in the district in which the nonpublic school is located. (Osenbaugh to Connolly, State Representative, 4-27-83) #83-4-9(L)

April 29, 1983

CIVIL RIGHTS: HANDICAPPED PERSONS. Iowa Code Chapters 104A, 601A, 601E (1983); §§104A.7, 601E.9, 601E.10. Private manufacturing plant which provides more than one thousand parking spaces for exclusive use of employees would not be subject to handicapped parking provisions of §§104A.7, 601E.9 and .10. If the facility provides parking for employees and visitors, it is a question of fact whether facility is "used by the general public." Attorney General's office cannot decide issues of fact. Compliance with Chapter 104A does not assure compliance with civil rights law. "Sign" in §601E.9 means mounted device. (Ewald to Hall, State Senator, 4-29-83) #83-4-10(L)

MAY 1983

May 1, 1983

COUNTIES; Land Use—Agricultural Areas. Iowa Code Chs. 93A and 358A (1983); Iowa Code §§93A.6 and 358A.27 (1983). (1) A county should not be liable for failure to enforce the land use restrictions of §93A.6, regardless of whether that county has adopted county zoning. (2) A county may not exercise zoning authority pursuant to home rule without initially complying with Ch. 358A. (3) A county should not be liable if a landowner files a nuisance action against another landowner within an agricultural area who has failed to comply with the use restrictions of §93A.6. (4) A county must adopt an agricultural land preservation ordinance to invoke the use restrictions of §358A.27, and the county must adopt this as a zoning ordinance under Ch. 358A. A county should enforce a §358A.27 ordinance as it would any other zoning ordinance enacted pursuant to Ch. 358A. Failure of a landowner to comply with the use restrictions of §§93A.6 and 358A.27 may also violate other county zoning ordinances. (5) A city is not prohibited from annexing land within an agricultural area. (Weeg to Richards, Story County Attorney, 5-1-83) #83-1-1

Ms. Mary E. Richards, Story County Attorney: You have requested an opinion of the Attorney General concerning interpretation of Iowa Code Ch. 93A (1983), the new land preservation and use act. We shall address each of your questions in turn.

1.

First you ask:

Is a zoned county liable for failure to enforce the use restrictions?

This question refers to the land use restrictions of §93A.6 on land included in an agricultural area. We addressed this same question in an opinion that was recently issued. Op.Att'yGen. #83-2-5, a copy of which is enclosed. In that opinion we concluded that the county has no mandatory duty to enforce the provisions of §93A.6. *Id.* Consequently, we held that because enforcement of limitations on use of agricultural areas under §93A.6 is a discretionary act, Iowa Code §613A.4 (1983) precludes county liability for failure to enforce these provisions. *Id.* For enforcement purposes, §93A.6 does not distinguish between counties in which county zoning has been implemented and counties in which there is no zoning. Consequently, it is our opinion that the county's authority to enforce §93A.6 itself is the same regardless of whether the county has adopted county zoning. However, a violation of §93A.6 could also constitute a violation of zoning ordinances, in which case the law relating to enforcement of zoning violations would apply.[1] Section 93A.6 generally requires that the use of an agricultural area be limited to farm operations. If converted to another use, the land would no longer be exempt from zoning ordinances under §358A.2. Thus, a violation of §93A.6 could in some instances constitute a violation of an ordinance adopted under §358A.27.

2.

Your second question is:

What is the scope of authority available to any Iowa county not zoned under Chapter 358A?

We are advised that this question is intended to determine the extent to which a county could, pursuant to home rule authority, impose any type of use restriction on land within the county without acting pursuant to Iowa Code Ch. 358A (1983). We are further informed that the use restrictions referred to for the purposes of this question are not the use restrictions on land in agricultural areas discussed in

[1] We note at this point that it is our opinion the legislature intended that Ch. 93A exist in harmony with existing zoning ordinances. *See* 1982 Iowa Acts, Ch. 1245, §20 ("This Act does not invalidate any part of a zoning ordinance which is in effect on the effective date of this Act, or require the adoption of a zoning ordinance by any subdivision of the state.")

§93A.6, but any general restriction on the use of land.

It is our opinion that a county may not exercise zoning authority without as an initial matter complying with the provisions of Ch. 358A. However, it is our opinion that the county does have authority pursuant to home rule to exercise zoning powers that are not expressly governed by Ch. 358A and are not inconsistent with the provisions of that chapter.

This conclusion is consistent with the concept of home rule. As expressly stated in Iowa Const., art. III,§39A, counties are granted home rule authority when "not inconsistent with the laws of the general assembly." *See also* Iowa Code §331.301(1)(1983). Further, §331.301(4) provides that exercise of a county power is not inconsistent with a state law "unless it is irreconcilable with state law." Finally, §331.301(5) states:

> A county shall substantially comply with a procedure established by a state law for exercising a county power unless a state law provides otherwise. . . .

In the present case, Ch. 358A establishes a comprehensive plan by which counties may exercise zoning authority within the county; this chapter also establishes certain procedures to be followed in the exercise of this authority. We believe the express provisions of the statute must be followed when they are applicable, but in the event statutory provisions do not apply to a particular matter, the county may exercise its home rule authority to decide the issue in question so long as the exercise of that authority is not inconsistent with Ch. 358A or other law. *See* Iowa Code §331.301; Op.Att'yGen. #81-11-10(L)(under home rule, a county may impose subdivision regulation beyond that required by statute). However, home rule authority does not extend so far as to allow the county to ignore Ch. 358A when exercising zoning authority, and it does not permit the county to adopt its own comprehensive scheme for exercising zoning authority.

3.

Your third question asks:

Since counties are obligated by state law to accept voluntarily formed agricultural areas, would a county be liable if a neighboring landowner filed a nuisance action against a landowner inside an agricultural area who has expanded his farming operation?

As an initial matter, §93A.11 expressly states that:

> A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the . . . expansion of the agricultural activities of the farm or farm operation.

Consequently, expansion of a farm operation in an agricultural area does not constitute a nuisance pursuant to §93A.11, and therefore a landowner would be barred by §93A.11 from suing another landowner for expanding his or her farm operation when the latter is located in an agricultural area and that landowner has complied with the land use restrictions of §93A.6, unless that farm operation was negligent.

However, we will assume for the purpose of answering your question that one landowner has sued another who has failed to comply with the use restrictions of §93A.6 and that the plaintiff landowner has named the county as a defendant for failing to enforce these provisions. Presumably the plaintiff landowner would argue that the county has an implicit enforcement duty with regard to the agricultural area provisions of Ch. 93A because the county is expressly required by statute to consider and approve proposals for agricultural areas and meet other statutory requirements with regard to these areas. However, we have previously concluded, as set forth in response to your first question, that the county has no mandatory duty to enforce the provisions of Ch. 93A relating to agricultural areas. Op.Att'yGen. #83-2-5. Therefore, we believe the county should not be liable under the situation described above.

4.

Fourth, you ask:

Iowa Code §358A.27 (1983) states that if a county adopts an agricultural land preservation ordinance, it can restrict the use of the land on farms, even though farms are normally exempt from zoning regulations.

a. Does a county have to adopt an agricultural land preservation ordinance to enforce use restrictions on farms inside agricultural areas even if the county already has zoning?

b. Can an unzoned county adopt an agricultural land preservation ordinance to enforce use restrictions on farms inside or out of agricultural areas?

Agricultural areas may be created by private landowners pursuant to Ch. 93A in all counties, regardless of whether county zoning has been adopted in a particular county. In this situation, we have previously concluded that the county may, but is not required to, enforce the use restrictions of §93A.6. Op.Att'yGen. #83-2-5. However, in order for the county to impose §93A.6 land use restrictions on farmland throughout the county, §358A.27 must be followed.

Section 358A.27 states as follows:

> *If a county adopts an agricultural land* preservation ordinance under this chapter which subjects farmland to the same use restrictions provided in sections 93A.6 for agricultural areas, sections 93A.10 to 93A.12 and section 472.3, subsection 6, shall apply to farms and farm operations which are subject to the agricultural land preservation ordinance. (emphasis added)

The language of this section expressly provides that adoption of an agricultural land preservation ordinance is a prerequisite to invocation of the land use restrictions of §93A.6 if those restrictions are imposed by the county pursuant to §358A.27. Further, §358A.27 applies only "if a county adopts an agricultural land preservation ordinance *under this chapter*." (emphasis added) This emphasized language refers to Chapter 358A, which governs county zoning. Thus, it is our opinion that the county may not adopt an "agricultural land preservation ordinance" pursuant to §358A.27 unless it exercises its zoning authority under Ch. 358A.2 In counties with no county zoning, the only method for imposing the land use restrictions found in §93A.6 and for invoking the incentives found.in §93A.10 through 12 is by the creation of agricultural areas on the part of private property owners.

We have previously concluded that there is no express requirement in §93A.6 that a county enforce the provisions of that section, and therefore a county may, but is not required to, enforce the use restrictions of §93A.6 when a privately created agricultural area is involved. Op.Att'y Gen. #83-2-5. However, when a county imposes §93A.6 use restrictions on designated land by adopting an ordinance pursuant to §358A.27, we believe the county should enforce that ordinance as any other ordinance adopted under its general zoning authority. It is further our opinion that enforcement of use restrictions on land within agricultural areas, whether created by the county or by private landowners, is not limited to action pursuant to §93A.6 or §358A.27. As set forth in response to your first question, failure of a landowner within any agricultural area to comply with the use restrictions of §93A.6 or §358A.27 could also constitute a violation of other relevant county zoning ordinances. Section 93A.6 basically limits use of land in agricultural areas to use for agricultural purposes. The separate provisions of

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[2] We note that the term "agricultural land preservation ordinance" referred to in §358A.27 is not to be confused with the "county land preservation and use plan" referred to in §93A.5. Although contained in the same chapter, we have previously concluded that the provisions of §§93A.3 through 93A.5 relating to agricultural land preservation and use are separate and independent from the provisions of §§93A.6 through 93A.12 relating to agricultural areas. Op.Att'yGen. #83-2-5. It is these latter provisions relating to use restrictions in agricultural areas that are referred to in §358A.27, which in effect allows a county to create an agricultural area. Therefore, §358A.27 is triggered by the adoption of an ordinance designed to preserve agricultural land, as opposed to an ordinance designed to implement a county land preservation and use plan adopted pursuant to §93A.5.

§358A.2 exempt land being used for agricultural purposes from county zoning regulation. Thus, if land within an agricultural area is no longer being used for agricultural purposes, §93A.6, §358A.27, *and* other relevant county zoning ordinances may be violated. In this event the county would have the authority pursuant to its zoning power as well as pursuant to Ch. 93A to enforce use restrictions on the land in question.

In sum, a county must adopt an agricultural land preservation ordinance to invoke the provisions of §358A.27, but the county may not adopt this ordinance except under its zoning authority. A county should enforce a §358A.27 ordinance as it would any other zoning ordinance enacted pursuant to Ch. 358A. Failure of a landowner to comply with the use restrictions of §§93A.6 and 358A.27 may also violate other county zoning ordinances.

5.

Finally, you ask:

> Section 93A.6 states that "Agricultural areas shall not exist within the corporate limits of the city." Does this mean that agricultural areas cease to exist when annexed to a city, or that a city is prohibited from annexing agricultural areas?

It is our opinion that §93A.6 prohibits a landowner from including land within the city limits in an agricultural area. However, we do not believe the legislature intended this prohibition to impose a limitation on city's authority to annex land within an agricultural area.

In reaching this conclusion, we refer to relevant principles of statutory construction. First, in the event a statute is ambiguous, a court may consider, *inter alia*, the consequences of a particular construction. Iowa Code §4.6(5). Second, in the event a general statutory provision conflicts with a specific provision, they are to be construed so that effect is given to both. Section 4.7; *Doe v. Ray*, 251 N.W.2d 496, 501 (Iowa 1977). If the conflict is irreconcilable, the specific provision prevails. *Id.*

We refer to these principles in the present case. First we conclude that §93A.6 is ambiguous. The relevant portion of this section simply states:

> Agricultural areas shall not exist within the corporate limits of the city.

It is unclear from this language whether the legislature intended that land within an agricultural area could never fall within the corporate limits of a city, thereby preventing the city from annexing any land within such an area, or whether the legislature merely intended to prohibit any part of an agricultural area from existing within city limits, in which case land in an agricultural area subsequently annexed by the city could no longer be included within that area. We believe this latter result was intended. A contrary result would allow landowners to effectively hamper a municipality's ability to grow and expand. The interests of individual landowners in creating agricultural areas would be given priority over the interests of a municipality and its residents in the orderly expansion and development of their city. We do not believe the legislature intended such a farreaching result when it enacted the briefly worded and general prohibition against agricultural areas within city limits in §93A.6.

Second, we observe that detailed and specific provisions relating to a city's authority to annex land and to the procedures governing the annexation process are found in Iowa Code Ch. 368 (1983). This chapter provides for both voluntary (§368.7) and involuntary (§368.11) annexation of land adjacent to a municipality. On the other hand, there is no discussion of annexation in Ch. 93A, but merely a general prohibition against inclusion of land in an agricultural area which is within the corporate limits of a city. We believe it is possible to read §93A.6 in harmony with Ch. 368 and conclude that §93A.6 prevents a landowner from including city land within an agricultural area when that area is first established, but that a city could later annex land that was properly within an agricultural area when that area was first established, thus dissolving that portion of the agricultural area which was annexed. However, even if §93A.6 and Ch. 368 are viewed as conflicting, we believe that §93A.6 does not expressly or impliedly overrule the annexation provisions of Ch. 368, and therefore the more specific

provisions of Ch. 368 relating to the annexation process should prevail. Section 4.7; *Doe v. Ray*, 251 N.W.2d at 501. In conclusion, a municipality is not prohibited from annexing land in an agricultural area. When such land is annexed, the agricultural area is dissolved with respect to that particular land.

In conclusion, it is our opinion that: (1) a county is not liable for failure to enforce the land use restrictions of §93A.6, regardless of whether that county has adopted county zoning; (2) a county which has adopted county zoning pursuant to Ch. 358A is nonetheless required by §358A.27 to adopt an agricultural land preservation ordinance pursuant to its zoning authority before imposing use restrictions on land as provided in §358A.27, but a county which has not adopted county zoning pursuant to Ch. 358A may not adopt an agricultural land preservation ordinance pursuant to §358A.27; (3) a city is not prohibited from annexing land within an agricultural area.

May 4, 1983

MUNICIPALITIES: Council Members. Eligibility for City Employment. Iowa Code §§362.5(1), 372.13(8), 372.13(9), and 376.2 (1983); 1980 Iowa Acts, Chapter 1125, §2; 1975 Iowa Acts, Chapter 203, §23. A city council member may accept employment with his or her city upon resignation, but shall not receive compensation for that employment during the officer's term of office. The consequences of Iowa Code §372.13(8) (1983) cannot be avoided by resignation. (Walding to Renaud, State Representative, 5-4-83) #83-5-2(L)

May 4, 1983

TRANSPORTATION - Motor Vehicles: Safety Standards: Exception: Drawbars and Safety Chains. Iowa Code §§321.383, 321.462, 321.1(16) and 321.1(5). The implement of husbandry exception for equipment under §321.383 includes the safety chain(s)required under §321.462. A pickup truck is not an implement of husbandry as defined by §321.1(16) and therefore is subject to the §321.462 safety chain requirement. (Lamb to Wilson, Marion County Attorney, 5-4-83) #83-5-3(L)

May 12, 1983

PUBLIC SAFETY: Peace Officer Retirement System. Iowa Code §§97A.1, 97A.6, 97A.8 (1983). The phrase "regular compensation for the member's rank or position" in the definition of "earnable compensation" in Iowa Code §97A.1(10) (1983) refers to the salary actually paid to an officer, based upon the officer's position within the appropriate salary range for his or her rank, plus the additional monies paid to the officer referred to in that section. (Hayward to Nystrom, State Senator, 5-12-83) #83-5-4(L)

May 12, 1983

SCHOOLS: Board of Directors. Iowa Code §§277.23; 275.12(2) (1983). A school district which includes all or part of a city of fifteen thousand or more in population is required to have a seven member board of directors. A change in circumstances by which a school district contains all or part of such a city gives rise to the requirement of a seven member board. If board members are elected at large, §277.23 contains the steps necessary for implementing this change. If directors are nominated or elected from subdistricts, procedures needed for changing director district boundaries must be undertaken to implement the change from a five to a seven member board. (Fleming to Renaud, State Representative, 5-12-83) #83-5-5(L)

May 13, 1983

PUBLIC OFFICERS AND EMPLOYEES: Use of Public Property for Private Purposes. Iowa Constitution, Article III, §31, Iowa Code Section 721.2(5). A leasehold interest in vehicles or other property is "public property" if the lease is acquired in the name of a public agency and/or it is acquired with public funds. Private use of public property is permissible only if the private use is incidental to a public purpose. Heads of agencies should promulgate rules establishing guidelines for mixed public and private usage of public owned property. A salary contract may not authorize purely private use of public property, nor may public property be used for purely private purposes on a reimbursement basis. (McFarland to Johnson, Auditor of State, 5-13-83) #83-5-6

Honorable Richard D. Johnson, Auditor of State: You recently requested an Attorney General's opinion on a series of issues involving sections of the Iowa Constitution and Iowa Code which prohibit private use of public property. You specifically asked the following:

> 1. Should vehicles leased in the name of a public agency be constructively interpreted as being public property or property owned by the state as referenced in article III, section 31 of the Constitution or section 721.2(5) of the Code of Iowa?
>
> 2. If so, does the use of such public property for non-business purposes where no reimbursement to the government agency is made or reimbursement is made at less than the rate established by the government agency in accordance with section 79.9 of the Code constitute a violation of:
>
> (a) article III, section 31 of the constitution of the State of Iowa:
>
> ". . . no public money or property shall be appropriated for local or private purposes . . ." and, or
>
> (b) Iowa Code Section 721.2(5), "nonfelonious misconduct in office,". . .:
>
> "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 or for personal gain, to the detriment of the state or any subdivision thereof."
>
> 3. Does the use of a publicly owned or leased vehicle by an employee to commute to and from home and his/her place of employment constitute "use of public property for private purposes?"
>
> 4. In light of the aforementioned legal references, may a public vehicle be made available for private purposes (i.e., commuting or other) to a public official or employee as part of a salary contract or compensation package?

Your first question is whether leased property such as a vehicle, although the state does not actually own the physical property itself, is considered public property within the meaning of article III, section 31 of the Iowa Constitution and Iowa Code section 721.2(5) (1983). The concept of "property" encompasses much more than just ownership of a physical thing, but also includes obligations, rights and other intangibles. *State v. Cowey*, 3 N.W.2d 176, 231 Iowa 1117 (1942); *Beeghly v. Wilson*, 152 Fed.Supp. 726 (N.D. Iowa 1957). A leasehold interest in physical property is itself considered property and is subject to the body of common and statutory law governing property. *See* Am.Jur. Landlord-Tenant, Section 7. It is reasonable to conclude, therefore, that a leasehold interest in an object such as a vehicle, which is acquired in the name of a public agency and sustained with public money is considered public property.

Since your first question was answered "yes," you asked in your second and third questions whether the use of a public owned or leased vehicle for non-business purposes, such as commuting between the work place and home, violates article III, section 31 of the Iowa Constitution and/or Iowa Code section 721.2(5), if the user does not reimburse the government agency or reimburses at a rate less than that established in Iowa Code section 79.9.

Article III, section 31 provides as follows:

> No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, *and no public money or property shall be appropriated for local, or private purposes*, unless such appropriation, compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly. [emphasis supplied]

And section 721.2 states in 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:

5. 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.

The first issue to be decided is whether a particular use is a "private purpose." A violation of section 721.2(5) will be established only if there is also proof of personal gain and detriment to the governmental body. As a prior opinion of the Attorney General concluded, however, regardless of whether the facts give rise to criminal liability under section 721.2(5), authorization to use public property for private purposes is impermissible as a violation of article III, section 31,[1] 1980 Op.Att'yGen. 721. Therefore, the analysis in this opinion will focus on the article III, section 31 prohibition.

The Iowa Supreme Court has not defined the phrase "private purpose" but it has considered whether certain legislative acts unconstitutionally appropriated public money for private use and in doing so the court looked for a "lack of public purpose" as a test of whether an appropriation would withstand a challenge under Article III, §31. *Dickenson v. Porter*, 35 N.W.2d 66, 240 Iowa 393 (1942); *Grubb v. Iowa Housing Finance Authority*, 255 N.W.2d 89 (Iowa 1977). In *Grubb*, the court upheld the Iowa Housing Finance Authority Act against a challenge under article III, section 31 and stated:

> although we are not required to treat a legislative declaration of purpose as final, binding or conclusive, . . . we will not find absence of public purpose except where such absence is so clear as to be perceptible by every mind at first blush, *Dickenson v. Porter*, 240 Iowa 393, 417, 35 N.W.2d 66, 80 (1948).
>
> An examination of *Dickenson, 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 . . . 255 N.W.2d at 93.

Since private individuals would derive some benefit, either directly or indirectly, from nearly all appropriations by government bodies, it is appropriate to look for a public purpose as a test of whether an appropriation will withstand an article III, section 31 challenge.

A public purpose may be served under some circumstances when an employee uses a publicly owned or leased vehicle to commute between the work place and home. A prior opinion of the Attorney General concluded, for example, that a public purpose was served when sheriff's officers on "24-hour call" were allowed to use county owned vehicles to travel between home and work. *See* 1980 Op.Att'yGen. 160. The opinion applied the following analysis:

> 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.

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[1] *Love v. City of Des Moines*, 210 Iowa 90, 230 N.W. 373 (1930), holds that the article III, section 31 prohibition operates as a limitation of power, not only on the legislature, but upon every city council in the state. This opinion assumes that the prohibition also applies to all governmental subdivisions or agencies with respect to public funds and property they control.

An earlier opinion of the Attorney General held that a public purpose is served when department of revenue field employees were allowed to drive state vehicles between home and their various places of work in the field.

> 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.

1975 Op.Att'yGen. 339.

Both of the two opinions cited above suggest that agency heads promulgate written rules establishing guidelines for mixed private and public usage of public owned vehicles. The 1979 opinion advanced the following specific suggestions:

> 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). [1977 Op.Att'yGen. 191]

The above suggestions should provide a source of reference for any public agency which has authorized or is considering authorizing mixed usage of publicly owned or leased vehicles.

If the mixed usage does not meet the public purpose test, you ask whether a public vehicle may be made available for private purposes to a public officer or employee as part of a salary contract or compensation package. The Iowa Supreme Court in *Love v. City of Des Moines*, 210 Iowa 90, 230 N.W. 373 (1930), held that Article III, Section 31's limitation on governmental powers is

"emphatically prohibitive" and that the sole exception is when an appropriation is allowed by a two-thirds vote of each branch of the General Assembly. This office has also held in two opinions, which seem consistent with *Love*, that an agency may not authorize purely private use of public property as a fringe benefit. *See* 1980 Op.Att'yGen. 720 and 1972 Op.Att'yGen. 651.

The 1980 opinion ruled specifically that cities may not authorize city employees to use city property for a private purpose, even by resolution authorizing use as a fringe benefit. The rationale used in the opinion was that the nature of the proposed use of property determines whether the use is permissible under Article III, Section 31, and that a resolution will not change the nature of the use. The opinion stated further that Art. III, Section 31 prohibits authorization to use city property for private purposes regardless of whether the particular facts give rise to criminal liability under §721.2(5).

The 1972 opinion stated that although Section 280A.23, which establishes powers and duties of boards of directors of area schools, does not preclude a board from authorizing use of an automobile as a fringe benefit, unrestricted use of the automobile for private purposes is prohibited by Iowa Code §741.20 (1971). [Section 721.2(5) is substantially similar to and replaces §740.20 which was repealed by 1976 Iowa Acts, Chapter 1245(4), Section 525.] The opinion seems to recognize, in other words, that the board may authorize use of a vehicle as a fringe benefit only to the extent that the use serves a public purpose.

By following the conclusions of the *Love* case and the 1972 and 1980 opinions of the Attorney General, this office must conclude that if mixed usage of public property does not meet the public purpose test, a governmental subdivision or agency may not authorize such usage through a salary contract, resolution or by any other method. While it is inappropriate for this office to substitute its judgment for that of agency heads and attempt to demark uses which meet the public purpose test versus uses which serve purely private purposes, certain distinctions seem clear.

For example, allowing the typical state employee to use a state vehicle to commute to work or for social purposes would not appear to serve a public purpose. On the other hand, one may conclude that providing a limousine and chauffeur for the Governor serves a public purpose in providing safety, savings in time and even preserving the prestige of the Governor's position. Similarly, the public's interest in having an officer available day and night to oversee the protection and care of public parks is served by providing homes for park officers on or close to park grounds. Heads of agencies and governmental subdivisions should, as suggested before in this opinion, adopt rules, or in the case of public bodies to which Chapter 17A rulemaking procedures are inapplicable, adopt resolutions, specifying when mixed private and public usage will be allowed on a finding that a public purpose is served by permitting the mixed usage.

Applying the rationale advanced in the preceding paragraphs, use of a public owned or leased vehicle for purely private purposes would not be legitimized by an agency requirement that employees reimburse the agency. The character of the use remains the same, regardless of the reimbursement. However, if the agency determines through departmental rules or resolutions that a public purpose will be served by allowing certain mixed public and private uses of public vehicles, the agency should, when feasible, require that employees reimburse the agency for the miles allocable to the private purposes. Requiring full reimbursement is a means of assuring that authorized mixed usage does not violate the purposes of Art. III, Section 31. The reimbursement rate should reflect the actual cost to the agency of operating the vehicle. The rate that the agency sets pursuant to Section 79.9 for reimbursing employees who use their private vehicles in performing public duties may serve as a guideline in determining operating costs, but it is not binding in determining the rate at which the agency should be reimbursed. Under no circumstances, should this paragraph be interpreted as stating that an employee should be allowed unrestricted use of a public vehicle for private purposes on a reimbursement basis. To the contrary, departmental rules or resolutions should specify when incidental private usage on a reimbursement basis would serve a public purpose.

In conclusion, a leasehold interest in vehicles or other property is "public property" if the lease is acquired in the name of a public agency and/or it is acquired with public funds. Private use of public property is permissible only if the private use is incidental to a public purpose. Heads of agencies should promulgate rules establishing guidelines for mixed public and private usage of public owned property. A salary contract may not authorize purely private use of public property, nor may public property be used for purely private purposes on a reimbursement basis.

May 13, 1983

PUBLIC SAFETY, CONSERVATION, STATE OFFICERS AND EMPLOYEES: Unused Sick Leave Upon Retirement. Iowa Code §79.23 (1983); Iowa Acts, Ch. 1184, §2 (1982). Pursuant to Iowa Code §79.23 (1983) and Iowa Acts, Ch. 1184, §2 (1982), for so long as the collective bargaining agreement for officers of the Department of Public Safety and the Conservation Commission provides that upon retirement members of the bargaining unit may receive the total value of their unused sick leave for payment of life and/or health insurance benefits, officers promoted after July 1, 1977, will be eligible upon retirement to receive such insurance benefits equalling the value of their sick leave earned in a position covered by the agreement and unused at retirement. Also, officers promoted before July 1, 1977, who retire before July 1, 1983, will be eligible upon retirement for such insurance benefits equalling the value of their unused sick leave earned in positions covered by the agreement at the time of their retirement. Officers promoted before July 1, 1977, who do not retire before July 1, 1983, are not eligible for such insurance benefits. (Hayward to Schwengels, State Senator, 5-13-83) #83-5-7(L)

May 26, 1983

COUNTIES; Liability for expense of medication for county jail prisoners; liability for court-ordered anabuse treatment program; Court Expense Fund. Iowa Code Ch. 356 (1983); Iowa Code §§331.401(1)(f); 331.424(3)(q); 331.426(9); 331.653(36); 331.658; 356.2; 356.5; 356.15; 811.1; 907.2 (1983). The expense of providing medication to county jail prisoners should be met from the sheriff's budget or the county general fund, but never from the court expense fund. In addition, the expense of an anabuse treatment program ordered as a condition of bail when the defendant is indigent is similar to other expenses imposed by bail requirements and therefore is not an expense which may be paid from the court expense fund. If such a treatment program is ordered as a condition of probation, Iowa Code §907.2 (1983) suggests that the judicial district department of correctional services direct an indigent defendant to an agency which could provide this treatment for a reduced charge or for no charge. (Weeg to Reno, Assistant Van Buren County Attorney, 5-26-83) #83-5-8(L)

May 31, 1983

WORKERS' COMPENSATION: Corporate officers' exemption. Iowa Code sections 3.7, 4.5 85.1, 85.3(1), 95.61(3)(d) (1983); 1983 Iowa Acts, S.F. 51, §§1, 3, 5, 7, 8; 1982 Iowa Acts, ch. 1221, §§2, 4. An acceptance of exemption filed by an existing corporate officer as of January 1, 1983, under Iowa Code section 85.61(3)(d) (1983) between March 2, 1983 and April 27, 1983, as well as those filed thereafter until December 31, 1983, is valid for purposes of removing the officer from Iowa Code ch. 85, the workers' compensation law. (Haskins to Skow, State Representative, 5-31-83) #83-5-9(L)

JUNE 1983

June 2, 1983

LAW ENFORCEMENT, MUNICIPALITIES, POLICEMEN AND FIREMEN: Contracts between municipalities and private concerns for police services. Iowa Const. art III, §38A; Iowa Code §§28E.21 and 364.1 (1983). Municipalities may not by contract or otherwise delegate the selection, appointment and retention of police officers nor the operation of police departments to private concerns. They may enter into agreements with other governmental entities for joint exercise of such authority in accordance with Iowa Code Ch. 28E (1983). (Hayward to Yarrington, 6-2-83) #83-6-1

Mr. Ben K. Yarrington, Acting Director, Iowa Law Enforcement Academy: You have asked this office for an opinion on the capacity of a city to enter into a contract with a private concern for police law enforcement services. Specifically you have asked:

> Can a municipality contract with a private agency for police services and, by swearing in the contract personnel, confer peace officer status on them?

The primary legal issue involved in this question is the extent of a municipality's authority to delegate its functions to others. As shall be noted below, the resolution of this issue depends on the nature of the function involved.

Cities, and parenthetically counties, in Iowa have been granted home rule. In regard to cities, Iowa Constitution art. III, §38A 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 the 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.

Also, Iowa Code §364.1 (1983) provides:

> 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 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 independent city power.

Thus, unless reserved by the legislature or constitution, cities have broad authority to exercise their police power through the enactment of ordinances in the public interest and the enforcement of the law, and to create city departments to effect such enforcement. If the question presented in this opinion were whether a city could create a police department, and if the Iowa Code were totally silent on this subject except as to the granting of home rule,[1] it would seem a simple question to answer. The creation of a police department is within the power of a city. However, that is not the question posed. The issue here goes one step further. Accepting the authority to create a police department and the vesting of peace

[1] The Iowa Code of course is not silent on the subject of city police departments. While it does not expressly grant any authority to create such departments, numerous provisions presume that authority. *See*, e.g. Iowa Code §28E.21, *et. seq.* (providing for unified law enforcement agreements), Ch. 80B (requiring training for police officers), Ch. 80D (permitting and regulating reserve police forces), Ch. 400 (requiring civil service in cities with populations in excess of 8,000), Ch. 410 (providing disability pensions for police), Ch. 411 (providing retirement pensions for police), and §801.4(7)(b) (including city police and marshals within the definition of "peace officer") (1983).

officer authority upon its officers, can the city delegate this police operation to a private company by contract? This includes not only the delegation of law enforcement to a private concern, but the delegation of the selection, appointment, retention, supervision, direction, discipline and discharge of police personnel. It is our opinion that these responsibilities cannot be delegated by the city.

The Iowa Supreme Court addressed an analogous issue in *Bunger v. Iowa State High School Athletic Ass'n.*, 197 N.W.2d 555 (Iowa 1972). In *Bunger*, the court held that local school boards could not agree to operate their school athletic programs in accord with the bylaws of Iowa High School Athletic Association because it was an illegal delegation of authority. As with cities, the authority of school boards is delegated from the state, and, except for purely ministerial acts, that authority cannot be redelegated.

> It is a general principle of law, expressed in the maxim "delegatus non potest delegare" that a delegated power may not be further delegated by the person to whom such power is delegated, and that in all cases of delegated authority, where personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another unless there is a special power of substitution either express or necessarily implied.

Bunger, 197 N.W.2d at 560. This is in keeping with the general theory of law applicable in this country.

> A municipal corporation may, by contract, curtail its right to exercise functions of a business or proprietary nature, but, in the absence of express authority from the legislature, such a corporation cannot surrender or contract away its governmental functions and powers, and any attempt to barter or surrender them is invalid. Accordingly, a municipal corporation cannot by contract, ordinance or other means surrender or curtail its legislative powers and duties, its police power, or its administrative authority.

62 C.J.S. Municipal Corporations §139 (1949).

> A municipality may delegate powers to those who are authorized by statute as officers or employees to act for it. Where duties have been validly delegated, such duties must be performed by the municipal agencies to which they are delegated, and responsibility may not be avoided by shifting such duties to others.

62 C.J.S. Municipal Corporations §154a (1949). The police power is derived from the state and cannot be vested in the private sector.

> While this inalienability of the police power makes it impossible for the state to delegate it to any private person or agency, it does not preclude delegation to municipal corporations of the authority to exercise it; since these are agencies and merely part of the total government of the state. However, the inalienability of the police power governs municipal corporations authorized to exercise it; that is to say, they cannot alien, delegate, limit, or contract away the police power vested in them.

6 McQuillin, *Municipal Corporations* 431 (3d Rev. Ed. 1980).

The function of a police department, the enforcement of law, is a governmental rather than proprietary or business nature. A police department is not a public utility. The exercise of authority by a police department entails the exercise of a great deal of judgment and discretion which has an important impact on the members of the community, both collectively and individually. Therefore, under the legal principles set forth above, a city cannot delegate or contract its law enforcement authority to a private concern and its employees.

In fact, the delegation of the appointment of law enforcement officers to a private concern is by itself sufficient to render any such agreement invalid. In *Gamel v. Veterans Memorial Auditorium Com'n.*, 272 N.W.2d 472 (Iowa 1978), the court discussed the legal limitations on the delegation of the appointment of public officials to the private sector. The court recognized two theories on such

delegations. First, one theory holds that there must be a substantial and rational relation between the appointive or elective power and the function of government which the appointees are to perform. Examples are having members of a bank control board appointed by a bank association and a savings and loan association, *Floyd v. Thornton*, 220 S.C. 414, 421-422, 68 S.E.2d 334 (1951), having members of a technical livestock committee appointed by the trustees of an agricultural college and a livestock dealers association, *State v. Taylor*, 223 S.C. 526, 77 S.E.2d 195 (1953), and having members for a fish and game council nominated by hunting clubs and an association of commercial fisherman, *Humane Society v. New Jersey State Fish and Game Council*, 70 N.J. 565, 362 A.2d 20 (1976). The question asked in these cases is whether the particular delegation is reasonable under the circumstances. *Gamel*, 272 N.W.2d at 475. The second, more strict view adopted in *Gamel*, is that appointment of officials who are empowered to spend public funds cannot be delegated. The court stated in *Gamel*, 272 N.W.2d at 476:

> We now adopt the more strict rule . . ., at least insofar as the appointment by private individuals of persons empowered to spend public funds is concerned. Whether delegation of other powers might survive scrutiny if proper safeguards or special qualifications are present is a question which we reserve. It is sufficient that we here decide that there are special interests involved which prohibit giving private groups control of the appointment of public officials with the power to spend public funds. Those interests require a strict rule against any delegation of sovereign power.

It would seem that similarly important public interest is involved in the enforcement of criminal law as in the expenditure of public monies. Misuse of peace officer authority can be the cause of lost liberty and reputation of citizens, diminished respect for law and lost revenue. The duties performed by law enforcement officers are vital to the operation of government and crucial to the protection of the liberty and property of the people. It is our opinion, therefore, that, if faced with this question, the Iowa Supreme Court would apply the stricter standard of scrutiny enunciated in *Gamel* and declare such delegations to any private concern or organization, regardless of its interests or expertise, per se unwarranted and illegal.

Even were the court to apply the more lenient standard in *Gamel* to the delegation of appointment of police officers to the private sector, contracts such as described in your question would not meet that standard. Absent the contract for services, the private concern has no greater interest in law enforcement in the community than does the public at large. There is no substantial and rational relationship between the private concern and law enforcement, its only special interest being a desire to perform that governmental function.

This does not mean that no services which are traditionally performed by police departments can be provided by contracts with private concerns. A small city could conceivably enter into a contract with a private security agency for a night watchman to patrol the streets watching for signs of trouble. However, that person could not be authorized to intervene in any situation in an official capacity. The person on watch would only be able to contact competent government authorities if official intervention is needed. Contracts could be entered into with private concerns for support services to the police department. However, we again emphasize that the authority of government to enforce the law and to keep the peace cannot be delegated to the private sector.

In reaching this opinion, we are not passing on the intentions, competence or motives of persons wishing to provide such services. We have no reason to doubt them. Yet the potential for abuse of our system of law is too serious to ignore. One of the basic premises for the development of these rules on the delegation of power is that the government exercises its power at the behest of the people. They must have control over it through their elected officials and the delegation of its power to private concerns is contrary to the democratic principles of our legal system. *Gamel*, 272 N.W.2d at 476. ("[a] fundamental precept of the democratic form of government imbedded in our Constitution is that the people are to be governed only by their elected representatives.") The functions of a police department, *i.e.*, the maintenance of public peace and enforcement of law, are the very essence of governmental authority. The same considerations which preclude delegation of

the appointment of public officials empowered to spend public funds preclude delegation of police power as well. If a government is to be responsible to the people, it must not abdicate its governmental duties and powers to others by contract or otherwise.

This opinion only addresses contracts for police services between cities and private concerns. We should note that Iowa Code Ch. 28E (1983) provides a specific vehicle for cities to enter into agreements with other cities or other government entities for the joint exercise of law enforcement authority. Iowa Code §§28E.21 *et seq.* (1983) specifically allows for the creation of public safety districts for this purpose. This is the vehicle provided for cities which want a local police force but for one reason or another cannot support one by themselves.

In summary, it is our opinion that municipalities may not by contract or otherwise delegate the selection, appointment and retention of police officers nor the operation of police departments to private concerns. They may, in accordance with Iowa Code Ch. 28E (1983), enter into agreements with other government entities for the joint exercise of law enforcement and other police powers.

June 2, 1983

SCHOOL: Teachers: Rules. Iowa Code §§257.10(11); 294.2 (1983); IAC §§670 - 16.4 and 670 - 16.5. An elementary teacher who held a valid certificate on or before April 6, 1983 is eligible for assignment to teach reading outside the selfcontained classroom for fifty percent or more of the school day, i.e., exempt from the new reading rule requirement. However, a school board is not required to select such a teacher but may choose to select a teacher who has obtained the new approval because §294.2 limits the rule making power of the state board but not the district board's power to select teachers. (Fleming to Groth, State Representative, 6-2-83) #83-6-2(L)

June 2, 1983

MOTOR VEHICLES: Certificate of Title. Iowa Code §321.47 (1983); 26 U.S.C. §§6323, 6335-6339. When a new certificate of title is issued following federal tax sale of motor vehicle, county treasurers have authority to delete junior liens which are discharged under federal law but have no mandatory duty to do so. (Osenbaugh and Fitzgerald to Richards, 6-2-83) #83-6-3(L)

June 2, 1983

COUNTIES; Board of Supervisors; County Engineer; Authority to bind successor board. Iowa Code Sections 309.17, 331.321(1)(k) (1983). A county board of supervisors may not bind a successor board to an employment contract with the county engineer which restricts the board's authority to terminate the engineer at any time. (Weeg to Schwengels, State Senator, 6-2-83) #83-6-4(L)

June 6, 1983

CRIMINAL LAW, OBSCENITY, PREEMPTION. Iowa Code §728.11 (1983). Iowa Code §728.11 (1983) does not preempt local ordinances prohibiting nudity in clubs or establishments holding a liquor license. (Cleland to Richter, Pottawattamie County Attorney, 6-6-83) #83-6-5(L)

June 6, 1983

ANTITRUST LAWS: State action exemption. Iowa Code Chapter 551A (1983). The state may lawfully regulate the price of cigarettes, or any other item, and be exempt from federal and state antitrust laws prohibiting price fixing. (Perkins to Taylor, State Senator, 6-6-83) #83-6-6(L)

June 16, 1983

COUNTIES; Land Preservation and Use. Iowa Code Chapter 93A (1983); §§93A.4 and 5. The only requirement relating to the substance of a county inventory is that it comply with the requirements of §93A.4. In compiling the inventory, the county land use commission makes the initial determination as to whether "adequate data," as that term is used in §93A.5, has been considered. (Weeg to Stueland, State Representative, 6-16-83) #83-6-7(L)

June 16, 1983

COUNTIES; Clerk of Court; Solemnization of Marriage Requirement. Iowa Code Ch. 596 (1981); 1982 Iowa Acts, Chapter 1152, Section 3. There is no longer a requirement that persons solemnize a marriage within twenty days

from the date a marriage license was issued; the parties may now solemnize a marriage at any time after they receive the license. (Weeg to White, Johnson County Attorney, 6-16-83) #83-6-8(L)

June 17, 1983

COUNTIES; Board of Supervisors; Compensation Board; Authority to provide longevity pay to Elected Officials, Deputies and Employees. Iowa Code Sections 331.324(1)(o); 331.904(1), (2), (3), and (4); 331.905 to 331.907 (1983). (1) The county compensation board, and not the board of supervisors, has sole authority to determine whether elected officials should be awarded additional compensation for length of service. The compensation board may consider length of service in determining an elected official's compensation. (2) Each elected official has the authority to determine whether his or her deputies should receive longevity pay, but pursuant to §§331.904(1) and (3) longevity pay must be considered along with other compensation in determining the maximum salary allowed by statute for most deputies; §331.904(2) provides otherwise for deputy sheriffs. (3) The board of supervisors has the authority to determine whether all other county employees should receive longevity pay. (Weeg to Dillard, Linn County Attorney, 6-17-83) #83-6-9(L)

June 23, 1983

MUNICIPALITIES: Public Improvements. Local Hiring Preference. IOWA CONST., Art. III, §38A. Iowa Code chapters 73 and 384 (1983); Iowa Code §§73.3, 73.4, 73.5, 362.2(3), 384.37-79, 384.95(1) and (2), 384.99, and 384.100 (1983). I. Existing Iowa authorities indicate that a local hiring preference for nonutility public improvements is invalid. However, to the extent that those decisions relied on the Dillon rule, adoption of home rule may result in the validation of a reasonably drawn preference for local labor. Iowa Code chapter 73 does require a city to give preference to Iowa domestic labor on any public improvement. II. A city council may not be compelled to award a public improvement contract to the lowest bidder. (Walding to Groninga, State Representative, 6-23-83) #83-6-10

Honorable John Groninga, State Representative: We are in receipt of your request for an opinion of the Attorney General regarding preferential hiring of the long-term unemployed of a city in a public improvement project funded by the city, wholly or partially. On behalf of Lionel J. Foster, the Human Rights Director for the City of Mason City, you pose the following questions:

> 1. If the City Council enacts an ordinance which requires that [70%] of the workers on public works construction for the City be long-term unemployed city residents, and the lowest bidder fails, or refuses, to meet those statutory provisions, could the City reject his/her bid without violating Chapter 384.99, *Iowa Code* (1981)?
>
> 2. Where contractors are low bidders on public works projects pursuant to §384.99, *The Code*, (1981), but City Council accepted a higher bid because the higher bidder met the local hiring rules, does lowest bidder have fixed absolute right to a writ of mandamus compelling the execution of a contract with him/her?

The stated purpose of the Proposed Ordinance, titled "Public Improvement Unemployed Resident Preference Policy," *see* CITY OF MASON CITY, IA PROPOSED ORDINANCE §1, is:

> [T]o limit the serious social consequences caused by long-term unemployment, to promote and preserve the economic well-being of all citizens of the City of Mason City, Iowa, to undertake to alleviate the problem of long term high unemployment among its residents and citizens, to provide employment for the long term unemployed residents of Mason City, Iowa by granting employment preference to its residents on all publically funded public improvement projects, and to promote the health, morals, safety and general welfare in the City of Mason City, Iowa.

CITY OF MASON CITY, IA PROPOSED ORDINANCE §2. The relevant provision of the Proposed Ordinance, for our purposes, is found in section 7. It provides:

> The developer/contractor and sub-contractor to whom this ordinance is applicable shall, in all hiring for jobs on public improvement projects make every feasible effort to employ long-term unemployed residents of the City of Mason City, Iowa, but in no event shall less than seventy percent (70%) of the entire labor force on any given public improvement project be residents of Mason City, Iowa. Compliance with the above goals are expressed in terms of comparing worker hours to be worked by underemployed city residents in trades and crafts at every level, to worker hours worked by non-underemployed, non-residents of Mason City on a project by project basis. In no event shall the total number of worker hours by long term unemployed city residents, during the performance of any given public improvement project, be less than the worker hours of non-long term unemployed, non-city residents.
>
> The developer/contractor, and sub-contractor shall ensure that any sub-contractor working on any part of a public improvement or publicly assisted housing project exceeding $50,000.00 and involving worker hours in excess of eighty (80) hours per week for four (4) weeks, excluding hours worked by foremen, women, shall have ten percent (10%) of all worker hours performed by underemployed city residents. This provision shall not apply to all speciality trade (sic) or craft unions, where such speciality trades or craft unions are nonexistent in the City of Mason City, Iowa.

CITY OF MASON CITY, IA PROPOSED ORDINANCE §7. The term "resident" is defined in the Proposed Ordinance as a person who has been domiciled in the city for a continuous period, yet to be determined, and who expresses an intention to make that city a permanent place of residence. CITY OF MASON CITY, IA PROPOSED ORDINANCE §3(5). The "Long Term Unemployed" constitute those individuals whose maximum total amount of weekly benefits payable to any eligible unemployed individual during any benefit year have elapsed or who have been unemployed and receiving poor relief assistance for a stipulated period prior to application for employment on a public improvement project. CITY OF MASON CITY, IA PROPOSED ORDINANCE §3(6). Finally, we note that the applicability of the Proposed Ordinance would generally be limited to "public improvements" as used in Iowa Code §384.95. CITY OF MASON CITY, IA PROPOSED ORDINANCE §§3(1) and 4.

I. LOCAL HIRING PREFERENCE

The principal question posed in your request is whether the Proposed Ordinance is valid under Iowa law. We therefore do not address whether the Proposed Ordinance violates the Privileges and Immunities or Commerce Clauses of the United States Constitution. Nevertheless, it is observed that local hiring preference laws have come under constitutional scrutiny in recent years. A mayor's executive order requiring that half of the labor force on municipal contracts be composed of city residents was upheld against Commerce Clause challenge in *White v. Massachusetts Council of Construction Employers, Inc.*, U.S. , 75 L.Ed.2d 1, 103 S.Ct. 1042 (1983). *See also Hicklin v. Orbeck*, 437 U.S. 518, 57 L.Ed.2d 397, 98 S.Ct. 2482 (1978) (declaring an Alaska statute which provided an employment preference for Alaska residents over nonresidents on the Alaska pipeline project a violation of the Privileges and Immunities Clause); *Construction & General Laborers Local 563 v. City of St. Paul*, 270 Minn. 427, 134 N.W.2d 26 (1965) (invalidating, partially on privileges and immunities grounds, a city ordinance requiring contractors on public building projects to hire only residents of the county in which the city was located).

> The contract-letting procedure for public improvements is governed by Iowa Code chapter 384 (1983). Iowa Code §384.99 (1983), which controls the award of a public improvement project, provides:
>
> The contract for the public improvement must be awarded to the lowest responsible bidder, provided, however, that contracts relating to public utilities or extensions or improvements thereof, as described in division V of this chapter, may be awarded by the governing body as it deems to be in the best interest of the city.

Of course, the "governing body" of a city, consistent with Iowa Code §362.2(3) (1983), is the council. Iowa Code §384.95(2) (1983). Accordingly, a city council, by statutory directive, is required to award a public improvement project for the municipality to the lowest responsible bidder, except for public utility projects in which case the standard is the best interests of the city.[1]

The Iowa Supreme Court in two early cases held that a city could not require that only citizens of that community be hired. Provision in plans, specifications, and a contract for a public improvement in Keokuk requiring a contractor to employ only citizens of that community for that project were examined in *Diver v. Keokuk Savings Bank*, 126 Iowa 691, 102 N.W. 542 (1905). The Court, without explanation, stated: "The provisions as to what laborers should be hired, and as to where materials should be purchased were, no doubt, invalid." *Diver*, 126 Iowa at 699, 102 N.W. at 545. Three years prior to that decision, the Court invalidated a provision in a paving contract requiring all laborers on a public improvement project to be citizens of a city within the defendant county. *Edwards & Walsh Construction Co. v. Jasper County*, 117 Iowa 365, 90 N.W. 1006 (1902). Again, no explanation was offered for the decision.

One basis for the decisions could have been the "Dillon rule," a recognized rule, except where home rule prevails, that a municipal corporation, being a creature of the legislature, possesses only such powers as are specifically conferred, necessarily or fairly implied, or incident to powers expressly conferred. *See Huff v. City of Des Moines*, 244 Iowa 89, 92, 56 N.W.2d 54, 56 (1952). A leading case from another jurisdiction, *Bohn v. Salt Lake City*, 79 Utah 121, 8 P.2d 591 (1932), seemingly used that analysis. In *Bohn*, the Utah Supreme Court voided a contract requiring certain portions of a public works project to be done by hand labor, labor employed by contractors to be rotated, and a preference to residents and heads of families of Salt Lake City, with a view to alleviating unemployment. The *Bohn* Court reasoned that those conditions were not incidental to the authority conferred on the city to provide a system of storm sewers, and resulted in a diversion of funds to a collateral objective. The *Diver* and *Bohn* decision, taken together, have been cited for the proposition that a municipal corporation does not have authority, implied or incidental, to require a contractor on public improvements to employ residents of the city. *See* 65 Am.Jur.2d, *Public Works and Contracts*, §202 (1972). The adoption of the home rule amendment, IOWA CONST., Art. III, §38A (as added by amend. 25 in 1968), could well change this analysis.

While the home rule amendment and the broader concept of public purpose applied by courts today might well cause a court to reach a different result, this Office is unable to overrule these prior Iowa Supreme Court decisions absent clear indication that the law has changed.

Another basis on which the Court may have rejected those labor preference conditions is that the conditions were regarded as an undue restriction on competition resulting in increased cost to taxpayers. This was the basis on which the Iowa Supreme Court in 1909 held invalid an ordinance requiring union printers. *Miller v. City of Des Moines*, 143 Iowa 409, 122 N.W. 226 (1909). This was also the basis on which this Office opined in 1934 that a city council should not enact an ordinance rejecting all bids for materials from other than local bidders.

> We incline to the opinion that such an ordinance would be a discrimination against the taxpayers of the city if not contrary to the state law. A situation could be imagined where there would be one bidder within the city and several bidders within the state but outside the city. If the bidder located in the city knew that his bid must be accepted he could make a bid outrageously high knowing that it could not be turned down, and while this would be of great advantage to him personally, it would be of great disadvantage to the taxpayers of the city.

[1] In the absence of statutory requirement that a municipal project be competitively bid, a city is not required to adopt such procedures, nor is it required to let a contract to the lowest bidder in case it does solicit bids. *See Lee v. City of Ames*, 199 Iowa 1342, 203 N.W. 790 (1925).

1934 Op.Att'yGen. 371, 372.

The Iowa authority on point indicates that a requirement that laborers be residents of the city is unlawful. We cannot conclude that this has been overruled although the trend in the law following the home rule amendment and the United States Supreme Court's opinion rejecting a Commerce Clause challenge in *White v. Massachusetts Council of Construction Employers, Inc.*,____ U.S.____ , 75 L.Ed.2d 1, 103 S.Ct. 1042 (1983), may well indicate that the courts might reach a different result today.

If such provisions are not *ultra vires per se* under the *Diver* and *Edwards & Walsh* cases, then a reviewing court would interfere only if the ordinance was unlawful, arbitrary and capricious, in bad faith, or an abuse of discretion. *See Istari Construction, Inc., v. City of Muscatine*, 330 N.W.2d 798, 800 (Iowa 1983); *Menke v. Board of Education, Ind. Sch. District, West Burlington*, 211 N.W.2d 601, 608 (Iowa 1973); Op.Att'yGen. #82-8-4.

Unlike Iowa Code chapter 73, which gives a qualified preference to Iowa labor, *see* Op.Att'yGen. #82-8-4, the proposed ordinance would require that seventy percent of the labor force be residents of Mason City. In determining whether the ordinance would be inconsistent with the purposes of the competitive bidding statute or an abuse of discretion, we believe the primary question would be whether the conditions in the ordinance would be so restrictive as to effectively eliminate competition.

> competitive bidding in the granting of municipal contracts "is employed for the protection of the public to secure by competition among bidders, the best results at the lowest price, and to forestall fraud, favoritism and corruption in the making of contracts." C Rhyne, *The Law of Local Government Operations* §27.6, at 942 (1980); *see e.g., Weiss v. Town of Woodbine*, 228 Iowa 1, 11, 289 N.W. 469, 474 (1940); *Miller v. Town of Milford*, 224 Iowa 753, 769-70, 276 N.W. 826, 834 (1938); *Iowa Electric Light Co. v. Town of Grand Junction*, 216 Iowa 1301, 1303, 250 N.W. 136, 137 (1933).

Istari Construction, Inc., 330 N.W.2d at 800. In *Diver* and *Edwards & Walsh* the invalidated conditions required that all laborers be city residents. In *White*, the United States Supreme Court upheld, against a Commerce Clause challenge, an ordinance requiring that half of the labor force be from Boston. Ultimately the determination whether the ordinance is an abuse of discretion would likely depend on factual determinations—the availability of labor in a city the size of Mason City, the number of contractors who would be precluded from bidding because of existing contract relationships with laborers who reside out of the city, the number of contractors who could meet the condition, whether great economic advantage is provided to only one or several local contractors, and the increased cost of the project. These are factual questions which cannot be resolved in an Attorney General's opinion. Op.Att'yGen. #82-2-1.

We note that cities, under section 384.99, may not grant awards to other than "the lowest responsible bidder" except in public utility contracts where the standard is the best interest of the city. Juxtaposing the two standards it appears that the legislature has granted even broader discretion to cities in awarding utility contracts. A principle rule of statutory construction is that the express mention of one thing in a statute implies the exclusion of others. Stated otherwise, legislative intent is expressed by omission as well as by inclusion. *See In Re Estate of Wilson*, 202 N.W.2d 41, 44 (Iowa 1972). *Expressio Unis Est Exclusio Alterius* is the legal maxim. The legislature has authorized a city council to award a bid to one other than the lowest responsible bidder only in the case of public utility contracts. *Dunphy v. City Council of Creston*, 256 N.W.2d 913, 921 (Iowa 1977).

In conclusion, it is our view that existing Iowa authorities indicate that a local hiring preference for non-utility public improvements is invalid. However, we note that to the extent that those decisions relied on the Dillon rule, adoption of home rule may result in the validation of a reasonably drawn preference for local labor.

II. PETITION

The second question presented concerns the rights of a bidder to petition the award of a contract for a public improvement if based on a local hiring preference law. Specifically, we have been asked whether, in that case, a city council can be compelled to award the contract to the lowest bidder.

Initially, we note that competitive bidding in the granting of public improvement contracts is employed for the protection of the public. *Istari Construction, Inc. v. City of Muscatine*, 330 N.W.2d 798, 780 (Iowa 1983). The competitive bidding statute, therefore, was not specifically intended for the benefit or enrichment of bidders.

Municipal authorities do possess a discretionary power in the awarding of public improvement contracts. *Istari*, 330 N.W.2d at 799. For instance, Iowa Code §384.100 (1983), in pertinent part, provides:

> The governing body may, by resolution, award the contract for the public improvement to the bidder submitting the best bid, determined as provided in section 384.99, *or* it may reject all bids received, fix a new date for receiving bids, and order publication of a new notice to bidders. [Emphasis added]

A city council, according to the aforementioned statute, may award a public improvement contract to the lowest responsible bidder or reject all bids.

In *Istari*, the Court declined to decide whether the preposition "or" in that statute is conjunctive or disjunctive. *Istari*, 330 N.W.2d at 799-800. Plaintiff contractor in that case contended that under the statute, the word "or" is disjunctive and, therefore, would prevent the rejection of all bids and compel the council to award the public works project to the lowest responsible bidder. Defendant council responded that the statute is designed to give the governing body an alternative to awarding a contract and that a city council cannot exercise both options in response to a single bid submission. Given the intent of the competitive bidding statute to protect the public's interest and the discretionary authority of municipalities in the awarding of public improvement contracts, a court would probablybe reluctant to compel the award of a contract to a particular bidder. Accordingly, we are of the opinion that a city council may not be compelled to award a public improvement contract to the lowest bidder.

June 28, 1983

COUNTIES; Clerk of Court; Filing Fees. Iowa Code Sections 4.13, 331.705(1), 331.705(1)(aa) (1983); 1983 Iowa Acts, Senate File 495, §9105(1), §9105(aa), 1983 Iowa Acts, Senate File 549, §§2(a), 2(b), 10, 14(a), 14(b), and 15. (1) The fee provided for in S.F. 549, §§2(b) and 14(b), may be assessed only against the plaintiff; (2) A separate fee should be assessed pursuant to S.F. 549, §§2(a) and 14(a), for a petition, motion, or application to modify a dissolution decree; (3) A separate fee should be assessed pursuant to S.F. 549, §§2(b) and 14(b), for services performed by the clerk in an action to modify a dissolution decree; (4) The fee provided for in S.F. 549, §§2(b) and 14(b) applies to criminal as well as civil cases but a fee may not be assessed for filing an indictment or information; (5) Eight dollars is the total amount of costs that may be assessed against a defendant in scheduled violations cases. In all other simple misdemeanor cases, the initial filing fee is eight dollars; additional costs should be assessed pursuant to S.F. 549, §§2(b) and 14(b); (6) S.F. 549, §§2(b) and 14(b), do not preclude the clerk from assessing other costs expressly provided for in other statutes; (7) In cases filed before July 1, 1983, the clerk should follow the fee schedule in Iowa Code §331.705(1) (1983) as that statute existed prior to its amendment by S.F. 549. The clerk should follow the fee schedule in S.F. 549 in cases filed after July 1, 1983. (Weeg to O'Brien, Court Administrator, 6-28-83) #83-6-11(L)

June 28, 1983

ZONING: Developmentally Disabled Family Homes Iowa Code §§358A.25 and 414.22 (1983); House File 108 (1983). All zoning classifications which permit residential use of property in the zone or district come within the

ambit of House File 108. (Walding to Rosenberg, State Representative, 6-28-83) #83-6-12(L)

June 29, 1983

SUBSTANCE ABUSE. Involuntary Commitment. Role of the Presiding Judge or Judicial Hospitalization Referee. Iowa Code §§ 125.75, 125.75, 125.78, 125.82 (1983). The involuntary commitment procedures of Iowa Code §§ 125.75 et. seq. clearly envision an adversarial process in which the applicant bears the burden of establishing by clear and convincing evidence that the respondent is a substance abuser. Sections 125.76 and 125.78(2) provide for the appointment of counsel for applicants where a court determines that counsel is necessary and that an applicant is unable to afford an attorney. Where, however, the applicant is not represented by counsel, a presiding judge or judicial hospitalization referee may not, consistent with due process principles of law, interject himself or herself into the adversarial process by presenting evidence on behalf of the applicant. (Freeman to Wilson, Judicial Hospitalization Referee, Buchanan County, 6-29-83) #83-6-13

Denny R. Wilson, Buchanan County Hospitalization Referee: You have requested, in your capacity as a judicial hospitalization referee and with the approval of the chief judge of the First Judicial District, an opinion from our office concerning the involuntary commitment law for substance abusers, Iowa Code sections 125.75 *et. seq.* (1983). In particular you have asked what role a judicial hospitalization referee, acting in lieu of a judge of the district court pursuant to §125.90, should play where the applicant seeking commitment of an alleged substance abuser in not the county attorney and is not, himself or herself, represented by counsel. You inquire whether you, as referee, may proceed to present the evidence and to ask questions that you feel are relevant and appropriate to elicit linformation needed for a substance abuse committal. You query whether involvement to such an extent by a court, or judicial hospitalization referee serving on behalf of the court, is proper. Before addressing this question directly, an examination of the provisions of the involuntary commitment law is necessary.

Iowa Code §§125.75-94 constitute Iowa's involuntary commitment law for substance abusers. These provisions were adopted by the 1982 Iowa legislature, resulting in a repeal of the former commitment procedures located at Iowa Code sections 229.50-53 (1981). 1982 Iowa Acts, ch. 1212, House File 2426 (effective July 1, 1982). Legislative amendments to the prior commitment law sought to assure greater due process protections to alleged substance abusers. For the most part, the involuntary commitment procedures for substance abusers largely parallel those procedures for the involuntary commitment of the mentally ill, Iowa Code chapter 229 (1983).

Proceedings for the involuntary commitment of an alleged substance abuser may be commenced by the county attorney or an interested person by the filing of a verified application for commitment with the clerk of the appropriate district court. Iowa Code §125.75. At the commitment hearing, evidence in support of the application for commitment shall be presented by an applicant who is an interested person, or by the applicant's attorney, or by the county attorney if the county attorney is the applicant. Iowa Code §125.82(1). The optional characteristic of this provision, *see* Op.Att'yGen. #83-3-7(L), differs noticeably from Iowa Code §229.12(1), which provides that evidence in proceedings for the involuntary commitment of the mentally ill shall be presented by the county attorney. Recognizing that county attorneys would not be presenting evidence at all substance abuse commitment hearings, the legislature specifically allowed for the appointment of counsel for an applicant when requested in the application for commitment if the court determines that an attorney is necessary to assist the applicant and that the applicant is financially unable to hire his or her own attorney. Iowa Code §§125.76, 125.78(2). Section 125.78(1) likewise provides for the appointment by the court of an attorney for a respondent who is the subject of an involuntary commitment application.

In examining the procedures of the involuntary commitment law, it is clear that an adversarial setting has been established where the applicant for

commitment bears the burden of showing by clear and convincing evidence that the respondent is a substance abuser. Section 125.82(4) states in part: "A presumption in favor of the respondent exists, *and the burden of the evidence and support of the contentions made in the application shall be upon the person who filed the application.*" (Emphasis added.) That subsection goes on to state: "If upon completion of the hearing *the court* finds that the contention that the respondent is a substance abuser has not be sustained by clear and convincing evidence, the court shall deny the application and terminate the proceedings."

In this adversarial setting, then, the parties are responsible for submitting evidence in support of their respective positions. The court, on the other hand, must hear the evidence as an impartial decisionmaker and decide, at the close of evidence, whether the contentions in the application are established by clear and convincing evidence. The informal nature of commitment proceedings, §125.82(4), does not negate the responsibility of the parties to present evidence on their own behalfs and the responsibility of the court to hear the evidence as an impartial decisionmaker. The query remains, however, as to how far a court can go in participating in the proceedings before the court's impartiality is called into question.

"A fair trial in a fair tribunal is a basic requirement of constitutional due process." *State v. Larmond*, 244 N.W.2d 233, 235 (Iowa 1976). Consequently, a presiding judge must not only *be* fair and impartial, but must also conduct himself or herself in such a way as to constantly manifest those qualities. *Id.* In *State v. Cuevas*, 288 N.W.2d 525 (Iowa 1980), defendant claimed he had been denied a fair trial due to alleged interference by the trial court. The Iowa Supreme Court found no reversible error on this issue, but the Court did note the following:

> The presiding judge is not a mere functionary present only to preserve order and lend ceremonial dignity to the proceedings. We have previously said that the judge's role is not restricted to the functions of an umpire or referee in a contest between opposing parties or counsel. We have declared that a trial judge has the duty to control and conduct its court in an orderly, dignified, and proper manner. In fulfilling its role, occasions will arise when a trial judge is constrained to intervene on its own volition . . . to take reasonable measures to insure that the evidence is intelligibly presented to the jury. Yet the trial court should not intervene without cause to do so. . . . But when compelled to intervene, the court should conduct itself with scrupulous detachment; *it must act as a neutral force in the interplay of an adversary process. It is imperative that the court not become an advocate of any party's cause.*

Id. at 531. (Emphasis added.)

In *Cuevas*, defendant alleged that the trial court improperly interfered with the adversarial process by, among other things, entering into the questioning of a witness. The Supreme Court responded in part as follows:

> Although we have recognized the power of the trial judge to question witnesses, we have cautioned against assuming the role of an advocate. We do not encourage judges to enter the fary with their own interrogation of witnesses. And when cause to do so exists, restraint must be used. By engaging in the examination of witnesses, the court becomes vulnerable to a multiplicity of criticisms; bias, prejudice or advocacy are some of those.

Id. at 532-33. The Court found that the trial court had acted properly by concluding:

> *Here trial court acted only to clarify the evidence* regarding the perimeters of time within which the death occurred. The underlying evidence of those perimeters had previously been presented. *In other words, trial court did not undertake the introduction of evidence; it asked nothing not already before the jury.* We note, also, that trial court's questions were impartially framed, with a view to 'straighten the record out.'

Id. (Emphasis added.) Although *Cuevas* was a criminal case tried before a jury, the Court in no way indicated that its conclusion that a trial court in its discretion may ask clarifying questions concerning evidence already presented but may not

actually introduce evidence should be limited only to the criminal process or to cases tried before a jury. The conclusion of the Iowa Court is consistent with the federal view as well. In *United States v. Harris*, 488 F.2d 867, 869 (8th Cir. 1973), the federal court stated: "In drawing the line between improper an proper questioning by a trial judge we have often placed emphasis upon whether the trial court 'merely asked clarifying questions . . .."'

Clearly, then, in order to protect the integrity of the adversarial process, courts are not permitted to introduce or present evidence although they may in certain situations use their own discretion to ask clarifying questions concerning evidence that has been presented. Furthermore, the fact that one party is inexperienced or not represented by an attorney would not serve to justify improper interference by a court in the adversarial process. In *State v. Glanton*, 231 N.W.2d 31 (Iowa 1975), the trial court was alleged to have improperly interfered in the course of the trial. The trial court argued, however, that it was prompted by a desire to assist student lawyers representing the defendant. The Iowa Supreme Court was not convinced by this argument, stating: "[I]t is ordinarily a dangerous practice for a presiding judge to contribute its efforts in an attempt to equalize what he perceives to be disparity in the trial ability of opposing counsel." *Id.* at 35.

In proceedings for the involuntary commitment of substance abusers, the burden of establishing the contentions in the application belong to the applicant. The court acts improperly in assuming the applicant's role by actually presenting evidence for the applicant although the court could, in appropriate situations, ask clarifying questions concerning evidence that has been presented. If the application fails to present clear and convincing evidence to support contentions in the application, then the court must dismiss the application.

This conclusion, based on the analyses in the cases cited above, is consistent with the concept of separation of functions as well. This concept generally arises in the area of administrative law where the investigation and prosecution of a particular matter are conducted by the same agency that then hears and adjudicates the matter. Combination of functions within an administrative agency may or may not be constitutionally permissible depending upon the facts at hand. *E.g., Huber Pontiac, Inc. v. Allphin*, 431 F.Supp. 1168 (S.D. Ill. 1977); *Wedergen v. Board of Directors*, 307 N.W.2d 12 (Iowa 1981); *Keith v. Community School District*, 262 N.W.2d 249 (Iowa 1978); Note, *Due Process and the Combination of Administrative Functions*, 63 Iowa L.Rev. 1186 (1978). Certain principles should, however, be kept in mind. An administrative hearing involving the exercise of judicial or quasi-judicial powers must be fair and impartial. *Keith*, 262 N.W.2d at 260. Furthermore, administrative officers acting in a judicial or quasi-judicial capacity must not only be fair and impartial but must carry the appearance of fairness and impartiality. *Id.* at 261.

In the *Huber* case, the federal court was faced with a due process challenge based on a combination of functions not only in one agency but also in one person. A rule of the Illinois Department of Revenue provided that the officer presiding at a Departmental hearing would also present evidence on behalf of the Department's position at the hearing. Consequently, in that case the presiding officer also called witnesses on behalf of the Department; offered, introduced, and received evidence and exhibits; entered objections to the other party's questions; and cross-examined witnesses. The federal court found that the combination of prosecutorial and adjudicatory functions in such a situation created an unconstitutional risk of bias and prejudice. *Huber*, 431 F.Supp. at 1171. While the Iowa Supreme Court has not been faced with as blatant a case of improper combination of prosecutorial and adjudicative functions as in *Huber*, the Court in dicta has stated that "an unconstitutional combination of prosecutory and adjudicative functions may occur where the individual who is responsible for presenting one party's case to a decisionmaker also acts as a decisionmaker." *Wedergren*, 307 N.W.2d at 18.

Whether a due process violation occurs where a judge or an administrative tribunal becomes involved in the presentation of evidence in a case being heard before him or her depends in large measure upon the facts at hand in a particular

situation. It is our opinion, though, that the actual presentation of evidence on behalf of an applicant by a judge or judicial hospitalization referee in a substance abuse commitment hearing would constitute improper interference with the adversarial process and could result in a denial of due process to the alleged substance abuser. Even where a judge would have no actual bias and would fairly and scrupulously review all the evidence on the record after presentation, or assistance in the presentation, of evidence for one party, due process requires the avoidance of those situations where bias is likely to occur or where the appearance of impartiality is destroyed. *See Keith*, 262 N.W.2d at 260.

It seems that a policy of proceeding to present evidence where an applicant is not represented by an attorney is in response to a recognition that applicants who are not attorneys are generally not skilled in judicial and legal matters. From a practical standpoint, applicants might be encouraged by clerks of court at the time of filing an application for commitment to consider the assistance of counsel and to make application for the appointment of counsel if they are unable to afford an attorney. *See* §§125.75, 125.76, 125.78(2). Also when an applicant appears without an attorney, the court is not constitutionally prohibited from offering procedural guidance to the applicant concerning the conduct of the hearing and what the applicant needs to do, especially since substance abuse committal hearings are to be informal. The applicant, however, bears the burden of presenting evidence in support of the application and showing the court by clear and convincing evidence that the respondent is a substance abuser. If the applicant, due to lack of evidence, or inexperience, or some other factor, fails to meet this burden, the court may not attempt to meet the burden of evidence and proof for him or her.

In conclusion, the substance abuse commitment procedures of Iowa Code §§125.75 *et. seq.* clearly envision an adversarial process whereby an applicant bears the burden of showing clearly and convincingly that the respondent is a substance abuser. Sections 125.76 and 125.78(2) provide for the appointment of counsel for applicants where the court determines an attorney is necessary and the applicant is financially unable to employ an attorney. Where, however, the applicant is not the county attorney or where the applicant is not represented by counsel, a presiding judge or judicial hospitalization referee should not interject himself or herself into the adversarial process by presenting evidence on behalf of the applicant.

JULY 1983

July 6, 1983

TAXATION: Sales and Use Taxes on Purchases of Newsprint and Ink. Iowa Code §§422.42(3) and 423.1(1) (1983). In light of the United States Supreme Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, U.S. , 75 L.Ed.2d 295, 103 S.Ct. 1365 (1983), the director of revenue would be justified in discontinuing enforcement of the Iowa newsprint and ink tax which singles out newspapers for differential tax treatment upon purchases of components. The director, in his discretion, can promulgate a rule explaining that he has discontinued such enforcement. (Osenbaugh to Bair, 7-6-83) #83-7-1

G. D. Bair, Director of Revenue: You have requested an opinion of the Attorney General pertaining to the Iowa retail sales and use taxes imposed upon purchases of newsprint and ink pursuant to the provisions of Iowa Code §§422.42(3) and 423.1(1) (1983). Your opinion request is associated with the recent decision of the United States Supreme Court in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, U.S. , 75 L.Ed.2d 295, 103 S.Ct. 1365 (1983) (hereinafter referred to as the "*Star Tribune*" case).

First, you inquire whether the director of revenue should continue to enforce and collect Iowa retail sales and use taxes upon purchases of newsprint and ink in light of the *Star Tribune* case. Second, in the event that you can discontinue enforcement of the newsprint and ink tax, you inquire whether you should promulgate a rule retroactive to March 29, 1983, the date of the Supreme Court's *Star Tribune* decision. Third, you ask whether, in the absence of a statute limiting or precluding refunds, the director of revenue would be required to refund newsprint and ink tax.

With regard to your first question, you would be justified in discontinuing enforcement of the Iowa newsprint and ink tax upon purchases of such components for newspapers produced for sale. Second, you can promulgate a rule explaining that you are discontinuing that tax enforcement. Your third question is moot.

In *Star Tribune*, the Supreme Court considered the constitutionality of a Minnesota tax scheme which singled out the press for differential taxation. Minnesota exempted retail sales of "publications" and, instead, imposed a special use tax upon the purchase price of newsprint and ink which became a component part of the publications to be sold at retail. However, the first $100,000 of newsprint and ink consumed by a publication during a calendar year was exempted from this use tax. Minn. Stat. §§297A.14, 297A.25(i) (1982). The Minnesota newsprint and ink tax was imposed at the rate of 4 percent of the purchase price of those items, the same rate as the Minnesota general sales and use tax imposed upon retail transactions of finished goods. The newsprint and ink tax was the only Minnesota tax imposed upon purchase of component parts of finished products which would be intended for ultimate retail sale. Other producers were not subject to tax upon their purchases of components which became integral parts of products sold at retail.

The Supreme Court held that the Minnesota newsprint and ink tax which singled out the press for differential tax treatment upon components whereas other producers obtained an exemption upon their component purchases violated United States Constitutional First Amendment freedom of press guarantees, even if the newsprint and ink tax might have been favorable tax treatment of the press. In addition, the Supreme Court held that the Minnesota newsprint and ink tax violated the First Amendment for the further reason that the effect of the $100,000 exemption was to exempt most newspapers from, and subject only a few newspapers to, the tax.

For Iowa sales and use tax purposes, retail sales of newspapers are not subject to tax. *See* Iowa Code §§422.45(9) and 423.4(4) (1983). Like Minnesota, Iowa imposes a tax upon purchases of newsprint and ink incorporated into newspapers which will be sold at retail. In addition, like Minnesota, Iowa exempts from tax purchases of components by other producers of finished products to be sold at retail.[1] Unlike Minnesota, Iowa does not exempt the first $100,000 of calendar year purchases of newsprint and ink.

For all practical purposes, the Iowa newsprint and ink tax and the Minnesota newsprint and ink tax imposed upon purchases of components of newspapers sold at retail are identical.[2] As a consequence, the Supreme Court's *Star Tribune* opinion clearly implicates the Iowa newsprint and ink tax imposed upon components of newspapers produced for sale. Like Minnesota, Iowa's newsprint and ink tax singles out newspapers for differential tax treatment not accorded to other producers of products for sale. In your opinion request, you state that you have concluded that the Iowa newsprint and ink tax is unconstitutional and we agree that the tax is unconstitutional to the extent that it imposes a tax upon components used in producing a product which is intended to be sold.[3]

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[1] Section 422.42(3) exempts from Iowa sales tax sales of tangible personal property "when it is intended that such property shall by means of fabrication, compounding, manufacturing, or germination become an integral part of other tangible personal property intended to be sold ultimately at retail." Then, the statute, subsequently provides:

> Notwithstanding the foregoing provisions of this subsection, the sale of newsprint and ink delivered after April 1, 1970, to any person, firm or corporation to be incorporated in or used in the printing of any newspaper, free newspaper or shoppers guide . . . shall be considered as a sale at retail . . . and subject to the payment of sales tax.

A similar provision, for use tax purposes, is in §423.1(1). These statutory provisions, along with §422.45(9), were enacted by the legislature in 1970. *See* 1970 Iowa Acts, ch. 1201. This 1970 legislation appears to be a response to an opinion from this office on the tax status of newsprint and ink. *See* 1970 Op.Att'yGen.384.

[2] As noted, Minnesota had a tax exemption on the first $100,000 of calendar year purchases of newsprint and ink while Iowa does not have such an exemption. While this granting of the $100,000 exemption was a reason why the Supreme Court struck the Minnesota tax, it was not the Court's principal reason. The bulk of the Court's opinion involves differential tax treatment of newspapers as compared to other producers of products and is devoted to a condemnation of the Minnesota newsprint and ink tax upon that basis.

[3] If newsprint and ink are to be used to print a product which is not to be sold by the producer and which is to be distributed for free, then the processing exemption in §422.42(3) and §423.1(1) would not be accorded to purchases of newsprint and ink. In such a situation, where a producer does not purchase components for purposes of processing a product to be sold, the processing exemption for components is not available and, in general, Iowa law subjects such components purchases to tax. Therefore, the newsprint and ink differential tax treatment occurs only where the components are purchased for printing newspapers which are intended for sale. In a situation where so-called "free" newspapers and shoppers guides are distributed for free to the public, if these items are purchased by the distributor from the printer, such items have been produced for retail sale.

A decision by the United States Supreme Court on the applicability of the United States Constitution to a state statute is binding upon all federal and state courts. *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N.W. 28 (1928); *Santa Rita Oil & Gas Co. v. State Board of Equalization*, 112 Mont. 359, 116 P.2d 1012 (1941); 20 Am.Jur.2d *Courts* 558 (1965). While the *Star Tribune* case dealt only with the Minnesota newsprint and ink tax law, we believe that the Supreme Court's decision would be adhered to by a court in the event of an appropriate proceeding to enjoin the director of revenue from enforcement of the Iowa newsprint and ink tax.

Given the invalidity of the Iowa newsprint and ink tax, the question posed by you is whether you can discontinue enforcement of this tax, since the legislature did not repeal the tax law.[4] In raising this question, you cite several opinions of this office which opined that in the absence of a judicial ruling that an Iowa tax law was unconstitutional, the department of revenue or other tax officials lacked the authority to refuse to administer an alleged unconstitutional law. *See, e.g.* 1980 Op.Att'yGen. 42; 1980 Op.Att'yGen. 118.

In 1980 Op.Att'yGen. 42, 48, the general rule was set forth as follows:

> 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.'

In *Board of Supervisors of Linn County v. Department of Revenue*, 263 N.W.2d 227 (Iowa 1978), county officers attempted to challenge the constitutionality of the Iowa property tax statutory equalization procedures. The Iowa Supreme Court held that such county officers had no standing to challenge the constitutionality of the tax law relying upon *C. Hewitt & Sons Co. v. Keller*, 223 Iowa 137, 275 N.W.94 (1937). The Court stated in 263 N.W.2d at 234:

> In summary, the general rule first articulated in *Keller* and other like cases is viable in modern day constitutional law: A county and its ministerial officers ordinarily have no right, power, authority, or standing to question the constitutionality of a state statute. We see no reason to here alter or abandon such a commonly accepted premise. Nor are plaintiffs aided by any of the exceptions thereto commonly recognized by other courts.

This general rule set forth in the *Linn County* case applies to state officials, including the director of revenue. 1980 Op.Att'yGen. at 48. In the *Linn County* case, the Court noted that some exceptions to this general rule have "emerged and gained some acceptance in other jurisdictions." 263 N.W.2d at 233. These exceptions are: (1) the subject matter of the controverted legislation is of major public importance. (2) The public official's duties require the official to interpret and administer the alleged unconstitutional statute in a nonministerial manner. (3) The public official would be personally liable for implementing a law which is later judicially declared invalid. The Iowa Court, in *Linn County*, found it unnecessary to decide whether any of these exceptions should apply to Iowa public officials.

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[4] After your Department notified legislators of the Supreme Court's *Star Tribune* decision, H.F. 648 which would have repealed the newsprint and ink tax was introduced in the House of Representatives but was not enacted.

In the Attorney General opinions alluded to in your opinion request wherein this office had opined that an Iowa tax statute was unconstitutional, but that tax officials had no authority to disregard enforcement of such statutes, no decision of the United States Supreme Court was found which expressly implicated the identical tax scheme found in the Iowa statute.[5] Under such circumstances, the general rule in the *Linn County* case would apply.

However, your opinion request poses an unusual situation where the United States Supreme Court has expressly declared that a differential Minnesota sales and use tax scheme whereby newspapers are singled out for taxation on their purchases of components is a constitutional violation and where Iowa has, in essence, an identical differential tax scheme. The director of revenue and department of revenue have openly declared that the Iowa newsprint and ink tax is invalid. If, therefore, the director of revenue continues to enforce the newsprint and ink tax whereby newspapers are singled out for differential taxation not accorded other producers of finished goods, such action would be inconsistent with the *Star Tribune* case and the director of revenue would appear to be knowingly and intentionally violating the constitutional rights of newspapers.

Under the unusual and limited circumstances where the United States Supreme Court has recently ruled on essentially the same tax scheme as a matter of federal constitutional law and no apparent means exist for you to obtain a judicial ruling directly on the Iowa statute prior to your enforcement decision with resulting potential liability, it is our opinion that you should follow the decision of the United States Supreme Court and not proceed to enforce and collect Iowa's differential sales and use tax on purchases of newsprint and ink.

Reliance upon our opinion by you would, in our judgment, demonstrate your good faith and should not cause you any personal consequences for refusal to enforce the invalid Iowa newsprint and ink tax. Larson, *The Importance and Value of Attorney General Opinion*, 41 Iowa L.Rev. 351, 363 (1956).

We would caution you that this opinion is limited to the peculiar circumstances involved and should not be construed as a mandate for executive officials to disregard Iowa laws. Such disregard would not be consistent with the *Linn County* case.

You next inquire whether, if you can discontinue enforcement of the newsprint and ink tax which creates differential taxation of newspapers, you would promulgate a rule retroactive to March 29, 1983, the date of the Supreme Court's *Star Tribune* decision. If you choose to do so, you can make a rule setting forth that the director of revenue has discontinued enforcement of the newsprint

[5] In 1980 Op.Att'yGen. 42, we opined that the Iowa franchise tax law which excluded income from Iowa securities and included income from federal securities in the tax base was unconstitutional, but that the department of revenue lacked authority to refuse to enforce that law. In *Memphis Bank & Trust Co. v. Garner*, 624 S.W.2d 551 (1981), the Tennessee Supreme Court upheld the constitutionality of an identical Tennessee tax scheme. However, the United States Supreme Court reversed the Tennessee Court's decision and found the tax to be unconstitutional for essentially the same reasons set forth in our opinion. *Memphis Bank & Trust Co. v. Garner*, 74 L.Ed.2d 562 (1983). If the Supreme Court had affirmed the decision of the Tennessee Court, our opinion would, by hindsight, have been in error. Therefore, in the absence of a controlling Supreme Court decision applying the United States Constitution to a particular tax scheme, a public official would not generally be justified in refusing to enforce the tax merely because the official or the Attorney General believed that the tax scheme might be unconstitutional. But, under the circumstances of your opinion request, a controlling Supreme Court decision, *Star Tribune*, does exist and would be applicable to an Iowa tax scheme identical to the one declared invalid by the Supreme Court.

and ink tax which singles out newspapers for differential taxation on components. Since the differential newsprint and ink tax is unenforceable, in our opinion, and since Supreme Court decisions have retroactive effect, generally, to the extent such tax may be unpaid for periods prior to March 29, 1983, we would advise you not to attempt to collect the tax for such prior periods. We would note, however, that the Supremacy Clause, which in our opinion compels you to cease affirmative steps to enforce this tax, does not authorize you to promulgate rules which create state law inconsistent with that statute. *See Washington v. Fishing Vessel Association*, 443 U.S. 658, 695, 61 L.Ed.2d 823, 852, 99 S.Ct. 3055 (1979). In other words, while you can promulgate a rule which gives notice that you will not enforce the differential newsprint and ink tax, you are not authorized to promulgate a rule which attempts to go further and make law contrary to the Iowa statute.

Your final question asks whether, in the absence of a statute limiting or precluding refunds, the director of revenue would be required to refund newsprint and ink tax. The legislature adopted legislation precluding refund of voluntarily paid sales and use taxes paid as a result of a mistake regarding the validity of an Iowa sales or use tax law. *See* Acts of 70th General Assembly, 1983 Session, Senate File 538. Thus, your final question is moot.

July 6, 1983

COUNTIES: Authority of counties to utilize Iowa Code Section 314.7 (1983) to remove levees located upon private property causing water to collect on county roads. U.S. Const. amends. V and XIV; Iowa Const. art. I, §§9 and 18; Iowa Code Sections 306.27, 309.21, 309.67, 314.7, 314.9, 319.1, 319.7, 319.8, 319.9, 319.13, 331.301(5), 33.1301(6), 331.304(8), 331.362(1), 455.1, 455B.275, 455B.277, 457.12, 460.2, 462.1 (1983); 1982 Iowa Acts, Chapter 1199; 900 I.A.C. §§70.2, 71.4(1). Private levees causing water to collect on and damage county roads may fall within the regulatory authority of the Iowa Department of Water, Air and Water Management. Iowa Code Section 314.7 (1983) authorizes the county to enter upon private property to remove such levees, but the county should adopt procedural guidelines governing the exercise of that authority. (Benton to Schroeder, 7-6-83) #83-7-2(L)

July 18, 1983

AREA SCHOOLS; CREDIT CARDS. Ch. 279; §§279.29, 279.30, 279.32. Ch. 280A; §280A.42. Merged area schools, vocational schools, and community colleges may issue credit cards to pay the actual and necessary travel expenses of their respective boards or board members incurred in the performance of official duties. (Pottorff to Johnson, Auditor of State, 7-18-83) #83-7-3(L)

July 18, 1983

PREARRANGED FUNERAL PLANS: PUBLIC RECORDS: Iowa Code Ch. 523A (1983); Iowa Code §§523A.2(1), 523A.2(2), 523A.7; Iowa Code Ch. 68A; Iowa Code §§68A.1, 68A.2, 68A.7(3), 68A.7(5), 68A.7(6); 510 I.A.C. 19.1 (523A). 1) Trust account records filed with the county attorney by sellers under Ch. 523A are not confidential under Ch. 523A or under Ch. 68A. 2) Bonds uselers under Ch. 523A in lieu of trust accounts and filed with the county attorney may be confidential under some circumstances. (Lowe to Burk, 7-18-83) #83-7-4

Peter W. Burk, Office of Black Hawk County Attorney: In your letter of April 29, 1983, you requested an opinion of the Attorney General regarding two questions arising under Iowa Code Chapter 523A (1983), *Prearranged Funeral Plans*. You first asked whether under §523A.2(2), which requires sellers of prearranged funeral plans to file certain information with the county attorney in the county in which they are located, the information held by the county attorney is confidential. Secondly, you asked whether under §523A.7, which permits sellers in lieu of complying with the trust provisions of §523A.1 and 2 to file a surety bond with the county attorney, records held by the county attorney concerning these bonds are confidential. It is our opinion that the records held by the county attorney pursuant to §523A.2(2) are not confidential and that records held by the county attorney under the bonding alternative

in §523A.7 are confidential only to the extent that the records contain information which would be confidential under §523A.2(1)(f).

Chapter 523A contains a provision in §523A.2(1)(f) which makes confidential records filed with the county recorder by both the sellers of prearranged funeral plans and by the financial institutions holding trust funds of these sellers:

> Notwithstanding chapter 68A, all records maintained by a county recorder under this subsection shall be confidential and shall not be made available for inspection o copying by any person except the county attorney or a representative of the county attorney.

The scope of §523A.2(1)(f) does not encompass the records required to be filed with the county attorney under §523A.2(2). Thus Chapter 523A does not make these records confidential.

The records held by the county attorney pursuant to §523A.2(2) consist of a statement or report by each seller of all trusts created under §523A.1 which statement includes a listing of the financial institutions which hold the trust funds, the names on the trust accounts and the trust fund account numbers. The statements must be filed on forms provided by the State Insurance Commissioner. *See* 510 I.A.C. 19.1 (523A). The forms used by the county attorney (*see* Form 1E-3, 510 I.A.C. 19.4) require the following information to be reported:

1. The name of the financial institution holding the funds.
2. The names on the trust accounts.
3. The account numbers.
4. The dates on which the agreements were filed with the county recorder.

In contrast, the forms required to be used for reports to the county recorder by sellers and by financial institutions (*see* Form 1E-1 and Form 1E-2, 510 I.A.C. 19.2 and 19.3) include, in addition to the items required to be reported by the county attorney:

5. The amounts of funds received.
6. Interest earned as of the date of the filing of the report.

The forms (1E-1 and 1E-2) for the reports filed by sellers and financial institutions with the county recorder include the following confidentiality notice:

> This report is confidential and should not be made available for inspection or copying by any person except the county attorney or a representative of the county attorney.

There is no confidentiality notice on the forms for reports filed with the county attorney (1E-3).

We find no specific provision for confidentiality in §68A.7[1] Some sellers might claim that the records in question were confidential because they contained funeral industry trade secrets. The Iowa Supreme Court, in *Basic Chemicals, Inc. v. Benson*, 251 N.W.2d 220, 226 (Iowa 1977) adopted the Restatement of Torts, §757, definition of trade secrets which states that: "A trade secret is a process or device for continuous use in the operation of a business." Clearly, none of the information required under §523A.2(2) is in any way related to a process or device for continuous use in the funeral industry and accordingly it must be concluded that the records in question do not contain trade secrets and therefore are not confidential under §68A.7(3).

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[1] Given the nature of the records required to be filed with the county attorney under §523A.2(2) and the legislative omission of these records from the express confidentiality provision in §523A.2(1)(f), it does not appear that these records would be "peace officers investigative reports" under §68A.7(5). This distinguishes these records from records the county attorney might compile in an investigation by virtue of §523A.2(1)(b) or under other law enforcement powers.

While the records do not contain trade secrets, a related exception which sellers might claim applied here is §68A.7(6) which protects "reports to governmental agencies which if released would give advantage to competitors and serve no public purpose." This exception is construed narrowly, and the court will "adhere to a presumption in favor of disclosure." *Craigmont Care Center v. Dept. of Social Services,* 325 N.W.2d 918 (Iowa App., 1982). In order for the party making the confidentiality claim under §68A.7(6), to show that release of the information would serve no public purpose, the injury which allegedly would occur would have to be substantial. "Injury in the nature of inconvenience and embarrassment, although it should be considered, does not control." *Craigmont Care Center v. Dept. of Social Services,* 325 N.W.2d 918, 921. In *Craigmont,* the Court held that the semiannual cost reports which were required to be filed by nursing homes with the Department of Social Services in order for the homes to qualify for Medicaid payments were not confidential public records within the scope of §68A.7(6).

Any advantage that competitors might derive from access to the reports in *Craigmont* was said to be overshadowed by the public interest at stake, ". . . given the magnitude of the industry, the number of people it affects, and the tax dollars used to support the industry." Although there is no large expenditure of tax dollars to support the funeral industry, certainly the prearranged funeral industry is one of great magnitude and one which potentially affects the entire public. "In recent years, there have been approximately 1.9 million deaths annually bringing the amount that consumers spend to over 5.2 billion per year." 47 F. R. 42260 (Sept. 24, 1982). When the impact of the industry on the public is considered with the fact that the Legislature could have expressly provided for confidentiality of the records required to be filed with the county attorney under §523A.2(2), just as they did in §523A.2(1)(f) for the records held by the county recorder, it must be concluded that the records held by the county attorney are not confidential and are subject to public disclosure.

You also asked whether the records provided to the county attorney under the bond in lieu of trust provisions of §523A.7 are confidential. If the seller elects to file under §523A.7, the seller files a surety bond with the county attorney. Unlike the reports filed under §§523A.2(2) and 523A.2(1)(c) and (d), there is generally no detailed financial information being provided by the seller. However, upon cancellation of the bond the seller could be required to provide this financial information to the county attorney. Seller might then claim that this information was exempt from public disclosure.

In connection with such a confidentiality claim, it should be noted that §523A.7(4) states that §523A.2(1)(f) applies to ". . . sellers whose agreements are covered by a surety bond maintained under this section, . . ." At first glance, it might be assumed that the reference to §523A.2(1)(f) means that filings with the county attorney under the bond provision are confidential. The reference to §523A.2(1)(f) in the bond provision is somewhat confusing since the confidentialty provisions of §523A.2(1)(f) expressly apply only to ". . . records maintained by a county recorder under this subsection." However, a seller who elects to follow the bond provisions might, particularly under the cancellation of bond provisions of §523A.7(3) file records with the county attorney which are similar to those filed with the county recorder under §523A.2(1) and therefore it is possible that the confidentiality provisions of §523A.2(1)(f) could apply to a seller who posted bond under §523A.7.

In order to harmonize these sections, *Doe v. Ray,* 251 N.W.2d 496 at 501 (Iowa 1977), it must be concluded that information in bonds posted with the county attorney is confidential insofar as these records contain information similar to that information contained in records filed with the county recorder which are protected by §523A.2(1)(f). In other words, to the extent records filed under §523A.7 contain information beyond that which is contained in reports filed under §523A.2(2), especially if the additional information includes the amount of funds in trust, then these records would also be confidential. If the seller claims that these records contain information exempt from public

disclosure, then we would conclude that at the time of filing under §523A.7 the seller would file two sets of records, one of which would have the information claimed to be exempt from public disclosure deleted from it. *See* 1980 Op.Att'y.Gen. 372.

In conclusion, trust account records filed with the county attorney pursuant to §523A.2(2) by sellers of prearranged funeral plans and services are not confidential under either Chapter 523A or under Chapter 68A, §68A.7(3) and §68A.7(6). Records filed along with seller's surety bonds filed with the county attorney pursuant to §523A.7 may be confidential to the extent that these records contain essentially the same sort of information as those filed with the county recorder under §523A.2(1)(c) and (d).

July 20, 1983

MOTOR VEHICLES - MOTORCYCLE LICENSE REQUIREMENTS. Iowa Code §321.189 (1983), Iowa Constitution, Article I, §6, United States Constitution, Amendment XIV, §1. Iowa Code §321.189 (1983), which requires that persons under the age of eighteen applying for a motor vehicle operator's license valid for motorcycles must successfully complete a motorcycle education course, does not violate the equal protection clause of either the United States Constitution or the Iowa Constitution. (Fitzgerald to Hughes, 7-20-83) #83-7-5(L)

AUGUST 1983

August 3, 1983

COUNTIES; Dissolution of County Library District. Iowa Code Ch. 358B (1983). There is no authority under current law for a county to dissolve a county library district. (Weeg to Welsh, State Senator, 8-3-83) #83-8-1

Honorable Joseph J. Welsh, State Senator: You have requested an opinion of the Attorney General concerning dissolution of a county library district pursuant to Iowa Code Chapter 358B (1983). In particular, you ask:

> 1. Is it within the authority of the county board of supervisors to dissolve a county library system simply by vote of the board?
>
> 2. If the above-described action is not within the authority of the board, is it within the authority of the county board of supervisors to submit the question of dissolution of the county library system to the eligible electors of the library district and thereby dissolve the district in a manner similar to the city withdrawal provisions of Section 358B.16?
>
> 3. If neither of the above-described actions are within the scope of the boards authority, what if any procedures may be used to dissolve a library district or provide for the withdrawal of the rural areas from a library district?

Chapter 358B authorizes establishment of a county library district upon petition to the supervisors and election of the voters within the proposed district. §358B.1. The district is primarily designed to provide library services to residents of unincorporated areas of the county, as §358B.1 expressly provides that "no city shall be included within the county library district unless a majority of its electors . . . favor its inclusion." Section 358B.1 also provides that after creation of a district other areas may be included if the board of library trustees and the governing body of the area sought to be included so agree. Persons not residing within the district may, however, use the county library, but the board of library trustees may charge an appropriate fee for that use. §358B.8(6). Chapter 358B contains numerous other provisions concerning creation of the board of library trustees, operation and financial support for the district, and other related matters.[1] - [2]

Turning now to your specific questions, it is our opinion that the county board of supervisors is not authorized to dissolve a county library system either by vote of the board or by submitting the question to the voters. A board of supervisors is required to perform a number of functions with regard to creation and support of a county library district. *See, e.g.,* §§331.421(10); 358B.2, 358B.4, 358B.11, and 358B.13. In addition, a board of library trustees is appointed by the supervisors pursuant to § 358B.4 to perform a number of governmental functions. *See, e.g.,* §§1358B.6, 358B.8, 358B.11, and 358B.12. Nowhere in Ch. 358B is there a provision which authorizes the supervisors or the library trustees to dissolve the library district once that district is established.

The only provision in Ch. 358B which authorizes any form of withdrawal or dissolution is §358B.16, which provides a city may withdraw from a district upon

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[1] We note that Ch. 303B establishes a regional library system which is charged with:

> providing supportive library services to existing public libraries and to individuals with no other access to public library service and to encourage local financial support of public library service in those localities where it is presently inadequate or nonexistent.

Section 303B.1.

[2] Section 331.421(10) requires the board of supervisors to impose a tax levy for a library maintenance fund in an amount not to exceed fifty-four cents per thousand dollars on property in the unincorporated area of the county.

a majority vote of the electors in that city. Reviewing the legislative history of this section we find that Ch. 358B contained no provision authorizing cities to withdraw from a county library district until 1953. In 1952, the Iowa Supreme Court held that, in the absence of express statutory authority, a town could not withdraw from a county library district by forming a town library. *Isabell v. Board of Supervisors of Woodbury County*, 243 Iowa 941, 54 N.W.2d 508 (1952). To remedy the cities' inability to withdraw from such a district, the legislature in 1953 enacted what is now Section 358B.16. 1953 Iowa Acts, ch. 159, §1. The original withdrawal provision was limited in nature, but was amended on numerous occasions into the form in which it currently exists.

We do not believe, particularly in light of the legislative history of this provision, that the specific language of §358B.16 can be interpreted so broadly as to authorize withdrawal of rural areas from the district, nor does it authorize dissolution of the entire district. Had the legislature intended to include a provision for dissolution of the entire district, it could have included an express provision as it did for withdrawal of cities in §358B.16 or as it has done in a number of other similar statutes. Sections 357A.17 (dissolution of inactive rural water district); 357B.5 (dissolution of benefited fire district); 357C.11 (dissolution of benefited street lighting district); and 357D.12 (dissolution of law enforcement district). The legislature also expressly provided for county termination of contracts to use city libraries in §358B.18(2), as amended by 1983 Iowa Acts, H.F. 628, § 165. Therefore, in the absence of any provision authorizing dissolution of a library district, we believe that such a district, once established, cannot be dissolved under the law as it currently exists.

An argument exists that, in the absence of an express statutory provision, the district could be dissolved by the supervisors pursuant to their home rule authority.[3] However, home rule authority may only be invoked when state law has not preempted the particular matter. Iowa Const., art. III, section 39A; Iowa Code §331.301 (1983). We believe that the legislature intended Ch. 358B to be the exclusive means for establishing and maintaining a county library district. The only provision in this chapter which authorizes any sort of dissolution is §358B.16, which, as discussed above, is a specific provision with regard to individual cities and in no way authorizes dissolution of the entire district. Therefore, we conclude that Ch. 358B preempts the supervisors from acting pursuant to home rule authority to dissolve a county library district either by vote of the supervisors or by submitting the question to the voters of the district.

In sum, there are no procedures available under current law to dissolve a county library district or to provide for the withdrawal of rural areas from a library district. We suggest that legislative action be sought in the event such procedures are deemed necessary.

August 24, 1983

GAMBLING, LICENSING, RACING COMMISSION: Prime farm land, contracts or options to purchase stock, and deductions from wagers. Acts of the 70th General Assembly, 1983 Session, Senate File 92, §§7(1), 9(1), 9(3)(e), 9(4), 9(7), 11(5), and 15. The phrase "prime farm land" in S.F. 92, §9(1), means land that due to its particular circumstances is especially well suited for raising crops. The precise application and definition of the phrase is left to the racing commission through its rule making authority. Senate File 92, §9(3), requires any nonprofit corporation applicant for a race track license to report any enforceable contract or option which will or may result in the transfer of ownership of ten percent or more of its stock within the requested license period to the racing commission so that the commission can evaluate the reputation and character of the probable or possible owners of the corporation as well as those of its current owners. Senate File 92, §§11(5) and 11(6), require a racetrack licensee to deduct sixteen percent from the gross amount of wagers for operating expenses, one of which is the six percent tax imposed by S.F. 92, §15. (Hayward to Harbor, State Representative, 8-24-83) #83-8-3(L)

[3] The library trustees could not act similarly because they do not have home rule powers.

August 24, 1983

STATE OFFICERS AND DEPARTMENTS: Department of Human Services canteen operations. Iowa Code §218.98 (1983). Canteens in institutions run by the Department of Human Services or Department of Corrections need not be self-sustaining; the institution may supplement the revenues generated in the canteen with operating funds for purposes of supporting the operations of the canteen. (Hunacek to Reagen, 8-24-83) #83-8-2

Dr. Michael V. Reagen, Commissioner, Iowa Department of Social Services: You have requested an opinion from this office concerning the financing of canteens in institutions run by the Department. Specifically, you have inquired whether these canteens must be completely self-sustaining, or whether (and to what extent) an institution may supplement with institutional operating funds the revenues generated in the canteen for purposes of paying certain costs of canteen operations such as utilities and salaries. For the reasons enumerated below, we believe that institutional canteens need not be self-sustaining, and that the various institutions may draw upon their operating budgets to pay such costs.

The maintenance of canteens is authorized and controlled by Iowa Code §218.98 (1983):

> *Canteen maintained.* The directors of divisions in the department of social services in control of state institutions may maintain a canteen at any institution under their jurisdiction and control for the sale to persons confined therein of toilet articles, candy, tobacco products, notions, and other sundries, and may provide the necessary facilities, equipment, personnel, and merchandise therefor. Such directors shall specify what commodities will be sold therein. The department may establish and maintain a permanent operating fund for each canteen. The fund shall consist of the receipts from the sale of commodities at the canteen.

The statute, of course, does not directly address the question you pose. It thus becomes necessary to attempt to determine what the legislature intended the answer to be. In determining the meaning of a statute, "the ultimate goal is to ascertain, and if possible, give effect to the intention of the legislature." *Hines v. Illinois Central Gulf R.R.*, 330 N.W.2d 284, 288 (Iowa 1983), *quoting Iowa Beef Processors, Inc. v. Miller*, 312 N.W.2d 530, 532 (Iowa 1981).

Our examination of the statute and its history convinces us that the legislature did not intend for canteens to be selfsustaining. This conclusion is made particularly clear by an examination of the statutory forerunners of Section 218.98. Prior to 1969, the statute provided in part that:

> *The sales prices of the articles offered for sale shall be fixed by such directors at such amounts as well, as far as possible, render each canteen self-supporting.* The board may establish and maintain a permanent operating fund for each canteen. The fund shall consist of the receipts from the sale of commodities at the canteen and the moneys now in the operating fund of the canteen.

Iowa Code §218.98 (1969) (emphasis added).

Thus, the statute as it existed at this time specifically required canteens to be self-sustaining. Later in 1969, the legislature amended the statute by eliminating the language "and the moneys now in the operating fund of the canteen." 1969 Iowa Acts, Ch. 152, §21. This change, if anything, emphasized the fact that canteens were at that time supposed to be self-sustaining.

However, in the present statute, the underlined language requiring that canteens be self-sustaining has been stricken. This change, which occurred in 1977 Iowa Acts, Ch. 89, §1, clearly suggests that the legislature no longer intends for canteens to be self-sustaining. The Iowa Supreme Court has repeatedly stated that the striking of a provision before the enactment of a statute is an indication that the statute should not be construed so as to include that provision. *Iowa State Ed. Association-Iowa Higher Ed. Ass'n. v. P.E.R.B.*, 269 N.W.2d 446, 448 (Iowa 1978); *Chelsea Theater Corp. v. City of Burlington*, 258 N.W.2d 372, 374 (Iowa 1977); *Lenertz v. Municipal Court of City of Davenport*, 219 N.W.2d 513, 516 (Iowa

1974). Although these cases dealt with statutes that were changed by the legislature in the process of their passage, the principle would seem to be of equal applicability here: the legislature, by deliberately removing language from the statute which would require canteens to be self-supporting, has unequivocably expressed its intent to eliminate this requirement. It would be manifestly improper to resurrect this requirement under the guise of statutory interpretation.

We also find relevant the preamble to the 1977 amendment. The preamble, of course, can be used to discern legislative intent. *Cf. State ex rel Turner v. Limbrecht*, 246 N.W.2d 330, 333 (Iowa 1976). The preamble to the 1977 amendment reads:

> AN ACT providing that the director of the division of corrections of the department of social services shall pay the salary for commissary personnel at the penitentiary and men's and women's reformatories.

We believe that this language is entirely consistent with, and reinforces, our previously stated belief that the 1977 amendment was designed to remove from the statute the requirement that canteens be self-supporting.

Although §218.98 as currently written does provide for a permanent operating fund for each canteen, it does not, as noted earlier, explicitly provide that all expenses must be paid from this fund. The legislature, elsewhere in the same chapter, has indicated that it knows how to impose such a provision when it wishes to. *See* Iowa Code §§218.73, 218.74 (1983). Its failure to provide such language in §218.98 thus additionally indicates its unwillingness to impose such a condition.

We conclude that canteens in state institutions need not be self-sustaining. Funds appropriated to the institution may be used to pay for the salaries of canteen personnel and such indirect costs of canteen operations as utilities. We express no opinion as to whether institutional funds can be used to pay other canteen costs.

August 25, 1983

JUVENILE LAW: Use of Photographs. Iowa Code Section 232.148 (1983). Iowa Code Section 232.148(5) (1983) would allow a peace officer to use the photograph of an alleged juvenile delinquent for a photo line-up purpose showing an array of photographs to victims or witnesses for identification of the perpetrator. Assuming compliance with Iowa Code Sections 232.148(2), (4) and (6) (1983) relating to obtaining and retaining photographs, the provision does not require peace officers to obtain a court order to use the photographs for such purpose. (Hege to McCormick, Woodbury County Attorney, 8-25-83) #83-8-5(L)

August 25, 1983

SCHOOLS: Gifts. Iowa Code §§278.1, 279.42, and 565.6 (1983). A school district board may accept a gift of an auditorium to be built upon school property without submitting the issue to a vote of the district electorate. (Fleming to Benton, State Superintendent of Public Instruction, 8-25-83) #83-8-4

Dr. Robert D. Benton, State Superintendent of Public Instruction: You have asked for our opinion on the following question:

> whether a local school district board of directors may accept a gift of an auditorium to be built upon school property with the facility to be managed and maintained by the school district without submitting the issue to a vote of the electorate of the district.

Your question was submitted because of a proposed gift of an auditorium worth approximately $1,000,000.00 to the Shenandoah Community School District. The auditorium would be constructed on school-owned land adjoining the district's high school.

It is our view that a district board may accept such a gift without submitting the issue to a vote of the people. Moreover, we know of no provision under which a district board would be authorized to submit such a question to the voters. Iowa Code §278.1 (1983) contains a list of subjects that the voters shall have power to

decide and the question of deciding whether to accept a gift is not included.

There are two statutes pertaining to a district board's power with respect to gifts of property. Iowa Code §565.6 (1983) contains the following:

> school corporations, are authorized to take and hold property, real and personal, by gift and bequest and to administer the property through the proper officer in pursuance of the terms of the gift or bequest. *Title shall not pass unless accepted by the governing board of the corporation or township. Conditions attached to the gifts* or bequests *become binding* upon the corporation or township *upon acceptance.* (Emphasis added.)

The language of the statute is clear: the governing board of a school district is the entity that has been authorized to accept gifts, not the voters.

Another statute grants a district board the power to utilize funds received through gifts for either general or schoolhouse purposes "unless limited by the terms of the grant." Iowa Code §279.42 (1983). However, a school district board cannot comply with terms of a grant that are in conflict with state law. We believe the statutes are clear; a school district board may accept a gift of an auditorium to be constructed on school-owned land.

We note that an earlier opinion discussed other questions in connection with gifts to school districts. *See* 1971 Op. Att. Gen. 303. We said that when funds are contributed to a school district for the purpose of constructing an auditorium, public bidding procedures must be followed. *Id.* at 304. We also said that the board could decide how land owned by the district could be used, i.e., that an auditorium could be built on school-owned land by utilizing donated funds.

We understand that in the situation that gave rise to your question, the donors intend to donate a completed building to the school district. We believe that it would be appropriate for the school board, in accepting such a gift, to impose conditions on the donors to insure that the auditorium be completed and that it meet various standards imposed by law with respect to buildings that are to be used for schoolhouse purposes. Such conditions should be imposed prior to commencement of construction.

In summary, a district board may accept a gift of an auditorium to be built upon school property without submitting the issue to a vote of the district electorate.

August 29, 1983

COUNTIES; County Officers; Treasurer's interest in purchase of poperty at tax sale. Iowa Code §446.27 (1983). The fact that an emancipated child of the treasurer purchases property at a tax sale does not *per se* render the treasurer interested in that sale in violation of §446.27, but that fact is significant in determining whether a prohibited interest exists. This determination must be made cautiously and in light of the particular facts of each situation. (Weeg to Richards, Story County Attorney, 8-29-83) #83-8-6

Ms. Mary E. Richards, Story County Attorney: You have requested an opinion of the Attorney General concerning the prohibition in Iowa Code Section 446.27 (1983) against a county treasurer being directly or indirectly concerned in the purchase of property at a tax sale. That provision was interpreted in 1980 Op.Att'yGen. 822 as prohibiting a county treasurer and the spouse or any other member of the treasurer's immediate family from purchasing real estate at a tax sale pursuant to Iowa Code Ch. 446. You ask whether an adult son no longer living in the treasurer's household constitutes a member of the treasurer's immediate family as that term is used in 1980 Op.Att'yGen. 822. We are unwilling to hold that the fact a purchaser at a tax sale is an emancipated member of the treasurer's immediate family *per se* renders the treasurer interested in that sale. While the fact of that relationship generally tends to establish that an interest prohibited by §446.27 does exist, we believe there may be situations in which other facts surrounding the tax sale could dispel any serious question as to the treasurer's interest in the sale.

Section 446.27 provides:

> If any treasurer is directly or indirectly concerned in the purchase of real

> estate sold for the nonpayment of taxes, the treasurer and the treasurer's sureties are liable on the treasurer's official bond for all damages sustained by the owner of the property. Sales made in violation of this section are void. In addition, the treasurer is guilty of a fraudulent practice.

In 1980 Op.Att'yGen. 822 we discussed the purpose of this prohibition which, as stated by the Iowa Supreme Court, is primarily "to secure perfect fairness in the conduct of the [tax] sale." *Kirk v. St. Thomas Church*, 70 Iowa 287, 30 N.W. 569 (1886). We further discussed a number of Iowa Supreme Court decisions construing this prohibition, including one in which the Court held the prohibition applicable to the purchase of property by a third person in order to transfer the property to the deputy's minor son. 1980 Op.Att'yGen. 822, 823; *Kirk v. St. Thomas Church, supra*. We then concluded that §446.27 prohibits a spouse or any member of the immediate family of a treasurer or the treasurer's deputy from purchasing real estate sold for nonpayment of taxes pursuant to Ch. 446. 1980 Op.Att'yGen. 822.

In our 1980 opinion, we did not discuss which particular family members should be included within the definition of "immediate family." We have found no Iowa cases addressing this specific question, and courts in other jurisdictions reach differing conclusions. *See, e.g., Grant-Morris Management Corp. v. Weaver*, 166 N.Y.S.2d 610, 611-612, 7 Misc.2d 449 (1957); *Bryant v. Deseret News Pub. Co.*, 233 P.2d 355, 357, 120 Utah 241 (1951) (emancipated adult child is not a member of his or her parents' "immediate family"). *But see Spandaro v. McGoldnick*, 102 N.Y.S.2d 802, 803, 278 App. Div. 668 (1951); *Danielson v. Wilson*, 73 Ill. App. 287, 299 (1898). However, Iowa Code ch. 68B (1983), which governs conflict of interest for state employees and gift law for all governmental officials, does define "immediate family" for the purpose of that chapter as the "spouse or minor children," and later as "wives and unemancipated minor children,"[1] of persons covered by this chapter. §68B.3(12). This definition is not controlling, but we do find it persuasive that in one context the legislature has limited the applicability.

While there is some question as to the definition of "immediate family" as that phrase is used in 1980 Op.Att'yGen. 822, we believe the primary question that needs to be addressed is whether the treasurer is "directly or indirectly concerned" in a tax sale where a family member is a potential purchaser.

A prohibition against a "direct or indirect interest" is contained in a number of other statutory provisions. *See, e.g.*, Iowa Code Ch. 68B (1983) and §§314.2, 331.342, 362.5, 403.16, and 721.11. These provisions have been construed in court decisions and in a number of opinions by this office. In one significant case, the Iowa Supreme Court in *Wilson v. Iowa City*, 165 N.W.2d 813 (Iowa 1969), reviewed the prohibition in §403.16 against a public official acquiring a direct or indirect interest in an urban renewal project. The Court voided certain city council actions on the ground that some council members faced a conflict of interest under this statute because of their financial interests in urban renewal property. In addition, the Court invalidated other council action because of the personal, as opposed to financial, conflict of interest on the part of the mayor, who was also employed in a "position of influence" by the University of Iowa. The University owned urban renewal property and was "vitally interested" in the city's urban renewal project. Finding that §403.16 should be read as incorporating common law conflict of interest principles, the Court stated as follows:

> These rules, whether common law or statutory, are based on moral principles and public policy. They demand complete loyalty to the public and seek to avoid subjecting a public servant to the difficult and often insoluble, task of deciding between public duty and private advantage.
>
> It is not necessary that this advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the *potential* for conflict of interest which the law desires to avoid.

[1] In Op.Att'yGen. #81-8-39(L), we concluded that the reference to wives in §68B.3(12) would likely be held unconstitutional, of a statutory prohibition against conflict of interest to extend only to a person's spouse and minor children.

(emphasis in original) 165 N.W.2d at 822.[2]

The *Wilson* Court thus makes clear that a conflict of interest may arise from a situation where a public official could potentially benefit from a personal relationship as well as a financial one. Further, *Wilson* emphasizes that even the *potential* for conflict, as opposed to an actual conflict, creates a serious conflict of interest problem.

In addition, prior opinions of this office have construed the phrase "direct or indirect interest" in situations where a familial relationship raises a question as to the applicability of the statutory prohibition. For instance, §362.5 prohibits a 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 the officer's or employee's city." This statute then enumerates several exceptions to this prohibition. We have held that a "direct or indirect interest" under this section did exist when a person was a city officer or employee and his or her spouse entered into a business transaction with the city, but that this interest was not prohibited by statute so long as one of the statutory exceptions applied. 1976 Op.Att'yGen. 551; 1973 Op.Att'yGen. 127; 1972 Op.Att'yGen. 338; 1966 Op.Att'yGen. 38.

Most recently, we concluded in 1980 Op.Att'yGen. 580, that an indirect interest was created within the meaning of §362.5 when the spouse of a council member was a member and stockholder in an engineering firm that did business with the city. We ultimately found that despite this indirect interest, one of the statutory exceptions was applicable and rendered the contract valid. 1980 Op.Att'yGen. 580. *See also* 1978 Op.Att'yGen. 769 (interpreting §§403A.22 and 721.11 to find that ownership of property by the spouse of a municipal housing agency board member rendered the board member interested in that property; however, another statute neutralized the potential conflict of interest);1928 Op.Att'yGen. 372 (prohibition against direct or indirect interest does not bar township trustee from hiring son as road superintendent where employment is made in good faith and father does not directly or indirectly profit from the appointment). Thus, while these opinions establish that a spousal relationship was sufficient in these cases to establish a "direct or indirect interest" within the meaning of the governing statute, statutory exceptions operated in each instance to prevent a statutory violation.

In addition, in the area of common law conflict of interest, we have held that a mere familial relationship does not create a *per se* conflict of interest, but there may be specific facts in a particular situation that transform a mere familial relationship into an actual conflict of interest. 1980 Op.Att'yGen. 300 (no conflict of interest when a council member votes with other council members to promote his son to the position of police captain); *see also* 1928 Op.Att'yGen. 372.

To summarize, §446.27 prohibits the county treasurer from being directly or indirectly concerned in the purchase of property at a county tax sale. There are no express exceptions to this prohibition contained in this section. We have previously stated that this provision prohibits members of the treasurer's immediate family from participating in a tax sale. 1980 Op.Att'yGen. 822. However, we now believe this earlier statement should not be read as strictly mandatory. That statement was made in construing the "directly or indirectly concerned" prohibition of §446.27. That phrase has been construed in the context of similar statutory prohibitions in a number of opinions, which were discussed above. While we have stated in those opinions that a spousal relationship constitutes a direct or indirect interest under the facts of those cases, we have never extended that conclusion to adult children. Indeed, in the area of common law conflict of interest, one opinion holds to the contrary. 1980 Op.Att'yGen. 300.

[2] Section 403.16 has since been amended, and the legislature has now specifically authorized many of the actions voided by the *Wilson* Court. Iowa Code §403.16 (1983).

As an example of a situation in which a prohibited interest arose, we refer to the case of *Kirk v. St. Thomas Church, supra.* In that case the deputy treasurer arranged for a third party to purchase property at a tax sale in order to later transfer that property to the deputy treasurer's minor son. 30 N.W. at 570. The Supreme Court subsequently invalidated the tax sale on the ground that the treasurer was concerned in the purchase of the property within the meaning of the statute which preceded §446.27, and stated that because the treasurer "acted as the representative of the purchaser he is presumed to have conducted the sale with reference to the interest of his principal, rather than with that perfect fairness and impartiality that the law requires; and it appears to us that the case is in precisely the same condition it would have occupied if he had personally bid in that property." *Id.* at 570-571. The Supreme Court obviously believed that in this case, despite the efforts at subterfuge, the actual purchaser of property at the tax sale was not the deputy treasurer's minor son, but the deputy himself. We do not believe the Court intended by this opinion to invalidate every tax sale at which a treasurer's son purchases the property, but that the treasurer's interest in this particular sale was undisputed under the facts of this case.

We are therefore reluctant to find as a matter of law that the familial relationship between a parent and an emancipated son or daughter inherently creates a direct or indirect interest which violates §446.27. While the fact this familial relationship exists does not automatically constitute a prohibited interest, this fact is very significant and would generally tend to establish that the treasurer was faced with a prohibited interest. However, we are reluctant to apply a *per se* rule because of the possibility that in some circumstances the factual situation may be such as to clearly establish that no prohibited interest exists. We therefore believe each situation should be evaluated on the basis of its specific facts.

August 31, 1983

CONSERVATION: Reversion of unobligated balances in conservation and administration funds. Iowa Code Sections 107.17 and 107.19 (1983). The unobligated balances remaining in the state conservation commission's conservation fund and administration fund (not including that portion of the administration fund reverted to the fish and game protection fund) properly revert to the state treasury on September 30 following the close of each fiscal term, where they are credited to the general fund by the state comptroller. (M. McGrane to Wilson, State Conservation Commission, 8-31-83) #83-8-8(L)

August 31, 1983

SCHOOLS: Transportation: Rules: Due Process Clause. Fourteenth Amend., U.S. CONST.; Iowa Code chs. 281, 285, 290 (1983); Iowa Code §§274.1; 279.8, 282.4, 285.1(1), and 285.12 (1983). Iowa school district boards of directors hold the right and the power to promulgate rules to regulate the conduct of students who ride on school buses and to impose sanctions for violating such rules. Rules should be developed to protect the rights of students who are charged with misconduct in the transportation context. (Fleming to Benton, State Superintendent of Public Instruction, 8-31-83) #83-8-9

Dr. Robert P. Benton, State Superintendent of Public Instruction: You have asked for our opinion on a series of questions with respect to the power of school districts to impose discipline for misconduct by student passengers on school buses. The complexity and ambiguity of the school laws pertaining to transportation and the complexity of the problems you present require us to discuss a variety of issues inherent in the specific questions you raise.

At the outset, we are of the view that a school district board has the right and the power to promulgate and enforce rules to ensure the safety and welfare of students who are transported to and from school and school activities by the school district. In our view, the statutory grant of a right to transportation is not absolute just as the right to a free public education is not absolute. Misconduct in the classroom is subject to sanction, pursuant to appropriate procedures that protect constitutional rights. Just so, misconduct on school buses is subject to sanctions, pursuant to appropriate procedural protections of the student's rights.

The questions you present are as follows:

1. When the misbehavior of individual students on a school bus endangers the safety of others on the bus, may a school district remove the misbehaving student from regular school bus transportation temporarily or for longer periods of time, such as the remainder of the school year, when the student is statutorily entitled to transportation Iowa Code Chapter 285 (1983)?

2. If the answer to the above question is in the affirmative, must a school district which has removed a student from the regular school bus transportation provide an alternate means of transportation or reimbursement for the student? The alternative would require the parents to accept the entire burden of transportation for the removed student.

3. If either or both of the above questions are answered in the affirmative, what procedural due process, if any, is required?

4. May a school district suspend or expel students from school, under the authority of Section 282.4, for violations of valid school rules established by the school board regarding conduct of students on school-provided transportation?

Our answers to these questions are based on an exploration of the statutory framework as well as the practical problems inherent in the transportation of students by a school district.

I. THE STATUTORY FRAMEWORK

Iowa Code §274.1 grants to a school district "exclusive jurisdiction in all school matters" in the district. The district board of directors is the governing body of the school district. *See Board of Directors of Waterloo v. Green*, 259 Iowa 1260, 1266-1267, 147 N.W.2d 854, 857 (1967). A district board is vested with broad power to promulgate rules as follows:

> The board shall make rules for its own government and that of the directors, officers, employees, teachers and pupils, and for the care of the schoolhouse, grounds, and property of the school corporation, and aid in the enforcement of the same, and require the performance of duties by said persons imposed by law and the rules. The board shall include in its rules provisions regulating the loading and unloading of pupils from a school bus stopped on the highway during a period of reduced highway visibility caused by fog, snow or other weather conditions.

Iowa Code §279.8, First para. (1983). The addition of the last sentence to this paragraph in 1980 by 1980 Iowa Acts. ch. 1082, §1, provides clear indication that the legislature intends that a board's general rulemaking authority extends to the regulation of the school transportation system.

In addition to the rulemaking authority granted by §279.8, the district boards hold power under Iowa Code §285.10(2) (1983) to "[e]stablish, maintain and operate bus routes . . . and to properly safeguard the health and safety of the pupils transported." *See also* Iowa Code §§285.10(4) and (5) (1983).

Thus, it is clear that a district board is empowered by the General Assembly to promulgate reasonable rules and to apply those rules in a reasonable manner to students who are transported to school pursuant to Iowa Code §285.1(1) (1983) and Iowa Code §285.1(14) (1983). Moreover the General Assembly has provided a specific procedure in the "event of a disagreement between a school patron and the board of the school district," Iowa Code §285.12 (1983), concerning school bus issues. Such a disagreement may be brought before the area education agency board; either party to the dispute may appeal the decision of the AEA to the state superintendent under the terms of §285.12.

We turn then to the practical problems inherent in the transportation of students of various ages and status. The main responsibility of a school bus driver is to operate the bus, pursuant to law. *See* Iowa Code §321.1(27) (definition of school bus) and Iowa Code §321.1(43) (1983) (definition of chauffeur). We also understand that in most circumstances no supervision of student passengers is provided, especially during the course of the daily transportation of students to and from school. It seems appropriate to acknowledge that the types of potential

mischief that can occur on a school bus is limited only by the imagination of the students who ride the particular bus. The only case we have found on this subject, *Rose v. Nashua Board of Education*, 506 F.Supp. 1366 (D.C. N.H. 1981); *Affirmed*, 679 F.2d 279 (1st Cir. 1982), supports this view. Excessive noise, teasing younger or smaller children, throwing objects in and out of the bus and more serious vandalism are but a few of the possibilities that come to mind. The potential danger to the driver, to other students and other vehicles is obvious. The school district clearly is charged with the duty to "properly safeguard the health and safety of the pupils transported." The problem is complicated by the fact that the bus driver, because of the demands of the primary task to operate the bus, may be unable to identify the student or students that have violated rules of conduct. Moreover the statutes require separate procedures when special education student's rights are at stake. The special education chapter, particularly in §281.2, "puts a special gloss on any expulsion proceedings. It does not preclude expulsion, but it requires special procedures before expulsion may occur." *Southeast Warren Community v. Department of Public Instruction*, 285 N.W.2d 173, 180 (1979). *See* Iowa Code ch. 281 (1983). Very different problems may arise when a school district provides transportation to nonpublic school students, i.e. students enrolled in parochial schools.[1] The school district is likely to have very limited contact with a parochial school student; transportation is often the only service provided. The measures that are available to the school district when a parochial school student misbehaves on the bus must occur in the context of the limited relationship with such a student.

II. RESPONSES TO YOUR QUESTIONS

A school district board clearly holds power to suspend bus service to a student who has misbehaved. Whether the suspension of service is brief or lengthy would depend on the circumstances. In addition it is our view that the decision of the courts in *Rose v. Nashua Board of Education, supra*, upholding the power of a school board to discontinue a bus route temporarily, would be appropriate under Iowa law. Such a result would be justified only in extreme situations, e.g., where the students who had committed acts that threatened the safety of all the passengers could not be identified.

We believe that the answer to your second question would depend on the facts of a given case. The discussion with respect to Question 3 provides further guidance. We note that the discretion granted to a district board to provide transportation "either directly or by reimbursement for transportation," Iowa Code §285.1(1) is particularly useful in the context of the need to impose sanctions for misbehavior on a school bus. If the conduct of a student is so egregious that permanent denial of transportation by school bus is necessary to protect the safety of others, reimbursement for transportation pursuant to §285.1(1) may provide a viable solution in some circumstances but is not required. We do not suggest that reimbursement would be required if bus service is suspended temporarily.

Question 3: We come then to the difficult part of your inquiry: how much process is due? The Supreme Court in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), established the principle that the due process clause applies when a student is suspended from school for 10 days and that before such a sanction may be imposed a student is entitled to some kind of notice and some kind of hearing.

The duty of a district board to provide transportation to eligible students as prescribed by Iowa Code §285.1 (1983) has been held to be mandatory. *See, e.g., Mumm v. Troy Township School Dist.*, 240 Iowa 1057, 38 N.W.2d 583 (1949);

[1] We express no view about the potential issues where a school district provides transportation to parochial students. In such controversies, Establishment Clause issues, especially entanglement of the state in religious matters, are lurking in the background. *See Americans United for Separation of Church and State et al v. Benton, et al*, 413 F.Supp. 955 (S.D. Iowa 1976); *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 29 L.Ed.2d 745, 755 (1971) (three part test for deciding Establishment Clause problems).

Silver Lake Consol. School Dist. v. Parker, 238 Iowa 984, 993, 29 N.W.2d 214 (1947); *Harwood v. Dysart Consol. Sch. Dist.*, 237 Iowa 133, 21 N.W.2d 334 (1946). However, as indicated above, this statutory duty to provide transportation is coupled with authority to discipline students as necessary.

We note that the courts have resisted, as much as possible, interference in the resolution of persistent and difficult questions of educational policy. *See Hendrick Hudson District Board of Education v. Rowley*, U.S. , 73 L.Ed.2d 690, 713, 102 S.Ct. 3034 (1982). The Iowa Supreme Court has upheld school district rules if such rules are found to be reasonable. *See Bunger v. Iowa High School Athletic Association*, 197 N.W.2d 555, 563-565 (1972); *Board of Directors of Waterloo v. Green*, 259 Iowa at 1266-1267, 147 N.W.2d at 857-859. Absent the abuse of discretion, the reasonable enforcement of rules is upheld. *See Bunger, supra; Green, supra*; and *Kinzer v. Directors of Ind. Sch. District of Marion*, 129 Iowa 441, 445-446, 105 N.W. 686, 687 (1906).

The courts have not finally resolved whether limitation of school transportation privileges for disciplinary reasons would deprive a student of an interest protected by the Due Process Clause and, if so, what process is due. *See Rose v. Nashua Board of Education*, 679 F.2d 279, 281-282 (1st Cir. 1982).

Instead of attempting to decide in the abstract whether and when the Due Process Clause applies and exactly what process is mandated, we will instead advise you of our views concerning the factors which should be evaluated by school officials so that they may utilize their knowledge and experience in developing procedures which are reasonable and appropriate.

In determining what procedures should be utilized, the school should consider the importance of the interest affected (the nature and severity of the punishment), the risks of erroneous determinations without various procedural safeguards, and the costs and benefits of providing various procedural safeguards. Application of these factors requires knowledge of the relevant circumstances and is within the expertise of school officials.

The need for procedural safeguards clearly varies according to the degree of punishment. Where the punishment would be termination of privileges for a significant period of time, the need for a hearing is significant. (Section 285.12 provides a mechanism for hearing and appeals of transportation disputes.) Where suspension would preclude a student from attending school at all because alternative transportation is impossible, then suspension of transportation would seemingly implicate the same interests as would suspension from school and similar procedures should be provided. *See Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

Conversely, school officials should consider the costs and burdens of providing various procedural safeguards. As recognized in *Rose*, 679 F.2d at 282, there are serious safety concerns connected with misbehavior on school buses. The danger of accidents caused by distraction of the driver is clearly often greater than the dangers caused by misbehavior in the classroom. Additionally, unlike the classroom teacher, the bus driver's attention is directed toward the road and not toward the students. The exigencies of the situation may at times dictate more summary measures than in the classroom. Additionally, the bus driver is not otherwise involved in the educational process and finally, in some situations, it is difficult or impossible to identify the culprits.

As we suggested above, the misconduct will vary. Different sanctions may be required for children of different ages. Misconduct by some students may occur only on the bus but with others, the misconduct may be part of an overall pattern of unacceptable behavior in school.

We take note of the Model Policy and Rules for Student Suspension and Expulsion Procedures prepared by the Department of Public Instruction in 1977. A similar model on this subject prepared by a knowledgeable committee would be helpful to school districts that have not promulgated rules with respect to conduct of school bus passengers. Such a committee would need to address the variety of misconduct, the need for quick action to protect the safety of others, the special problems where parochial students are transported by a school district,

and the very different problems, procedural and otherwise, where handicapped children are involved.

Your last question requires us to consider Iowa Code §282.4 (1983). As we suggested above, in some cases exercise of the board's discretion to provide transportation by reimbursement may be a suitable solution. A district board has power to suspend or expel students as follows:

> The board may, by a majority vote, *expel any scholar* from school for immorality, or for a *violation of the regulations or rules established by the board or when the presence of a scholar is detrimental to the best interests of the school*; and it may confer upon any teacher, principal, or superintendent the power temporarily to dismiss a scholar, notice of such dismissal being at once given in writing to the president of the board.

Iowa Code §282.4 (1983) (emphasis added). *See also* Iowa Code §282.5 (1983) (readmission after expulsion). If misconduct on the bus is a student's *only* problem, we suppose that a sanction with respect to bus service would generally suffice. If misconduct on the bus is only a part of a behavior pattern, it is our view that the evidence of behavior on the bus would be part of the general suspension or expulsion proceeding. It is clear that the statutes grant power to the district board to expel a student for violation of rules, including those pertaining to conduct on a school bus.

Finally, we note that Iowa law provides ample avenues for challenging school board action. *See* Iowa Code ch. 290 and Iowa Code §285.12 (1983). For the right to judicial review of a decision of the State Board of Public Instruction, *see* Iowa Code §17A.19 (1983).

In sum, school districts hold the right and the power to promulgate rules to regulate the conduct of students who ride on school buses and to impose sanctions for violating such rules. Rules should be developed to specify the procedures available to students who are charged with misconduct in the transportation context.

SEPTEMBER 1983

September 1, 1983

SCHOOLS: Gifts. Iowa Code §§279.8, 279.42, and 280.14 (1983). Iowa law does not require school districts to maintain funds raised by outside organizations in the school activity account. A school district board may regulate fund-raising activity during school and school sponsored events and it may regulate the use of funds derived from those sources. (Fleming to Jensen, State Senator, 9-1-83) #83-9-1(L)

September 7, 1983

BEER AND LIQUOR CONTROL: Extention of Credit. Iowa Code §§123.45, 123.49(2)(c), and 537.1301(15) (1983). Barter-exchange trade credits, to the extent that they defer payment, cannot be used as payment for alcoholic beverages or beer. (Walding to Gallagher, Director, Iowa Beer and Liquor Control Department, 9-7-83) #83-9-3(L)

September 7, 1983

DRAINAGE DISTRICTS: Interest rate on drainage district warrants not paid for want of funds. Iowa Code Sections 74.1(1), 74.2, 74A.2, 74A.6(1), 74A.6(2), 202.6, 454.19, 455.110, 455.198, 455.213 (1983). The maximum interest rate on unpaid drainage district warrants is set by the statutory committee pursuant to the first sentence of §74A.6(2). The interest rate applicable to anticipatory warrants does not apply to such warrants unless they are issued specifically as anticipatory warrants. (Benton to Neighbor, 9-7-83) #83-9-2(L)

September 12, 1983

CORPORATIONS: Reinstatement; payment of delinquent license fees and filing of delinquent annual reports in order to execute Articles of Dissolution. Iowa Code §496A.89; Iowa Code §496A.130; Iowa Code §496A.128; Iowa Code §496A.122; Iowa Code §496A.123(3). A corporation is required to pay delinquent license fees and file delinquent annual reports in order to execute articles of dissolution pursuant to Iowa Code §496A.89. However, a corporation which has had its certificate of incorporation cancelled is not required to be reinstated pursuant to Iowa Code §496A.130 before it may file such reports or pay such fees. (Nassif to Odell, Secretary of State, 9-12-83) #83-9-4(L)

September 12, 1983

STATE OFFICERS AND DEPARTMENTS: Licenses: Refund. Iowa Code §120.8; S.F. 530, §11. Watchmakers who paid administrative fees for two-year regulatory licenses are not entitled to refund where license requirements repealed, absent statutory provision for refund. (Osenbaugh to Halvorson, 9-12-83) #83-9-7(L)

September 12, 1983

TOWNSHIPS; CEMETERIES. Iowa Code Ch. 359 (1983); Sections 144.34; 359.33; 359.37. (1) Townships may levy and expend taxes for maintaining private cemeteries in the township pursuant to §359.33. (2) Townships do not have authority to issue deeds for lots in private cemeteries unless those cemeteries have been dedicated to the township. (3) Townships are not required to maintain private cemeteries in the township. (4) Townships are required to maintain township cemeteries. (5) Townships cannot convey township cemetery property that has been used for burials to a third party for another use, such as farming. (6) Remains in township cemetery lots may be moved pursuant to §144.34. (Weeg to Neighbor, Jasper County Attorney, 9-12-83) #83-9-6(L)

September 12, 1983

TOWNSHIPS; CEMETERIES. Township's authority regarding land dedicated for cemetery purposes. Iowa Code Ch. 359 (1983); Section 359.37. A township is in most situations not authorized to farm land dedicated to the township for cemetery purposes because that use is generally inconsistent with the dedication. (Weeg to Huffman, Pocahontas County Attorney, 9-12-83) #83-9-5(L)

September 15, 1983

COUNTIES AND COUNTY OFFICERS; Treasurer—Collection of sewer service charges at tax sale and redemption therefrom. Iowa Code Chapters 446, 447; §384.84(1) (1983). Sewer service charges certified to the county auditor as unpaid are collected by the county treasurer at tax sale with delinquent ordinary taxes for a single sum. One entitled to redeem may do so only by paying to the treasurer the full amount for which sold plus costs, penalty, etc. (Peterson to Short, Lee County Attorney, 9-15-83) #83-9-8(L)

September 21, 1983

ENVIRONMENTAL QUALITY: Beverage Container Deposit Law. Iowa Code Sections 455C.1, 455C.2, 455C.3, 455C.13, 455C.7 (1983). A distributor of beverages may enter an agreement with a dealer that the dealer will not present empty house brand containers back to the distributor for reimbursement. The distributor cannot, by entering an agreement with a dealer, avoid its statutory duties to accept and pick up empty containers from a redemption center for a dealer served by the distributor and to pay the redemption center the refund value and handling fee. (Ovrom to Rodgers, State Senator, 9-21-83) #83-9-9(L)

OCTOBER 1983

October 3, 1983

JUDGES; Judicial Retirement System; Credit for prior judicial service. Chapter 602; §602.36, Ch. 605A; §605A.4. A district associate judge who is subsequently appointed to a judgeship which is covered by the Judicial Retirement System can buy into the system and get credit for prior judicial service. (Pottorff to O'Brien, Court Administrator, 10-3-83) #83-10-1(L)

October 5, 1983

REAL PROPERTY; Co-operative Ownership; Requirement for Platting. Iowa Code Chapters 499A and 409 (1983). A development of single-family residence separated by yard space from similar structures does not qualify for co-operative association consideration and must be platted. (M. McGrane to Schroeder, State Representative, 10-5-83) #83-10-2(L)

October 6, 1983

BEER AND LIQUOR CONTROL: Verification of Age Form. Statutory Authority. Iowa Code §§68A.1, 68A.2, 68A.7, 68A.8, 123.3(33), 123.4, 123.21, 123.21(4) and (5), 123.47, 123.48(1) and (2), and 123.49(3) (1983); 150 IAC §4.32. The director of the Iowa Beer and Liquor Control Department, with the approval of the liquor council and subject to the provisions of the Iowa Administrative Procedures Act, can promulgate a rule to authorize the use of a verification of age form pursuant to Iowa Code §123.21 (1983). An individual who refuses to sign the form can be denied a purchase. The verification of age form would be a public record subject to public inspection. Use of the form would not constitute an equal protection violation. Finally, a licensee or permitee could use a verification of age form. (Walding to Royce, 10-6-83) #83-10-3(L)

October 6, 1983

COUNTIES; County Sheriff; Housing Allowance. Iowa Code §331.907 (1983). An annual housing allowance constitutes compensation, and therefore may only be paid to an elected county officer at the discretion of the county compensation board. (Weeg to Kenyon, Union County Attorney, 10-6-83) #83-10-4(L)

October 6, 1983

MUNICIPALITIES; Police and Fire Retirement System Investment in Annuities. Iowa Code sections 97B.7(2)(b), 411.7(2), 511.8(5) (1983). A police and fire retirement system may invest in "guaranteed-interest group annuity contracts" if the qualifications of subsections 5 and 8 of Iowa Code section 511.8 (1983) are met. (Haskins to O'Kane, State Representative, 10-6-83) #83-10-5(L)

October 10, 1983

INSURANCE: Workers' Compensation: Corporate officer's exemption. Iowa Code sections 87.21, 85.61(3)(d) (1983); 1983 Iowa Acts, S.F. 51, §§4, 5, 7, 8. The "written rejection" form set out in 1983 Iowa Acts, S.F. 51, §5 is of no force and effect for purposes of obtaining the corporate officers' exemption from the workers' compensation law, Iowa Code ch. 85, until January 1, 1984; the procedure set forth in Iowa Code §85.61(3)(d) (1983), as modified, must be followed until that time. (Haskins to Landess, Industrial Commissioner, 10-10-83) #83-10-6(L)

October 17, 1983

MUNICIPALITIES; Civil Rights. Iowa Code §§364.2(3) 601A.19 (1983). A City is within its authority to enact a local civil rights ordinance which expands the protections granted its citizens under the state statute, as long as the ordinance is not irreconcilable with either the procedural mechanism or substantive rights provided by Chapter 601A. A City may not enact a local civil rights ordinance through use of a referendum procedure. (Herring to Rosenberg, State Representative, 10-17-83) #83-10-7

Ralph Rosenberg, State Representative: You have asked this office to provide an Attorney General's Opinion on two questions:

1. Is it within the scope of the statutory authority of the City of Ames to enact an amendment to its local ordinance which would prohibit discrimination based on marital status or sexual orientation?

2. Does the City of Ames have the power to enact an amendment to its human relations ordinance by the method of referendum?

Our response to your questions requires an analysis of the Iowa Code provisions governing city government powers enacted after the passage of the Home Rule Amendment in 1968, as well as Chapter 601A prohibiting discrimination in certain areas and upon certain bases.

I. Limitations on Local Ordinances

When enacted in 1965, the Iowa Civil Rights Act contained the following language, currently found in Iowa Code §601A.19 (1983):

> Nothing contained in any provision of this chapter shall be construed as indicating an intent on the part of the general assembly to occupy the field in which this chapter operates to the exclusion of local laws not inconsistent with this chapter that deal with the same subject matter.

When this language was enacted, no home rule amendment to the Iowa Constitution existed and municipal corporations passed their ordinances under the authority of Iowa Code §366.1 (1962):

> Municipal corporations shall have power to make and publish, from time to time, ordinances not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall deem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars or by imprisonment not exceeding thirty days.

In light of the language of this section and that now found in section 601A.19 permitting local laws dealing with discrimination, it is clear that the Legislature intended to empower a city to pass ordinances dealing with the problem of discrimination, as long as those ordinances were "not inconsistent with" the terms of Chapter 601A.

The passage in 1968 of the Home Rule Amendment to the Iowa Constitution, Art. III §38A, granted municipal corporations the power and authority to conduct their local affairs as long as the exercise of that power and authority was "not inconsistent with the laws of the general assembly." The Legislature then exacted Iowa Code §364.2(3) (1983) in 1972 defining the inconsistent exercise of city power:

> An exercise of a city power is not inconsistent with the state law unless it is irreconcilable with the state law.

The Iowa Supreme Court construed this section in *Green v. City of Cascade*, 321 N.W.2d 882 (Iowa 1975), stating that state laws and local ordinances are to be interpreted in a harmonious fashion unless they cannot be reconciled, in which case the state law must prevail. The court then defined the terms used in section 364.2(3):

> irreconcilable means 'impossible to make consistent or harmonious' while inconsistent mean 'incongruous, incompatible, irreconcilable.'

Green, 231 N.W.2d at 890.

From this history of section 601A.19's language permitting the passage of local civil rights laws and the language of the Iowa Constitution and statutes regarding local government ordinances, it is apparent that as long as local ordinances are not irreconcilable with the state's statutory scheme for the prohibition of discrimination, they are valid.

II. Analogous Case Law

The Iowa Supreme Court has construed the provisions of section 601A.19, although each holding has focused upon instances of procedural irreconcilability rather than conflicts in substantive law, such as those suggested by your inquiry. In *Cedar Rapids Human Rights Commission v. Cedar Rapids Community School District*, 222 N.W.2d 391 (Iowa 1974), the Court faced an attempt by a local commission to enforce its ordinance in a case of sex discrimination. Because of the terms of section 601A.19 and the statutory and constitutional provisions governing home rule, the court held a local government could create a local human rights ordinance setting forth procedures governing the local commission's processing of complaints of discrimination. "[A] city has the authority under home rule power and under section [601A.19], The Code, to create this type [human rights] of commission, assuming adequate safeguards and guidelines govern the delegation of any quasi-judicial or quasi-legislative powers." 222 N.W.2d at 399. Because the ordinance under review in *Cedar Rapids* did not provide for appellate review by a district court of the local commission's findings unlike Chapter 601A, it was held to be invalid because "it was the legislative intent that ordinances adopted for the purpose of implementing Chapter 601A must not be inconsistent." 222 N.W.2d at 402.

It is important to note the Supreme Court's citation of *Hutchinson Human Relations Commission v. Midland Credit Management, Inc.*, 213 Kan. 308, 517 P.2d 158, 162 (1973) in *Cedar Rapids* for the proposition that discrimination is a local problem which "must eventually be dealt with and solved by people in the localities where they live." 222 N.W.2d at 399. Clearly, the Iowa Supreme Court views the prohibition of discrimination as a matter of concern for the entire state as well as one which may most appropriately be dealt with at the local level. The Legislature understood this and permitted localities to deal with discrimination in a manner "not inconsistent with" Chapter 601A.

The next case to deal with this issue was *City of Iowa City v. Westinghouse Learning Corporation*, 264 N.W.2d 771 (1978), where the Iowa Supreme Court noted that the Iowa Constitution's provisions regarding home rule as well as section 601A.19 indicated the field of discrimination law was not occupied by the state legislature to the exclusion of local laws. Chapter 601A establishes a "complete and comprehensive legislative plan for processing complaints concerning discriminatory practices" and, insofar as procedural mechanics are concerned, a local ordinance cannot deviate from the Legislature's procedural scheme by providing for judicial determinations of discrimination rather than an administrative agency determination. 264 N.W.2d at 772-73. Even if the procedure created by a local ordinance attempts to improve on the procedural scheme, it still frustrates the legislative purpose of Chapter 601A (which focuses upon an administrative resolution of the problem of discrimination); such an ordinance is therefore irreconcilable and cannot stand.

Most recently, in *Dietz v. Dubuque Human Rights Commission*, 316 N.W.2d 859 (Iowa 1982), the Iowa Supreme Court reviewed the provision of Chapter 601A permitting local civil rights laws following its amendment in 1979 to provide for cooperation and deferral/referral between local and state agencies. The court held that the first, original paragraph of section 601A.19 (quoted above) coupled with a new, second paragraph indicated an intent on the part of the Legislature "to provide for local agencies and to authorize them to adopt ordinances tracking with the provisions of Chapter 601A. . . .," including the procedural mechanics of judicial review. 316 N.W.2d at 861.

It is important to note that the original paragraph of section 601A.19, enacted in 1965, differs from the provisions contained in the amendatory language of the second paragraph added in 1978:

> Nothing in this chapter shall be construed as indicating an intent to prohibit an agency of local government having as its purpose the investigation and resolution of *violations of this chapter* from developing procedures and remedies necessary to insure the protection *of rights secured by the Iowa Civil Rights Act*. An agency of local government and the Iowa Civil Rights Commission shall cooperate in the sharing of data and

research, and coordinating investigations and conciliations in order to eliminate needless duplication.

The original paragraph empowers local governments to legislate in the area of discrimination; the amendatory language allows those governments to protect rights granted by the state statute, irrespective of those contained in the local law. Thus, a local government may grant a broader range of civil rights to its citizens as long as the procedural mechanism established in Chapter 601A is utilized in the local ordinance. It is permissible for a local authority to pass an ordinance banning additional forms of discrimination where the Iowa Legislature has not spoken to permit such discrimination. A local authority is not preempted by the passage of Chapter 601A from offering greater protections and rights to its citizens, as long as the procedures of Chapter 601A are used and the local prohibitation is not irreconcilable with Chapter 601A's terms.

III. Consistency of Marital Status Protections

The terms of Chapter 601A prohibit marital status discrimination in solely one area, that of credit. Iowa Code §601A.10 (1983). The Iowa Legislature has not acted to prohibit or to permit such discrimination in other areas. The proposed City of Ames ordinance not only bans marital status discrimination in the area of credit practices, but it seeks to expand the protection of local law to persons having a certain marital status in other areas as well (*i.e.*, employment, accommodations and services, housing, education, and aiding and abetting.) *See*, Proposed Ames Ordinance §14.6, .7, .8, .9, .10, .11. As Chapter 601A does not permit that form of discrimination in these areas and is merely silent with respect to its prohibition, the Ames ordinance may speak to this problem as it affects the citizens of Ames. There is no irreconcilability if a city seeks to afford greater rights to its citizens, as long as it does not restrict rights granted by the state statute.

IV. Consistency of Sexual Orientation Protections

The terms of Chapter 601A prohibit discrimination on the basis of sex in a number of areas: employment, accommodations or services, housing, education, credit practices, and aiding or abetting. *See*, Iowa Code §§601A.6, .7, .8, .9, .10, and .11 (1983). There are, however, exceptions to this broad prohibition of sex discrimination, such as those in the area of housing and retirement plans. *See*, Iowa Code §§601A.12(4, 5) and .13 (1983). The Iowa Legislature has not defined the term "sex" in its law and the question, therefore, is whether that term in Chapter 601A's prohibition against sex discrimination is broad enough to encompass discrimination based upon a person's sexual orientation or preference.

The position of the Iowa Civil Rights Commission with respect to whether Chapter 601A permits complaints of sexual orientation or sexual preference discrimination is clear in its departmental rules, contained within Chapter 240 of the Iowa Administrative Code §3.1. The rules speak of sex discrimination based upon a person's anatomical sex, not discrimination based upon a person's sexual preference or orientation. Further, recent litigation in the Iowa Supreme Court has established the Commission's authority to so construe its statute and indicated the Legislature's similar intent in its ban against sex discrimination.

In *Sommers v. Iowa Civil Rights Commission* _____, N.W.2d _____ (S.Ct. No. 681164: filed May 18, 1983, amended September 6, 1983), the Iowa Supreme Court narrowly construed the term "sex" to exclude transsexuals and, by inference, persons of a particular sexual preference or orientation as opposed to anatomical structure. "[T]he legislature's primary concern was a desire to place women on an equal footing with men in workplace . . . to prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred." (Slip. Op. at 9.) Accordingly, the Commission and Court have held that the prohibition against sex discrimination found in Chapter 601A protects men and women from discrimination based upon their anatomical characteristics (as male or female persons), not their orientation or preference respecting sexual activity.

Even so, the fact that the Ames ordinance seeks to grant protection to persons based upon their sexual orientation in addition to their anatomical sex is not irreconcilable with the Legislature's intent in fashioning Chapter 601A. The Legislature occupied the field to ban discrimination against a person because he/she is a male or female. It left open the opportunity for local authorities to deal with problems of a local nature, to deal with a broader concept of discrimination on the basis of sex, even to reach attitudinal discrimination. Thus, the City of Ames may enact an ordinance extending the protection of its civil rights law to persons in a broader-defined category.

V. Amendment by Referendum

Certainly, as stated above, civil rights is a matter of both local and state-wide concern. Where the Legislature has not occupied the field local ordinances proscribing discrimination may be enacted. The question, therefore, is whether a local ordinance may be enacted through the holding of a referendum as opposed to passage by the city council.

Municipal legislation may be enacted either by ordinance of the representative legislative body of a municipal corporation or by exercise of the power of initiative or referendum, *i.e.*, by direct vote of the electors. 5 McQuillin, *Municipal Corporations* §16.48 (3rd Ed.). Iowa Code §364.2(1) (1983) vests the city's power "in the city council except as otherwise provided by a state law." Accordingly, specific statutory authorization is required for the voters to exercise a city power by initiative or referendum. That statement is consistent with 1971 Op.Att'yGen. 263 in which we opined, prior to passage of the Home Rule Act, 1972 Acts, Chapter 1088, §1, that submission of a question of public opinion to the voters at a regular municipal or school election, in the absence of constitutional or statutory authority, is unlawful.

Examples of questions submitted to voters include: proposed amendments to the Iowa Constitution (Iowa Const., Art. X, §1, 2), contracting state debt (Iowa Const., Art. VII, §5), imposition of local hotel and motel tax (§422A.1), change in form of municipal government (§372.2), award of exclusive franchises (§364.2(4)), issuance of general obligation bonds for general corporate purposes (§384.26), and approval of boundary adjustments (368.19). No provision granting electors power to legislate directly on matters related to discrimination is contained in the Iowa Constitution or Code. Accordingly, it is our judgment that legislation related to discrimination must be enacted by ordinance and not by initiative or referendum.

CONCLUSION

It is the conclusion of this office that although a city may legislate with respect to prohibiting discrimination within the municipality, it must legislate through the passage of an ordinance or an amendment to an ordinance and may not act through the submission of a referendum to the electorate, in the absence of statutory authorization.

October 19, 1983

COUNTIES; Civil Service Commission; Requirements for certified eligible list for promotion: Iowa Code Chapter 341A (1983); Sections 341A.8, 341A.13. (1) When filling a vacancy by promotion, the county civil service commission may consider only those deputy sheriffs who have taken the competitive examination; (2) the certified eligible list for promotion referred to in §341A.8 need not include the names of ten deputies if there are fewer than ten deputies who meet the qualification requirements of that section; (3) the names of all deputies who qualify under §341A.8 must be included on the certified eligible list for promotion if there are fewer than ten qualified deputies applying. (Weeg to McCormick, Woodbury County Attorney, 10-19-83) #83-10-8(L)

October 25, 1983

MUNICIPALITIES; Racing Commission: Definition of "pari-mutuel system" and prohibition on use of revenue bonds. Iowa Code §419.2 (1983); Iowa Acts,

70th General Assembly, 1983, Senate File 92, §§9(2) and 28. Money received "from the operation of the pari-mutuel system" includes only those funds wagered on races. The prohibition on the use of industrial revenue bonds in Senate File 92, §28, is an exception to the general authority of cities and counties to issue such bonds under Iowa Code §419.2 (1983). (Hayward to Harbor, State Representative, 10-25-83) #83-10-9(L)

NOVEMBER 1983

November 1, 1983

COUNTIES; County Indemnification Fund; Iowa Code Section 331.427 (1983). (1) The legislature did not intend that counties should purchase a liability insurance policy designating the indemnification fund the primary source of payment and the insurance company the secondary source; (2) both final judgments and settlement agreements may be paid from the indemnification fund, but a settlement agreement must be paid from that fund in accordance with the provisions of §331.427(5), despite the operation of Iowa R.Civ. P. 226; and (3) plaintiff's attorney's fees may not be paid from the indemnification fund. (Weeg to Davis, Scott County Attorney, 11-1-83) #83-11-1(L)

November 1, 1983

JUVENILE LAW; Iowa Code Chapters 232, 234, 237, 238; Iowa Code Sections 232.2(45), (46); 232.20; 232.21, (2), (2)(b); 232.44, (6); 232.78; 232.79; 232.95, (2); 234.35, (2), (4) (1983). Iowa Code §§232.21, .44, and .95 (1983) allow a pre-adjudicative transfer of legal custody of a child to the Department of Human Services and such transfer of legal custody is sufficient to meet the requirements of Iowa Code §234.35(2) (1983) rendering the Department initially responsible for the costs of such placement. (Hege to Reagen, Commissioner, IDHS, 11-1-83) #83-11-2(L)

November 4, 1983

COUNTIES; COUNTY EMPLOYEES; BOARD OF SUPERVISORS; Authority of board of supervisors to initiate discipline against county employees. Iowa Code §§331.903, 331.904 (1983). A county board of supervisors does not have the authority to initiate disciplinary action against a county employee; that authority is vested solely in the elected county officer who appointed that employee. (Weeg to Schroeder, Keokuk County Attorney, 11-4-83) #83-11-4(L)

November 4, 1983

STATE OFFICERS AND DEPARTMENTS. Department of Substance Abuse. Confidentiality of Substance Abuse Treatment Information in Relation to the Child Abuse Reporting Law. Iowa Code Sections 125.33, 125.37, 232.69, 232.73, 232.74, 232.75 (1983). The confidentiality of substance abuse patient information is protected by Iowa law, Iowa Code §§125.33, 125.37 (1983). These provisions protecting confidentiality, however, must, where necessary, give away to the higher interests of Iowa Code §§232.69 *et seq.* (1983), providing for mandatory reporting by certain named classes of persons of suspected cases of child abuse. Staff persons of a mental health center, both professional and paraprofessional, are mandatory reporters under Iowa law. A mandatory reporter under Iowa law is free from civil and criminal liability for reporting a suspected case of child abuse in accordance with the provisions of chapter 232. While the provisions of chapter 125 protecting confidentiality are, thus, reconcilable with the reporting provisions of chapter 232, such reconciliation is not possible under federal law and regulations, 21 U.S.C. §1175; 42 C.F.R. Part 2, except where the report can be made without revealing patient identifying information. The use of "qualified service organization agreements" appears to be the only federal mechanism for resolving conflicts between federal confidentiality requirements and the child abuse reporting requirements of the various states. Department of Human Services' personnel bound by the terms of such agreements, however, would in many cases be thus required to act in direct contravention of various provisions of Iowa Code chapters 232 and 235. Because provisions of Iowa law in direct conflict with provisions of federal law in this case are preempted by federal law, persons who are mandatory reporters under Iowa law are not bound by the mandatory reporting provisions where such report would be in conflict with the confidentiality provisions of federal law and regulations. Consequently, qualified service organization agreements are unnecessary. (Freeman to Ellis, Director, Iowa Department of Substance Abuse, 11-4-83) #83-11-3

Mary Ellis, Director, Iowa Department of Substance Abuse: A request for an opinion from the Office of the Attorney General has been made by your Department regarding the relationship between the confidentiality of alcohol and drug abuse patient records and the child abuse reporting requirements of the Iowa Code. Concern has been expressed by personnel of substance abuse treatment facilities who have felt that in certain situations a conflict exists between the need to protect patient confidentiality and the need to report situations of suspected child abuse. Your specific questions are as follows:

1. Are staff of substance abuse treatment facilities mandatory reporters pursuant to Iowa Code §232.69?

2. How do federal and state confidentiality regulations apply to the staff of licensed substance abuse treatment facilities who are mandatory reporters under Iowa Code §232.69?

3. Would the use of a "qualified service organization agreement," as authorized by 42 C.F.R. §2.11, be consistent with the provisions of Iowa law regarding the confidentiality of patient records and the reporting of cases of suspected child abuse?

Answers to your questions demand an examination of certain provisions of Iowa and federal law and rules and regulations.

Iowa law, in requiring the reporting of suspected cases of child abuse, distinguishes between "mandatory" reporters and "permissive" reporters. Mandatory reporters are subject to civil and criminal liability for knowingly and willfully failing to report a suspected case of child abuse. Iowa Code §232.75 (1983). Permissive reporters,[1] on the other hand, bear no express statutory civil or criminal liability for failing to so report. Iowa Code §232.69(1)(a) defines mandatory reporters to include:

1) Every health care practitioner[2]

2) Who examines, attends, or treats a child, and

3) Who reasonably believes the child has been abused.

In much the same way, §232.69(1)(b) further names as mandatory reporters:

1) Every social worker under the jurisdiction of the department of social services, any social worker employed by a public or private agency or institution, public or private health care facility as defined in section 135C.1, certified psychologist, certificated school employee, employee of a licensed day care facility, member of the staff of a mental health center, or peace officer

2) Who in the course of employment

3) Examines, attends, counsels or treats a child, and

4) Reasonably believes a child has suffered abuse.

Clearly the legislature has sought to name as mandatory reporters those persons outside of the home setting who are most likely to have significant contact with children and who would, thus, be most likely to become aware of suspected cases of child abuse. It must be noted, though, that the classes of persons listed are *not* mandatory reporters with respect to *all* children. Rather the legislature limits mandatory reporting to those cases involving health care practitioners who

[1] A "permissive" reporter is any person other than a mandatory reporter who believes a child has been abused and who may, but is not required to, make a report as provided by Iowa Code §232.70.

[2] A "health practitioner" is specifically defined by §232.68(4) to include:

> [A] licensed physician and surgeon, osteopath, osteopathic physician and surgeon, dentist, optometrist, podiatrist or chiropractor; a resident or intern in any of such professions; and any registered nurse or licensed practical nurse.

examine, attend, or treat a child and who believe the child has been abused and other persons named in §232.69(1)(b) who in the course of employment[3] examine, attend, counsel, or treat a child and who reasonably believe that the child has suffered abuse.[4] As an illustration, then, the counseling of a parent who reveals that he or she has abused his or her child does not render the counselor (i.e., certified psychologist, social worker, member of staff of mental health center) a mandatory reporter with respect to the child unless the counselor is also working in the course of his or her employment with the child. It must be further noted that to be a mandatory reporter, a person must fall within one of the classes of persons listed by §232.69(1). Since §232.69(1)(b) includes the staff of a mental health center, without distinguishing between professional and paraprofessional staff members, it would appear that paraprofessionals who in the course of employment examine, attend, counsel, or treat a child are mandatory reporters with respect to that child.

As noted above, sanctions both civil and criminal in nature exist for a failure by a mandatory reporter to report a suspected case of child abuse. §232.75. Chapter 232, however, also provides for immunity from liability for those persons who in good faith report a suspected situation of abuse. In particular, §232.73 provides:

> *Anyone participating in good faith in the making of a report* or photographs or X rays pursuant to this chapter *shall have immunity from any liability, civil or criminal, which might otherwise be incurred or imposed.* Any such participant shall have the same immunity with respect to participation in good faith in any judicial proceeding resulting from such report or relating to the subject matter of such report.

[Emphasis added]. In addition, §232.74 provides for the admission into evidence of otherwise privileged evidence where that evidence is to be admitted into judicial proceedings involving reports of suspected child abuse and where the evidence relates to the child's injuries or the cause thereof. Iowa Code §232.74. Both of these provisions apply to reports made by both mandatory and permissive reporters. *See State v. Cahill*, 186 N.W.2d 587, 589 (Iowa 1971). These sections, essentially relieving good faith reporters from liability and allowing testimony that otherwise would be privileged, are in keeping with the articulated policy and purpose of the child abuse reporting law. Section 232.67 states in part:

> Children in this state are in urgent need of protection from abuse. It is the purpose and policy of this part . . . to provide the greatest possible protection to victims or potential victims of abuse through encouraging the increased reporting of suspected cases of such abuse . . . .

In accordance with this stated policy and purpose, the legislature clearly has demanded that other interests which might prevent the proper reporting of cases of suspect child abuse must give way to the higher interest of protecting children from abuse.

In light of the above, the confidentiality provisions of Iowa Code chapter 125 need to be examined. To begin, "[t]he registration and other records of facilities shall remain confidential and are privileged to the patient." Iowa Code §125.37(1) (1983). Section 125.37 goes on to provide exceptions to confidentiality to allow the release of nonidentifying information from patients' records for purposes of

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[3] It might be noted that §232.69(1)(a), unlike §232.69(1)(b), does not contain the phrase "in the course of employment." This distinction most likely derives from the fact that many health care practitioners are not "employed" in the usual sense of the word while the persons listed in subsection (b) are, for the most part, operating in an employment relationship. It is fair to conclude that the legislature's use of the terms "examines, attends, or treats" in §232.69(1)(a) implies the performance of such activities by a health care practitioner in his or her professional, rather than personal, capacity.

[4] "Child abuse" or "abuse" is defined at length by §232.68(2). Further definitions are found at Iowa Administrative Code 770-135.1, 135.2.

research and to provide patients' medical records to medical personnel in cases of medical emergency. §§125.37(2), (3). This section, concerned with the records of patients, appears consistent with Iowa Code §68A.7(2) which makes confidential the "[h]ospital records and medical records of the condition, diagnosis, care, or treatment of a patient or former patient, including outpatient."

The reporting provisions of Iowa's child abuse reporting law, §232.70, do not specifically require the release of the registration or other record of a substance abuser; however, information required to be reported may, indeed, be part of such records and, thus, protected by the above confidentiality provisions. Where a conflict does exist between the confidentiality provisions of §125.37 and the reporting provisions of §232.69(1), however, it is our opinion that the legislature, in providing for freedom from civil and criminal liability for reporting cases of suspected abuse, has determined that the interests protected by these two statutes must give way to the articulated urgent interests of the child abuse reporting law.

A similar approach can be used with respect to §125.33 concerning voluntary treatment of substance abusers. Sections 125.33(1) and (3) essentially prohibit the disclosure of a patient's name or the fact that treatment has been requested or undertaken to any law enforcement officer or agency, nor is such information admissible as evidence in any court, grand jury, or administrative proceeding unless authorized by the person seeking treatment. Section 125.33(1) also prohibits disclosure to parents or legal guardians that a minor has sought treatment unless the minor authorizes disclosure. Criminal sanctions attach for disclosure of information prohibited by §§125.33(1) and (3).

The disclosure provisions of §125.33 primarily seek to assure that law enforcement personnel do not receive knowledge that a person is a substance abuser as a result of that person seeking voluntary treatment for his or her condition. Without such protection, substance abusers fearing some type of law enforcement action against them might not seek treatment if a likelihood existed that law enforcement personnel would learn of their presence and their abuse problem through reports by a facility or another patient in a facility. *See* Op.Att'yGen. #82-3-25(L) at p. 7. Also, minors who fear parental reaction might not seek needed treatment and care for their substance abuse problems if they felt their parents could be notified by the facility, its personnel, or other patients at the facility. It appears, though, that most reports of child abuse, either mandatory or permissive, could be made without expressly violating the prohibitions of §125.33, especially since generally reports are made to the Department of Social Services and not to law enforcement personnel. Where a conflict between §125.33 and the child abuse reporting laws does exist, though, we again believe that the legislature, in providing for freedom from civil and criminal liability for reporting cases of suspected abuse, has determined the confidentiality interests of §125.33 are subordinate to the interests associated with protecting a child from potential further abuse.

While reconciliation of the confidentiality provisions of chapter 125 with the reporting provisions of chapter 232 is possible under Iowa law, federal requirements governing the confidentiality of substance abuse patient information cause special difficulties. Federal law and regulations are applicable to those substance abuse programs which are directly or indirectly assisted by the federal government. 21 U.S.C. §1175(a); 42 U.S.C. §4582(a); 42 C.F.R. §2.12(a). *See also* 805 I.A.C. 3.9. Essentially all licensed substance abuse facilities in Iowa are subject to federal confidentiality regulations. Op.Att'yGen. #82-3-25(L) at p. 10.

The federal statutory basis for confidentiality of substance abuse patient information is found at 21 U.S.C. §1175. In particular, §1175(a) provides:

> Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

See also 42 C.F.R. §2.12(a). Subsection (b) of 21 U.S.C. §1175 outlines those situations in which disclosure of confidential substance abuse patient information can be made, including 1) with prior written consent of the patient or 2) without written consent of the patient but a) where a bona fide medical emergency exists, b) where released to qualified personnel for research, audit, or program evaluation purposes minus information which would directly or indirectly identify the patient, and c) where authorized by an order of a court after a showing of good cause.[5]

The confidentiality regulations are specifically applicable to persons engaged in the performance of an alcohol or drug abuse prevention function. Department of Health and Human Services (HHS), Public Health Service (PHS), Alcohol, Drug Abuse, and Mental Health Administration, Legal Opinion 78-1 (January 23, 1978). An "alcohol or drug abuse prevention function" is defined by 42 C.F.R. §2.11(k) as programs or activities relating to alcohol abuse or drug abuse education, training, treatment, rehabilitation or research and includes the performance of such functions by organizations whose primary function is unrelated to alcohol or drugs. Consequently, if a person observes a substance abuser in treatment but if that person does not perform an alcohol or drug abuse prevention function related to that substance abuser, then the federal confidentiality requirements would not apply. Legal Opinion 78-1 *supra*. Persons guilty of violating the federal regulations are subject to criminal penalty. 21 U.S.C. §1175.

The primary prohibition of the federal regulations against disclosure relates to the release of records of the identity of a patient and information concerning the diagnosis, prognosis or treatment of that patient's condition. The "records" of a patient include any information relating to the patient, whether recorded or not. 42 C.F.R. §2.11(o). Thus oral communications do fall within the ambit of the §1175 prohibition against the release of confidential information. "Patient identifying information" includes the name, address, social security number, and other similar information from which a person could identify a patient by access to other public information. 42 C.F.R. §2.11(j). "Communications of information which includes neither patient identifying information nor identifying numbers assigned by the program to the patients," however, do not constitute disclosures of records. 42 C.F.R. §2.11(p)(3).

Thus where program personnel are able to report a suspected case of child abuse to the Department of Social Services without revealing identifying information, then the report can be made without fear of penalty under federal law. In at least one legal opinion, the Department of Health and Human Services (HHS) has stated that "patient identifying information," as used in the federal regulations, refers to "information which can be used to identify a patient, with reasonable accuracy and speed, *as an individual who has applied for or been given diagnosis or treatment for drug abuse or alcohol abuse.*" HHS, PHS, Alcohol, Drug Abuse, and Mental Health Administration, Legal Opinion 78-3 (February 1, 1978). (Emphasis added.) In that opinion it was determined that it is permissible under federal confidentiality regulations for a hospital to report, as required by state law, the positive venereal disease results of its alcohol and drug abuse patients so long as the information in the report did not identify those patients as alcohol and drug abuse patients. In much the same way, reports required under child abuse reporting laws which do not reveal a patient as a patient in a substance abuse treatment facility are permissible under federal confidentiality regulations.

As noted above, however, reports of information required to be supplied by Iowa Code §232.70 will, in certain situations, call for information (such as the present whereabouts of the child) that cannot be released because it identifies the child as a patient of a substance abuse facility. Recognizing that the personnel of many substance abuse facilities were placed in positions of jeopardy because of conflicts between the federal confidentiality regulations and the child abuse

[5] Subsection (e) of 21 U.S.C. §1175 refers to the release of records within the armed forces or components of Veterans' Administration furnishing health care to veterans.

reporting laws of their states, the Department of Health, Education and Welfare (now Health and Human Services) issued a legal opinion advising substance abuse facilities to enter into "qualified service organization agreements" as authorized by 42 U.S.C. §§2.11(m), (n), and (p)(2). Opinion from Robert B. Lanman, Senior Attorney, Public Health Service to John T. Dempsey, Director of the Department of Social Services, State of Michigan, dated May 3, 1979. Attached to the opinion is a Joint Statement on the Confidentiality of Alcohol and Drug Abuse Patient Records and Child Abuse and Neglect Reporting, issued by the Alcohol, Drug Abuse and Mental Health Administration and the National Center on Child Abuse and Neglect on February 1, 1978, as supplemented and modified on April 17, 1979. The opinion expressly approves the Joint Statement as consistent with provisions of federal regulations as those provisions are highlighted and explained by the opinion itself.

The primary requirements of a qualified service organization agreement is that the service organization receiving information from the substance abuse program agree to be fully bound by federal confidentiality regulations, to institute appropriate procedures for safeguarding such information, and to resist in judicial proceedings any efforts to obtain access to patient information unless federal regulations otherwise provide for such access. No express mention is made in the federal regulations concerning the reporting of child abuse information pursuant to a qualified service organization agreement. Authority to enter into such agreements is at least questionable. These agreements, however, appear to be the only federal mechanism for the release of information confidential under federal law to the child abuse authorities of the various states.

In addition to questionable authority for such agreements under federal law, it is clear, in examining various provisions of Iowa Code chapters 232 and 235A concerning child abuse reporting and the maintenance of report information in a central registry, that personnel of the Department of Human Services bound by the terms of a qualified service organization agreement would, in acting under the terms of the agreement, be maintaining information in certain situations in direct contravention of provisions of Iowa law. Iowa law does provide for the release and redissemination of information contained in child abuse reports to certain defined persons in certain limited circumstances. *E.g.*, Iowa Code §§232.71, 235A.15(2), 235A.17. Furthermore, requiring qualified service organization agreements and training all state social service workers, juvenile authorities, and courts in the proper use of information released to the Department of Human Services pursuant to these agreements would result in a procedural quagmire subjecting social services personnel to possible criminal liability under federal law for the violation of the complicated terms of federal regulations as expressed in these agreements.

It is our opinion that qualified service organization agreements are unnecessary since federal law, in preempting provisions of Iowa law inconsistent with its terms, essentially renders personnel of substance abuse facilities who are otherwise mandatory reporters under Iowa law *not* mandatory reporters where the release of information confidential under federal law is involved. The federal confidentiality regulations specifically address the relationship of federal and state law, stating in particular that federal law may not authorize the disclosure of information which may not be disclosed pursuant to state law nor may state law authorize or compel disclosure prohibited by federal law and regulation. 42 C.F.R. §2.23. This regulation is consistent with the view expressed in legal opinions issued by HHS that the confidentiality provisions of 21 U.S.C. §1175 preempt inconsistent provisions of state laws. *E.g.* HHS, PHS, Alcohol, Drug Abuse, and Mental Health Administration, Legal Opinions, 78-1 (January 23, 1978); 78-2A (January 26, 1978); 77-8 (March 3, 1977).

The doctrine of federal preemption derives from the Supremacy Clause, Art. VI, ch. 2, of the United States Constitution and essentially provides that state laws which interfere with or are contrary to the laws of Congress are invalid. Preemption comes into play whenever a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Chicago and North Western Transportation Co. v. Kalo Brick and Tile*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258, 265 (1981). State law is invalidated where it

conflicts with federal law, where it would frustrate a federal scheme, or where the totality of circumstances shows that Congress sought to occupy the field. *Matter of Gary Aircraft Corp. v. General Dynamics Corp.*, 681 F.2d 365, 369-370 (5th Cir. 1982). In certain situations, federal law forecloses any activity by a state in a particular area; in other situations, only those provisions of state law which conflict with federal law are preempted. *Hayfield Northern Railroad v. Chicago & Northwestern Transportation Co.*, 693 F.2d 819, 821 (8th Cir. 1982). Congressional intent is determinative. *Id.*

In addressing patient confidentiality, Congress made the confidentiality provisions applicable to those records "maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States. . . ." 21 U.S.C. §1165(a). The definition of "drug abuse prevention function" is broad, covering "any program or activity relating to alcohol abuse or drug abuse education, training, treatment, rehabilitation, or research. . . ." 42 C.F.R. §2.11(k). "Direct or indirect assistance" is viewed as operation through contract, grant, or otherwise of a program by any department or agency of the United States; licensing or registration by a department or agency of the United States; or direct or indirect provision of funds through grants, contracts, revenue sharing, or tax deductions or tax-exempt status by or through any agency or department of the United States. 42 C.F.R. §2.12(a). If the federal regulations are consistent with Congressional intent, it is difficult to envision a substance abuse treatment program that would not be bound by the confidentiality provisions of federal law. Consequently, it appears that Congress did intend to occupy the area of confidentiality of drug and alcohol abuse patient records to the extent that provisions of state law conflict with the provisions of federal law. This conclusion is supported by the following:

> The conferees wish to stress their conviction that the strictest adherence to the provisions of this section is absolutely essential to the success of all drug abuse prevention programs. Every patient and former patient must be assured that his right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome.
>
> Every person having control or access to patients' records must understand that disclosure is permitted only under the circumstances and conditions set forth in this section. Records are not to be made available to investigators for the purpose of law enforcement or for any other private or public purpose or in any manner not specified in this section.

H. Cong. Rep. No. 92-920, 92d Cong., 2d Sess. (1972), reprinted in 1972 *U.S. Co. Cong. and Admin. News*, pp. 2072, cited in part by *United States v. Graham*, 548 F.2d 1302, 1314 (8th Cir. 1977).

Consequently, we conclude that provisions of Iowa law mandating the reporting of information by substance abuse personnel pursuant to §232.69 *et seq.* are preempted by the provisions of federal law protecting the confidentiality of records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function. Where no conflict exists between Iowa's reporting law and the federal confidentiality provisions, preemption does not occur and persons falling within the definition of §§232.69(1)(a) or (b) are mandatory reporters bound by the reporting provisions of chapter 232.

In conclusion, only those persons specifically defined by statute and satisfying all of the statutory elements of Iowa Code §232.69(1) are mandatory reporters required by Iowa law to report suspected cases of child abuse. Reports of child abuse may in certain situations be made without releasing substance abuse patient information made confidential under both Iowa and federal law. Where the reporting provisions of Iowa law conflict with the confidentiality provisions of federal law, federal law prevails. Authority to enter into qualified service organization agreements is questionable under federal law; compliance with the terms of said agreements would, in many situations be in direct contravention with

various provisions of Iowa law. Because of the doctrine of preemption, however, mandatory reporters under Iowa law are not mandatory reporters where such reporting requires the release of substance abuse patient information held as confidential pursuant to federal law. Where, though, no conflict exists between federal and state law, substance abuse personnel who fall within the definitional framework of §§232.69(1)(a) or (b) are mandatory reporters subject to the reporting requirements of chapter 232.

November 3, 1983

MUNICIPALITIES: Cemeteries, Iowa Cost, Art. II §31; Iowa Code Chapter 566 (1983); Iowa Code §§359.33, 364.1, 364.2, 364.7(3), 384.24(3)(k), and 566.14 through 566.18 (1983);Iowa Code §404.10(1973). A municipal corporation is not prohibited from providing contributions to a privately owned, non-profit, nondenominational cemetry which is open to public use. As an alternative, a city could acquire ownership of a private cemetery, wholly or partially. (Walding to Gettings, State Senator, 11-3-83) #83-11-4(L)

November 14, 1983

ELECTIONS: Voter Registration; Residential Telephone Numbers. Chapter 48;§48.6, Ch. 47; §§47.7, SF 545. Senate File 545 provides a specific procedure for the additional of residential telephone numbers to voter registration records which precludes the State Registrar from invoking his general authority under §47.7 or any other section to contract with a private vendor to supply residential telephone numbers. (Pottorff to Nelson, State Registrar, 11-14-83) #83-11-6(L)

November 22, 1983

COUNTIES—PRISONERS—Room and Board Costs. Iowa Code §§331.301, 331.322(10), 331.658, 356.15, 356.30, 356.31 (1983). The County Home Rule Law does not confer upon the county the power to charge inmates for their room and board in the county jail except as provided in Iowa Code §356.30 (1983). Such an ordinance would be inconsistent with the general legislative scheme that except under certain circumstances, it is the county which must pay board and care costs for inmates in county jails. (Blink to Mann, State Senator, 11-22-83) #83-11-7

Thomas J. Mann, Jr., State Senator: You have requested an opinion from this office concerning the power of a county to charge prisoners for their stay in a county jail. Specifically, you pose the following questions:

> 1. Is there any statutory authority, including the Home Rule Act, which authorizes a county to charge a prisoner for his/her stay in a county jail?
>
> 2. If there is statutory authority for such charges, will a county violate the due process or equal protection provisions of the 14th Amendment to the Federal Constitution?
>
> 3. Will a "room charge" violate any other constitutional provision?

Because of our resolution of the first question, it is unnecessary to address the remaining questions.

Analysis begins with the general powers and limitations conferred upon the county through the County Home Rule Law. Iowa Code Chapter 331 (1983). Section 331.301 provides:

> 1. A county 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 county or of its residents . . . .
>
> 3. . . . A county may exercise its general powers subject only to limitations expressly imposed by a state law.
>
> 4. An exercise of a county power is not inconsistent with a state law unless it is irreconcilable with the state law.

(emphasis added).

The determination of whether the exercise of a county power is inconsistent with state law is essentially a question of preemption. In other words, where the

state has passed legislation in a given area, the question is whether the legislature has intended to exclusively regulate the subject matter. Where preemption is applicable, any county regulation is inconsistent with the pervasive state legislation. *See* Iowa Op.AttyGen. page 54 (1980). Although the legislature has not expressly prohibited counties from enacting ordinances allocating responsibility for room and board costs to inmates, the legislature has acted in the area of allocation of financial responsibility for county jail inmates. A review of the relevant statutes reveals a general legislative scheme of allocating financial responsibility for inmates in county jails to the county. It is our opinion that any county ordinance requiring an inmate to bear the cost of his stay in the county jail is irreconcilable with the general legislative scheme concerning the financial responsibility for inmates in the county jails.

Section 331.322(10) expressly provides that it is the duty of the County board of supervisors to "pay for the cost of board furnished prisoners in the sheriff's custody as provided in section 331.658 . . . ." Section 331.658(2) provides "the county shall pay the costs of the board and care of the prisoners in the county jail which costs in the board's judgment, are necessary to enable the sheriff to carry out the sheriff's duties under this section." However, the board "may establish the cost of board . . . in accordance with section 356.30." Section 356.30 concerning county inmates involved in work release programs provides, "every prisoner gainfully employed is liable for the cost of his board in the jail as fixed by the county board of supervisors. The sheriff shall charge his account for such board and any meals provided in section 356.31 . . . ." Section 356.31 provides that by court order wages of employed prisoners shall be disbursed for (1) the meals of the prisoner; (2) necessary travel expense; (3) support of the prisoner's dependents; (4) payment of the prisoner's acknowledged obligations or judgments; (5) the balance to the prisoner. Thus, §331.658(2) gives the board power to charge the inmate for board and other enumerated expenses. Although the enumeration of a specific power does not restrict the general power of a county, §331.301(3), the work release provisions appear to be a legislative exception to the articulated duty of the counties to pay the costs of an inmate's room and board.

In sum, the legislature has expressly provided that it is the duty of the county except in certain articulated circumstances, *see* Iowa Code §§356.15, 356.30, 356.31 (1983), to bear the financial responsibility for inmates in county jails. A county ordinance passing along the financial responsibility for room and board to the inmate cannot be reconciled with the express mandate of the legislature that the county pay the costs of board and care of prisoners. It should be noted that although there appears to be no case law in this area, this conclusion is fostered by the opinion of the New York Attorney General. *See* New York Op.AttyGen. No. 81-50 (April 1981) (A local law requiring that prisoners pay the cost of their maintenance in a county jail is inconsistent with New York Correction Law stating that except under certain express circumstances the county must provide food for prisoners at county expense). Likewise, in our view a county may not use the general powers conferred by §331.301 to enact a provision passing along its statutory financial obligation to inmates in the county jail until such time as the legislature chooses to revise or enact legislation permitting counties to do so.

November 23, 1983

MUNICIPALITIES: Public Sidewalks. Liability of Abutting Property Owners. House File 359 (1983 Session); Iowa Code §364.12(2) (1983). The validity of a statute imposing liability for injuries occasioned by the negligent failure to remove snow and ice on public sidewalks may depend on whether it is viewed as an exercise of the power of taxation or the police power. Regardless of which power is exercised, liability will not be imposed in the absence of an express provision. Finally, mandatory insurance for abutting property owners may be a valid exercise of the police power. (Walding to Priebe, State Senator, 11-23-83) #83-11-8(L)

DECEMBER 1983

December 1, 1983

SCHOOLS: Merged Area Schools; Transfer of Funds. Iowa Code Chs. 24 and 280A, Iowa Code §291.13 (1983). An area school may set aside funds for a particular purpose to the extent allowed by the local budget law. Funds may not be transferred from the general fund to the schoolhouse fund by the area school board of directors or the electorate. (Fleming to Johnson, Auditor of State, 12-1-83) #83-12-1(L)

December 2, 1983

STATE OFFICERS AND DEPARTMENTS; Compensation; Dual Employment; Separation of Powers. Iowa Const. Art. III, §1 : Chp. 79; §79.1 : S.F. 92, §5(4) : S.F. 495, §§9102, 10301. Appointment of a clerk of district court to the State Racing Commission would not violate Article III, Section I of the Iowa Constitution. The appointment would not require the appointee to forfeit all remuneration for services on the State Racing Commission; however, the appointee should not receive remuneration for services on the State Racing Commission which are rendered during time for which he or she is reimbursed for services as clerk of district court. (Pottorff to Doyle, State Senator, 12-2-83) #83-12-2

Donald V. Doyle, State Senator: You have requested an opinion of this office concerning the appointment of a clerk of district court to the State Racing Commission. You point out the position of clerk of district court is currently an elective, county position but will become an appointive, state position in the Judicial Department in July, 1986, under the Court Reorganization Act. S.F. 495 §10301(5). We note that the State Racing Commission is an administrative agency under the executive department of government. *See* 1976 Op.Atty.Gen. 253. We further note that Commissioners of the State Racing Commission receive an annual salary of six thousand dollars ($6,000) plus limited reimbursement for necessary travel and expenses. S.F. 92 §5(4). Specifically, you pose the following questions:

> 1. Will the appointment violate the separation of powers doctrine as contained within Article III, Section 1, of the Constitution of the State of Iowa?
>
> 2. If, however, the appointment can be made without Constitutional violation, would the appointee forfeit all right to remuneration for the Racing Commission post due to the Statutory requirements contained within section 79.1, Code 1983?

In our opinion the appointment would not violate the separation of powers doctrine contained in Article III, Section 1, of the Iowa Constitution. The appointment, moreover, would not require the appointee to forfeit all remuneration for services on the State Racing Commission; however, the appointee should not receive remuneration for services on the State Racing Commission which are rendered during time for which he or she is reimbursed by the state for services as clerk of district court.

I.

The Iowa Constitution divides the powers of Iowa government into three separate departments. Section 1 of Article III provides:

> Departments of government. Section 1. 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. [Iowa Const. Art. III, §1]

Under this language persons charged with the exercise of powers properly

belonging to one department are prohibited from exercising any function appertaining to either of the other two departments.

In order to determine whether there has been a violation of the separation of powers mandate of Article III, it is necessary to define the powers in issue. We have observed that, at a fundamental level, the powers of government may be categorized in relation to the laws of the state. The legislative power is the power to enact laws. The judicial power is the power to interpret laws and adjudicate the rights of persons under the laws. The executive power is the power to enforce laws. 1980 Op.Atty.Gen. 605, 608. *See State v. Lynch*, 169 Iowa 148, 155-56, 151 N.W.81, 83-84 (1915). In application, these distinctions among the departments of government tend to blur to the degree that the efficient administration of any one department involves performance of duties related to other departments. 1980 Op.Atty.Gen. at 608-09. *See Hutchins v. City of Des Moines*, 176 Iowa 189, 209, 157 N.W. 881, 888 (1916). *See generally* 16 Am. Jur. 2d *Constitutional Law* §297 (1979).

Applying these principles to the question which you pose, we observe that no issue will arise under Section I of Article III until the clerks of district court are incorporated into the state Judicial Department. We construe your question to raise the issue whether one person would be exercising powers belonging to both the executive and judicial departments of government. Section I of Article III, however, is applicable only to the instrumentalities through which the state, acting directly in its sovereign capacity, exercises its powers. *Eckerson v. City of Des Moines*, 137 Iowa 452, 464-65, 115 N.W. 177, 182-83 (1908). Clerks of district court, however, are currently county officials. *See* Iowa Code §§331.701-706 (1983). Appointment of a county official to the State Racing Commission, accordingly, will not involve two state positions and will not raise this issue under Section 1 of Article III.

Applying these principles to the question which you pose in light of the incorporation of clerks of district court into the state Judicial Department scheduled for 1986, we observe that no violation of Section I of Article III would occur under the current statutes. The clerk of district court has long been viewed as a ministerial officer. *Abrams v. Ervin*, 9 Iowa 87, 90 (1859). Senate File 495 vests clerks of district court with one hundred sixty-four (164) enumerated duties as well as some, minor discretionary functions. You have not drawn our attention to any specific duty or function about which you are particularly concerned. Based on our review of Senate File 495, we believe that the duties of the clerk of district court remain ministerial in character. *See, e.g.*, S.F. 495 §9102(47) ("The clerk shall . . . [f]orward support payments received under section 252A.6 to the department of social services and furnish copies of orders and decrees awarding support to parties receiving welfare assistance as provided in section 252A.13."). This office has previously determined that Section 1 of Article III has no application to positions which are ministerial in nature because no powers delineated in this section are vested in such positions. 1968 Op.Atty.Gen. 376. Appointment of a clerk of district court to the State Racing Commission, accordingly, will not involve two state positions separately exercising powers delineated under Section 1 of Article III.

II.

Incorporation of clerks of district court as state employees in the Judicial Department in 1986 will raise an additional issue concerning dual sources of state salary. Restrictions on the payment of salaries to state employees are contained in §79.1 which states in relevant part:

> 79.1 Salaries-payment-vacations-sick leaveinjuries in line of duty. Salaries specifically provided for in an appropriation Act of the general assembly shall be in lieu of existing statutory salaries, for the positions provided for in the Act, and all salaries, including longevity where applicable by express provision in the Code, shall be paid according to the provisions of chapter 91A and shall be in full compensation of all services, including any service on committees, boards, commissions or similar duty

> for Iowa government, except for members of the general assembly. [Iowa Code §79.1 (1983).]

Under this language all salaries "shall be in full compensation of all services" including any service on commissions.

The application of §79.1 has been unclear due to past statutory amendment and inconsistent opinions from this office. In 1975, §79.1 provided in relevant part:

> Salaries specifically provided for in an appropriation Act of the general assembly shall be in lieu of existing statutory salaries, for the positions provided for in any such Act, and all salaries shall be paid in equal monthly, semimonthly or biweekly installments and shall be in full compensation of all services, except as otherwise expressly provided. [Iowa Code §79.1 (1975).]

The last phrase in this sentence, "except as otherwise expressly provided," was interpreted to create an exception to the full compensation of state salaries. This office concluded that a salaried state employee could receive per diem compensation for service on a state board or commission if the per diem were expressly provided by the Legislature. 1976 Op.Atty.Gen. 255, 256. Express provision, in turn, was interpreted to include a statute which provided a per diem shall be paid. *Id.* at 256.

In 1976, §79.1 was amended to its current form which spawned a new interpretation. *See* 1976 Session, 66th G.A. Chp. 1001, §16. Construing the amended language, which provides that salaries "shall be in full compensation of all services, including any service on committees, boards, commissions, or similar duty," this office concluded that §79.1 precluded payment of per diem for service on a state commission to any person who is a state employee. 1976 Op.Atty.Gen. 803, 804. The opinion stressed that §79.1 had been amended in 1976 to limit state employees "to a single payment for all services rendered by such employee to the state." *Id.* at 804.

In 1977 this office issued another opinion which cast doubt on, but did not refer to, the 1976 opinion on the amended statute. The 1977 opinion determined that §79.1 did not prohibit an individual from working part-time for two state agencies and noted that the public policy underlying §79.1 "does not prevent dual employment where an employee is not being paid [twice] for the same time period." 1978 Op.Atty.Gen. 308, 309.

In our view, the 1977 opinion reflects a sounder interpretation of §79.1 than the 1976 opinion on this issue. A statute should be construed to effect its purpose *Iowa Department of Transportation v. Nebraska-Iowa Supply Co.*, 272 N.W.2d 6, 11 (Iowa 1978). We agree with the 1977 opinion insofar as the opinion characterizes the policy underlying §79.1 to preclude paying compensation to an individual twice for the same time period. The state has no interest which we can discern in denying compensation to an individual for separate services performed during separate time periods. Conversely, the state does have a fiscal interest in denying additional compensation to an individual for services performed during a period in which the individual is already receiving state compensation. To the degree that the 1977 opinion failed to expressly overrule the 1976 opinion on this issue, we now expressly overrule the 1976 opinion.

Our affirmation of the 1977 opinion is dispositive of the question which you raise. The appointee may not receive remuneration twice for the same time period. Accordingly, we conclude the appointment would not require the appointee to forfeit all remuneration for services on the State Racing Commission; however, the appointee should not receive remuneration for services on the State Racing Commission which are rendered during time for which he or she is reimbursed by the state for services as clerk of district court.

December 7, 1983

STATE OFFICERS AND DEPARTMENTS. Confidentiality of Records. Iowa Code §217.30 (1983); House Concurrent Resolution 37. Information concerning the social or economic conditions or circumstances of particular individuals, who are receiving services or assistance under the Indigent Patient Care Program (Iowa Code Chapter 255), may be disclosed by the

counties, as the local administrative agent, to the University of Iowa Hospitals, as contemplated by House Concurrent Resolution 37, without violating the confidentiality requirements of Iowa Code Section 217.30 (1983). Because the individuals involved are hospital patients, the records in question, although containing financial information, include a medical reason for the referral and are "hospital and medical records" and the University of Iowa Hospitals must maintain the confidentiality requirements imposed upon medical records by Iowa Code Section 68A.7(2), which are comparable to the requirements of 217.30. (Allen to Avenson and Junkins, 12-7-83) #83-12-3

Donald D. Avenson, Representative, Lowell L. Junkins, Senator: On behalf of the Legislative Council, you requested an Attorney General's Opinion regarding the legality of disclosure of patient profile information to University of Iowa Hospitals and Clinics by the respective counties. Specifically you ask:

Is it a violation of Iowa Code Section 217.30 (1983) for the counties to disclose to the University of Iowa Hospitals and Clinics the profile information requested pursuant to House Concurrent Resolution 37 and would the civil damages provision of Iowa Code Section 217.31 (1983) apply in any case to the disclosure?

Is it a violation of Iowa Code Section 217.30(1983) for the counties to disclose to the University of Iowa Hospitals and Clinics the profile information requested pursuant to House Concurrent Resolution 37 and would the civil damages provision of Iowa Code Section 217.31 (1983) apply in any case to the disclosure?

We have reviewed the historical and contemplated relationship between the University of Iowa Hospitals and Clinics, as the principal administrative agency for the Indigent Patient Care Program, and the counties in their capacity as the local administrative entity for the program (see Iowa Code Ch. 255) and the applicable statutes and previous opinions of the Attorney General. We have concluded that information concerning the social or economic conditions or circumstances of particular individuals who are receiving services or assistance may be disclosed under these limited circumstances to the University Hospitals by the counties without violating Iowa Code §217.30.

The close administrative relationship between University of Iowa Hospitals and the counties is as described in Iowa Code Ch. 255. In adopting House Concurrent Resolution 37, the Legislative Council directed the Legislative Fiscal Bureau to conduct a study of the potential costs and savings to state and county government resulting from the establishment of a medical needy program in Iowa. The Legislative Fiscal Bureau is required to oversee the collection of patient profile information from the counties by the University of Iowa Hospitals and Clinics, and then compile and analyze an aggregate patient profile, in order to determine the precise characteristics of the population being served or that might be served by a medically needy program. As the concurrent resolution and your letter of request describes, the profile data collected by the University Hospital are to be considered patient records of the University of Iowa Hospitals and subject to the confidentiality of patient records by that facility. The letter from William D. Stoddard, Director, Patient Fiscal and Admitting Service for the University of Iowa, to the counties requesting the submission of the appropriate information underscores this treatment of patient records as confidential, and makes assurances to the counties that the information once submitted will be treated as confidential patient information. It is in response to this letter, and these assurances, that the information will be submitted by the counties.

Under the terms of the concurrent resolution, the University of Iowa Hospitals and Clinics shall collect the required information and process it into a computerized file for the use of the Legislative Fiscal Bureau. The University will provide forms for the collection of patient profile information on family status, employment, income, resources, insurance coverage, county of residence and other items, necessary to support estimates of those who might also be eligible for a medically needy program. Identifying information will be collected in order to match the profile information with the patient's computerized medical and service records already maintained by the University. Once that match is complete, the records will then be purged of identifying information, and unidentifiable data will be transferred to the Legislative Fiscal Bureau for analysis. It is

important to note that the request only involves the disclosure of profile information contained in county records which are used by the counties as the local administrative agent for the Indigent Patient Care Program to qualify applicants for medical services administered by the University of Iowa Hospitals and Clinics.

The confidentiality of information concerning assistance provided to these individuals is delineated by Iowa Code §217.30, the provisions of which are applicable to the counties in this instance. (§217.30(6), The Code 1983) The specific information sought by the University is made confidential by the terms of Iowa Code §217.30(1)(b). That information may be disclosed for purposes of administration of programs of services or assistance to agencies who maintain the same standards of confidentiality applicable to the Department and the counties. (§217.30(2), The Code 1983).

Because the individuals involved are hospital patients, the records in question at the county level and although containing financial information, include a medical reason for the referral to the Indigent patient Care Program, and are "hospital and medical records . . . of the care or treatment of a patient." *See Head v. Colloton,* 331 N.W.2d 870, at 875 (Iowa 1983). The inclusion of nonmedical information does not disqualify the record from that definition. We have previously expressed our belief that the legislature intended the determination of whether a record is a "medical record" to be made based on the record as a whole. (Op.Att'yGen. # 82-9-3)

The University Hospital is obligated to maintain hospital and medical records as confidential pursuant to Iowa Code §68A.7(2) (1983). By the terms of that statutory provision, the information given by the county to the University Hospital, *if* maintained as a confidential "hospital record" may not be disclosed unless otherwise ordered by the lawful custodian of the records. The assurance that this discretionary release by the custodian, i.e., University Hospitals, will not be made is assumed in their assurance to the counties that they will maintain the records as confidential. The statute alone does not guarantee continued maintenance of the confidentiality of the records once delivered to the University of Iowa Hospitals, but the standards of confidentiality are comparable as required by §217.30(2), The Code 1983.

Additionally, the counties can require confidenttment @comparableto the requirements of §217.30 as a condition of release and approval of use under §217.30(4). The administration of the University Hospitals are "public officials" and their use of these records is arguably in connection with their official duties directly connected with the administration of the Indigent Patient Care Program. Because 217.30(4)(b) is an exception to the condition of release requirement of 217.30(2) of "standards of confidentiality comparable to those imposed...," the application and approval process of (4)(b) in our view implies the authority to condition receipt on adherence to imposed standards of confidentiality.

In our view, the information requested may be released to the University Hospitals to be maintained as a confidential hospital and medical record without violating Iowa Code §217.30 or resulting in damages pursuant to §217.31. Arguments to the contrary certainly exist but in our view are unpersuasive. In any event, disclosure would not violate §217.30 because of 217.30(4)(b) if, upon written application, the counties condition approval for release upon maintenance of standards of "comparable confidentiality."

This opinion is limited in its application to the medically needy program study as described in your request of October 17, 1983, and is based upon the facts as you presented them in your request.

December 8, 1983

GENERAL SERVICES: Revolving Fund; Authority of Department of General Services. Iowa Code §18.3(5); Iowa Code §18.132; Iowa Code §18.8; Iowa Code §18.135(2); Iowa Code §18.9(1). It cannot be concluded as a matter of law that the department of general services may not bill state agency users of telephone communications for an expenditure for a communications system study without the consent of the user agencies if the amount of the expenditure itself is reasonable. (Nassif to Gallagher, State Senator, 12-8-83) #83-12-4(L)

JANUARY 1984

January 3, 1984

CONSTITUTIONAL LAW: Contracting debts. Iowa Const. Art. VII, §2, Iowa Code Ch. 8; §§8.30, 8.31, 8.32. Neither Article VII nor §8.31 prohibits the governor from including appropriated state school aid foundation funds and relying on the accrual method of accounting to determine whether estimated budget resources are sufficient to pay all appropriations in full. (Pottorff to Priebe, State Senator, 1-3-84) #84-1-1

Honorable Berl E. Priebe, State Senator: You have requested an opinion of the Attorney General concerning the method by which the Governor evaluates the sufficiency of budget resources to pay all appropriations in full. You point out that Article VII of the Iowa Constitution prohibits the state government from incurring a financial deficit. You further point out that §8.31 of The Code authorizes the governor to impose budget reductions upon a finding that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full. You note that the comptroller has adopted the accrual method of accounting, which includes tax dollars owed to the state as well as tax dollars already in the treasury, to compute the treasury balance. Furthermore, payment of state school foundation aid has been delayed. In light of these factors, you specifically pose the following question:

> May the Governor avoid making across-the-board state budget reductions, and avoid a general property tax increase by retaining money in the state treasury which by law is to be paid to local school districts; and by simply re-defining the methods used to calculate the treasury balance?

In our opinion neither Article VII nor §8.31 prohibits the governor from including appropriated state school aid foundation funds and relying on the accrual method of accounting to determine whether estimated budget resources are sufficient to pay all appropriations in full.

Limitations on incurring a budget deficit are contained in the state constitution and the state statutes. Section 2 under Article VII of the Iowa Constitution provides:

> Limitation. Sec. 2. The State may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the General Assembly, or at different periods of time, shall never exceed the sum of two hundred and fifty thousand dollars; and the money arising from the creation of such debts, shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever. [Iowa Const. Art. VII, §2.]

This section limits debts for casual deficits or failures in revenues to two hundred and fifty thousand dollars ($250,000). This constitutional prohibition against contracting debts is supplemented by §8.31 of The Code which provides in relevant part:

> 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 state comptroller, 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. The requisition shall contain details of proposed expenditures as may be required by the state comptroller subject to review by the governor.
>
> The state comptroller shall approve the allotments subject to review by the governor, unless it is found that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, in which event such allotments may be modified to the extent the governor may

> deem necessary in order that there shall be no overdraft or deficit in the several funds of the state at the end of the fiscal year, and the comptroller shall submit copies of the allotments thus approved or modified to the head of the department or establishment concerned, who shall set up such allotments on the books and be governed accordingly in the control of expenditures.
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> . . . .
>
> Allotments thus made may be subsequently modified by the state comptroller at the direction of 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 the governor's own initiative to the extent the governor may deem necessary in order that there shall be no overdraft or deficit in the several funds of the state at the end of the fiscal year; and the head of the department or establishment shall be given notice of a modification in the same way as in the case of original allotments.
>
> . . . .
>
> 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. [Iowa Code §8.31 (1983).]

This section authorizes reductions in allotments of appropriated funds upon the finding by the governor that the estimated budget resources are insufficient to pay all appropriations in full.

The parameters of the gubernatorial powers under §8.31 have been analyzed in recent opinions of this office. All appropriations made by the legislature become available for spending according to the quarterly allotment system established under this section. 1980 Op.Atty.Gen. 804, 807. The governor does not have the authority to impound or otherwise prevent the expenditure of a legislative appropriation. The governor does, however, have the authority to reduce allotments of appropriations to the extent necessary to prevent an overdraft or deficit in the funds of the state at the end of the fiscal year. Reduction of allotments of appropriated funds must be executed in a manner that is uniform and proportionate among all state departments and agencies based upon their respective appropriations. 1980 Op.Atty.Gen. 786, 794-95. In application, §8.31 requires that reduction of allotments of appropriated funds must be accomplished on a line item basis. 1980 Op.Atty.Gen. at 808.

Allotments of appropriated funds to pay the state school foundation aid involve additional statutory provisions. Section 442.26 states in relevant part:

> All state aids paid under this chapter unless otherwise stated, shall be paid in installments due on or about September 15, December 15, March 15, and May 15 of each year, and the installments shall be as nearly equal as possible as determined by the state comptroller, taking into consideration the relative budget and cash position of the state resources. However, the state aids paid to school districts under section 442.28 shall be paid in installments due on or about December 15, March 15, and May 15 of each year and the state aids paid to school districts under section 442.38, shall be paid in installments due on or about March 15 and May 15 of each year. [Iowa Code §442.26 (1983).]

This section provides for installments of state school foundation aid to be paid "on or about" the dates specified in amounts "as nearly equal as possible . . . taking into consideration the relative budget and cash position of the state resources."

Construing §442.26 in light of §8.31, we are guided by principles of statutory construction. Both statutes relate to the payment of appropriated state funds.

Section 8.31 generally provides for the allotment of appropriated funds. Section 442.26 specifically provides for the allotment of state school foundation funds in periodic installments. Generally, related statutes are read in *pari materia* and the terms of a specific statute control over the terms of a general statute. *Berger v. General United Group, Inc.*, 268 N.W.2d 630, 638 (Iowa 1978). Applying this principle, we conclude that §442.26 controls the payment dates of installments of appropriated state school foundation aid.

A reasonable delay in payment of installments of state school foundation aid is authorized by the statutory language of §442.26. Installments are to be paid "on or about" the dates specified. The phrase "on or about" means proximately or near the date specified rather than exactly on the date specified. *See State v. Metzger*, 199 Neb. 186, 187, 256 N.W.2d 691, 692 (1977). Accordingly, we conclude that a reasonable delay in payment of installments of state school foundation aid is authorized.

We perceive no constitutional violation in the reasonable delay of payments under §442.26. Since there is no specific date on which the payments must be made, reasonably delayed payments may properly remain part of the state treasury after the dates provided in §442.26 have passed. We point out §442.26 specifically authorizes adjustment in the size of each installment to avert a budget deficit. The installments are to be "as nearly as equal as possible as determined by the state comptroller"; however, the comptroller is to take into consideration "the relative budget and cash position of the state resources." Iowa Code §442.26 (1983). Section 442.26, therefore, appears to authorize some adjustment not only in the payment date but also in the size of the installments to avert a budget deficit.

Allotments of all appropriated funds, including state school foundation aid funds, are subject to the governor's authority to make a finding that the estimated budget resources are insufficient to pay all appropriations in full. *See* Iowa Code §8.31 (1983). We have previously observed that §8.31, in combination with §§8.30 and 8.32, delegate to the governor a limited authority to make technical decisions concerning accountability for appropriated funds. 1980 Op.Atty.Gen. at 796. We find no authority which would prohibit the governor from relying on standard accounting methods, including the accrual method of accounting, to evaluate the estimated budget resources under §8.31.

We similarly perceive no constitutional violation in the governor's reliance on the accrual method of accounting to evaluate the estimated budget resources under §8.31. The governor is not delegated authority under Chapter 8 to make a constitutional determination that a deficit does or does not exist under section 2 of Article VII. Rather, the governor is delegated authority to find that estimated budget resources are insufficient to pay all appropriations in full and, with concurrence by the executive council, thereafter to reduce allotments to avert an overdraft or deficit at the end of the fiscal year. Accordingly, reliance on the accrual method of accounting to evaluate estimated budget resources does not directly raise a constitutional issue.

The constitutional issue of whether a deficit, in fact, exists cannot be resolved in this opinion based on the information which you have provided. We note, however, the Iowa Supreme Court has stated that warrants issued in anticipation of revenues collectible within the biennial period and payable from those amounts do not create a debt within the meaning section 2 of Article VII because the taxes are legally certain to reach the state treasury to meet the expenses authorized. *Hubbell v. Herring*, 216 Iowa 728, 737-38, 249 N.W. 430, 434-35 (1933); *Rowley v. Clarke*, 162 Iowa 732, 740-43, 144 N.W. 908, 912 (1913). Allotment of appropriated funds based on sound application of the accrual method of accounting, therefore, would not appear to create an unconstitutional deficit.

In summary, neither Article VII nor §8.31 prohibits the governor from including appropriated state school foundation aid funds and relying on the accrual method of accounting to determine whether estimated budget resources are sufficient to pay all appropriations in full.

January 3, 1984

HUMAN SERVICES: Confidentiality: Community Mental Health Center Records: Iowa Code §§230A.16, 230A.17, 230A.18, 498 I.A.C. §§33.4(1)(h) and (i). Iowa Code §§225C.4(1)(r), 225C.6(1)(d), 230A.16 - 230A.18, and 498 I.A.C. §§33.4(1)(h) and (i), authorize Division accreditation auditors' access to Community Mental Health Center patient records. Those provisions do not operate to make Center records available to the public. Rather, they merely define a right of access by Division staff while maintaining patient confidentiality. (Williams to Reagen, 1-3-84) #84-1-2(L)

January 4, 1984

HUMAN SERVICES; Employment; Judicial Districts Departments of Community Corrections; Parole and Work Release Officers; Department of Corrections: S.F. 464 (Ch. 96 Acts of The 70th G.A., 1983 Session); Chapter 905, Chapter 20, The Code. Legislative transfer of parole and work-release employees to the judicial departments of community corrections does not involve a reduction-in-force and those procedures but an administrative reorganization; employees transferred retain accrued vacation, sick leave, and seniority but terms and conditions of employment will thereafter be determined by judicial district schedules; the transfer of state-owned office equipment and outstanding lease obligations may be dealt with on a 28E agreement. (Allen to Farrier, Department of Corrections 1-4-84) #84-1-3(L)

January 4, 1984

TOWNSHIPS; Fire Protection Service; Anticipatory Bonds; Ch. 28E Agreements. Iowa Code Ch. 28E (1983); Ch. 345; §§28E.5; 331.441(2)(b)(5); 331.443; 359.42; 359.43; 359.45. A bond election is generally not required when a township requests the supervisors to issue anticipatory bonds for fire protection service pursuant to §359.45. In addition, a township may use revenues from these bonds to contribute to a Ch. 28E agreement for provision of fire protection services. (Weeg to Huffman, Pocahontas County Attorney, 1-4-84) #84-1-4(L)

January 6, 1984

TAXATION: Sales and Use Tax; Purchases of Bulk Paper by Commercial Printers. Iowa Code §§422.42(3) and 423.1(1) (1983). Purchases of bulk paper by printers for use as a component of finished printed material sold by printers to their customers are exempt from Iowa sales and use taxes under the processing exemptions in §§422.42(3) and 423.1(1). (Griger to Renken, 1-6-84) #84-1-5

Honorable Bob Renken, State Representative: You have requested an opinion of the Attorney General with reference to the sales and use tax treatment of purchases of bulk paper by commercial printers. Specifically, you ask whether such bulk paper purchases by printers are exempt from Iowa sales and use taxes if the paper is incorporated into and becomes an integral part of the printed materials sold by printers to their customers. You inquired whether the tax exemption would be justified under either the processing exemption or the sale for resale exemption. The printed materials would not be newspapers, free newspapers, or shoppers guides.

In our opinion, the bulk paper purchases under the circumstances above are exempt under the processing exemption. Therefore, we find it unnecessary to discuss the impact, if any, of the sale for resale exemption in Iowa Code §§422.42(3) and 423.1 (1983).

Iowa Code §422.42(3) (1983) provides for an Iowa sales tax exemption for sales of tangible personal property "when it is intended that such property shall be means of fabrication, compounding, manufacturing, or germination become an integral part of other tangible personal property intended to be sold ultimately at retail." A complementary Iowa use tax exemption is found in Iowa Code §423.1(1) (1983). The effect of these tax exemptions is that sales of components which are incorporated into goods to be sold ultimately at retail are not generally subject to Iowa sales and use taxes. There tax exemptions were enacted in 1937. 1937 Iowa Acts, ch. 196, §1 and 1937 Iowa Acts, ch. 198, §1.

In 1967, the Iowa legislature amended the Iowa sales and use tax laws to impose these taxes upon a variety of "services," one of which was "printing." 1967 Iowa Acts, ch. 348, §25. At that time, the Iowa State Tax Commission had a rule which provided that commercial printers were processors of personal property for sale at retail. 1971 I.D.R. §72, at 870. If commercial printers were producers of tangible personal property for sale and, as a consequence, entitled to sales and use tax exemption on purchases of components under §§422.42(3) and 423.1(1) since 1937, there is no indication that the legislature intended to change that result with the enactment of the 1967 legislation.

While there is some split of authority, in our opinion, the better view is that commercial printers who produce printed materials for sale, in fact, are engaged in the sale of tangible personal property, and not in the rendition of a service. Hellerstein, *The Scope of the Taxable Sale Under Sales and Use Tax Acts: Sales as Distinguished from Services*, 11 Tax Law Rev. 21 (1956); 68 Am.Jr.2d *Sales and Use Taxes*, §85 at 130 (1973). Therefore, it is reasonable to conclude that purchases of components by commercial printers would be entitled to the sales and use tax processing exemptions. This conclusion is supported by the latest expression of the Iowa legislature in 1983 Iowa Acts, S.F. 314, wherein sales and use tax exemption of certain items sold to printers by trade shops was enacted as long as these items were "to be used by the printer to complete a finished product for sale at retail." Such language in S.F. 314 describes a process of completing finished tangible personal property for sale, and not the rendition of a service.

If printers' purchases of components are held to be outside the scope of the processing exemptions, then printers will be subjected to differential tax treatment not accorded to other producers of tangible personal property. In *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, U.S. , 75 L.Ed.2d 295, 103 S.Ct. 1365 (1983) ("*Star Tribune*" case), the United States Supreme Court held that a Minnesota newsprint and ink tax upon producers of publications was invalid under the United States Constitution's First Amendment guarantees of freedom of the press since the tax was only imposed upon the press, and was not imposed ur producers of tangible personal property. *See also* Op.Att'yGen. #83-7-1.

An essential predicate to the decision in the *Star Tribune* case is that a newspaper publisher which printed newspapers to be sold was a producer of tangible personal property for sale, and did not render a service. If one who prints newspapers for sale is a producer of tangible personal property, then one who uses a similar printing process to produce printed matter for sale would also, in our opinion, be a producer of tangible personal property.

In addition, it is clear that a commercial printer is entitled to the First Amendment's constitutional guarantees of freedom of speech. In 16A Am.Jr.2d *Constitutional Law* §505 at 339 (1979), it is stated:

> The free publication and dissemination of books and other forms of the printed word are protected by the constitutional guaranty of freedom of speech and press, irrespective of whether the dissemination takes place under commercial auspices. The First Amendment protects speech even though it is in the form of a paid advertisement, in a form that is sold for profit, or in the form of a solicitation to pay or contribute money; such speech is not withdrawn from protection merely because it proposes a mundane commercial transaction, or because the speaker's interest is largely economic.

An interpretation of the Iowa sales and use tax laws which would impose a differential tax upon a commercial printer's bulk paper purchases whereas other producers would not pay tax upon their component purchases would raise very serious questions as to the validity of such a tax in light of the *Star Tribune* case. However, an interpretation of the processing exemptions to include the commercial printer's purchases of bulk paper for incorporation into finished printed material for sale to the printer's customers avoids such constitutional implications. In *Iowa National Industrial Loan Company v. Iowa State Department of Revenue*, 224 N.W.2d 437, 442 (Iowa 1974), the Iowa Supreme Court stated:

> It is well settled that when one of two possible interpretations leads to unconstitutionality and the other to constitutionality, we must adopt the view which upholds, rather than defeats, the law.

It is our opinion that purchases of bulk paper by printers for use as a component of finished printed material sold by printers to their customers are exempt from Iowa sales and use taxes under the processing exemptions in §§422.42(3) and 423.1(1).

January 6, 1984

TAXATION: Property Tax; Error in Calculation of Agricultural Land Tax Credit in Preparation of Tax List. Iowa Code §§426.8 and 443.6 (1983). Where county auditor erroneously calculated agricultural land tax credit upon the tax list with the result that the net tax was understated and where agricultural land taxpayers had fully paid the property taxes prior to correction of such error, the property taxes imposed upon those agricultural lands are discharged. (Griger to TeKippe, Chickasaw County Attorney, 1-6-84) #84-1-6

Richard P. TeKippe, Chickasaw County Attorney: You have requested an opinion of the Attorney General pertaining to erroneous calculation of real property taxes upon agricultural lands in Chickasaw County. The factual situation relating to your opinion request is as follows:

In preparing the tax list for the July 1, 1980 - June 30, 1981 tax year, property taxes payable in the July 1, 1981 - June 30, 1982 fiscal year, the county auditor erroneously determined the amount of agricultural land tax credit against real property taxes levied upon agricultural lands. The county auditor had received from the state comptroller a pro rata percentage (53.79%) which should have been used to calculate individual amounts of agricultural land tax credit to be applied to determine net real property taxes upon agricultural land. Instead, the auditor, in making up the tax list, applied 100 percent of the agricultural land tax credit, rather than 53.79 percent, as a credit against the real property taxes levied upon agricultural lands. The result was that real property taxes imposed upon "agricultural lands" as defined in Iowa Code §426.2 (1983) were understated. The county auditor prepared the tax list, as required by Iowa Code chapter 443 (1983) and Iowa Code §426.8 (1983), the tax list was delivered to the county treasurer, and agricultural land taxpayers paid the real property taxes during the July 1, 1981 -June 30, 1982 fiscal year. Subsequently, the State Auditor's office discovered the erroneous calculation of the agricultural land tax credit.[1]

Based upon the above circumstances, your question is whether Chickasaw County may now correct the agricultural land tax credit error and require those taxpayers who were affected by the error to pay the correct amount of real property taxes for the 19811982 fiscal year.

In Iowa, real property taxes are not a debt or personal obligation of the owner of the property and, consequently, there is a general lack of authority to bring suit against the owner or taxpayer to collect such taxes. *Lucas v. Purdy*, 142 Iowa 359, 120 N.W. 1063 (1909); *Helvering v. Johnson Realty Co.*, 128 F.2d 716 (8th Cir. 1942).

If a ministerial error, of the type listed in your opinion request, is made in the tax list, the county auditor has the power to correct such error because Iowa Code §443.6 (1983) states that "the auditor may correct any error in the assessment or tax list."[2] The auditor has no power to delegate this correction authority to the

[1] It is our understanding that the same type of error in calculating the agricultural land tax credit was made with reference to property taxes payable in the July 1, 1982 - June 30, 1983 fiscal year and for property taxes payable in the July 1, 1983 - June 30, 1984 fiscal year. The error was corrected on the tax list for taxes payable in the July 1, 1983 - June 30, 1984 fiscal year.

[2] Section 443.6 also allows the auditor or assessor to "assess and list for taxation any omitted property." In the situation which is involved in your opinion request, the agricultural lands were listed and assessed. Therefore, an omitted assessment could not be made. *Talley v. Brown*, 146 Iowa 360, 125 N.W. 248 (1910).

county treasurer (or anyone else). *Muscatine Lighting Co. v. Pitchforth*, 214 Iowa 952, 243 N.W. 292 (1932).

The authority reposed in the county auditor to correct errors in the tax list continues "until the taxes have been paid or otherwise legally discharged." *First National Bank of Guthrie Center v. Anderson*, 196 Iowa 587, 594, 192 N.W. 6, 10 (1923). This limitation upon the auditor's authority was explained in *First National Bank v. Hayes*, 186 Iowa 892, 896-7, 171 N.W. 715, 716-7 (1919) as follows:

> We are not inclined to recede from this view, and there is nothing in *Ridley v. Doughty*, supra, to the contrary. The error in the assessment or tax list is one relating to perfecting the tax list in the course of preparation or thereafter, at any time prior to the payment of taxes levied. Retroactive authority is not expressly conferred on the auditor, and there is no good reason for saying that, after the tax lists have been perfected by the officers, in so far as they know, and accepted by the property owner in discharging the burden imposed, the auditor may go "back of the returns" and, by the correction of errors thereafter discovered, exact payment of additional sums of taxes which neither the public nor the taxpayer knew of, or might reasonably have anticipated. There ought to be a time beyond which even an error in name, description, or valuation may not be corrected to the detriment of the taxpayer, and that time is when the proceedings relating to assessment, listing and collection of the tax, always construed *ad invitum*, have been consummated by full payment of the amount exacted by the records as they then exist. It follows that the county auditor exceeded his authority in undertaking to correct errors in the assessment of shares of stock made prior to 1917. (Emphasis supplied by Court.)

In *Elliot v. Rhoades*, 203 Iowa 218, 212 N.W. 468 (1927), the county auditor corrected an error in the tax list after the taxpayer had paid the first installment of property tax and prior to payment of the second installment. The Iowa Supreme Court held that the auditor's correction was timely made.

If the agricultural land taxpayers fully paid the real property taxes in the amounts which appeared on existing records prior to correction of the tax list error, such full payment precludes any attempt to correct the tax list as to those affected taxpayers. Full tax payment, even though based upon erroneous calculations, under these circumstances, discharges the property taxes imposed upon the agricultural lands.

January 9, 1984

COUNTIES AND COUNTY OFFICERS: Cemeteries; Perpetual Care Fund. Iowa Code section 566A.3 (1983). Income from a perpetual care and maintenance fund established under §566A.3 may not be used for capital improvements. (Peters to Herrig, Dubuque County Attorney, 1-9-84) #84-1-7(L)

January 9, 1984

LIQUOR, BEER AND CIGARETTES: Class "B" Permit. Iowa Code §§123.2 and 123.122 (1983). The issue of whether the charging of an admission fee constitutes, in whole or in part, the "sale" of beer is a factual question to be determined on a case-by-case basis. A factor to be considered is whether services other than the provision of beer are covered in the admission fee. If it is determined that the admission fee constitutes the "sale" of beer, then a Class "B" permit is required. (Walding to Bauch, Blackhawk County Attorney, 1-9-84) #84-1-8(L)

January 9, 1984

ANTITRUST: Iowa Competition Law. [Iowa Code Ch. 533] A private coalition whose members include competing hospitals may not compile non-price hospital data and use that data to formulate a health care plan for its community, since such an agreement would be a violation of the antitrust laws which would not be exempt from those laws. If, however, the coalition was formed pursuant to the National Health Planning and Resources Development Act of 1974 [42 U.S.C. § 300l-1] such activities would be exempt from the antitrust laws. (Perkins to Lind, State Senator, 1-9-84) #84-1-9(L)

January 11, 1984

CONSERVATION: Conservancy Districts. Iowa Code Sections 467D.3, 467D.5, 467D.6, and 467D.8 (1983). Conservancy districts may adopt rules to govern conduct of meetings and elections. Such rules are not subject to review by the State Soil Conservation Committee. (Norby to Gulliford, Director, Iowa Department of Soil Conservation, 1-11-84) #84-1-10(L)

January 17, 1984

LAW ENFORCEMENT: Policement and Firemen: Iowa Law Enforcement: Minimum Training Standards. Iowa Code §80B.11(2) (1983). The law enforcement Academy has authority to set minimum training requirements for all law enforcement officers in service after July 1, 1968. (Hayward to Administrative Rules Review Committee, 1-17-84) #84-1-11(L)

January 17, 1984

SCHOOLS: Contracts. Iowa Code Sections 278.1, 279.12 (1983). School districts may enter into contracts which exceed one year in length of performance if the contract is proprietary in nature, as opposed to governmental or legislative in nature. School districts may lease equipment. (Norby to Tyson, Director, Energy Policy Council, and Benton, Superintendent, Department of Public Instruction, 1-17-84) #84-1-12(L)

January 19, 1984

INSURANCE: Corporations. Procedure for placing subscribers on boards of directors of health service corporations. 1983 Iowa Acts, ch. 27, §§1, 2, 12, 15 [Iowa Code §145.1, 145.2, 514.4 (1985)]; Iowa Code sections 4.7, 4.8, 504A.15, 504A.18, 514.1 (1983). The nominating committee contemplated by 1983 Iowa Acts, ch. 27, is not the exclusive procedure for nomination of initial subscriber directors of the boards of directors of Iowa Code ch. 514 (1983) corporations; nomination of those directors by a petition of at least fifty subscribers or providers is also permitted. However, those two methods are exclusive. Therefore, existing subscriber directors cannot be considered as being automatically renominated but must be renominated by either the nominating committee or by petition (and be elected) in order to meet the percentage requirements for subscriber directors contained in the Act. Board vacancies need not be filled with subscriber directors once the two-thirds subscriber director requirement has been met; nevertheless, all vacancies occurring prior to the August 1, 1985 deadline for meeting that requirement must be filled with a subscriber director until the requirement is actually met. Neither the percentage requirement for subscriber directors nor the manner in which that requirement is to be implemented under the Act is unconstitutional. (Haskins to Foudree, Commissioner of Insurance, 1-19-84) #84-1-13(L)

January 31, 1984

CONSTITUTIONAL LAW: Fencing of Railroad Rights of Way. U.S. Const. amend. XIV; Iowa Const. art. I, §6; Iowa Code §327G.81 (1983). Iowa Code §327G.81 which places the total responsibility on owners, other than railroads, of railroad rights of way to construct, maintain and repair fencing on either side of the railroad right of way which is not used for agricultural purposes is not a denial of equal protection. (Olson to Black, State Representative, 1-31-84) #84-1-14(L)

FEBRUARY 1984

February 3, 1984

HIGHWAYS: DEPARTMENT OF TRANSPORTATION: Iowa Code §§4.7, 306.4, 306.8, 307.24, 308.5, 309.67, 313.2, 331.362 (1983). Section 308.5 concerning the Great River Road should be read together with Chapter 306. The functional review board should consider the legislative intent in § 308.5 in classifying segments of the Great River Road. (Osenbaugh to Huddle, Louisa County Attorney, 2-3-84) #84-2-1(L)

February 9, 1984

INSURANCE: Residential Maintenance Service Companies. Iowa Code section 4.1(13) (1983); Iowa Code Supp. sections 523C.1, 523C.2, 523C.3, 523C.5, 523C.6, 523C.7, 523C.11, 523C.14, 523C.15, and 523C.16 (1983); 1983 Iowa Acts, ch. 87. Any individual or corporation issuing a guarantee to its customers which provides, for a predetermined fee and for a specified period of time, to maintain, repair, or replace all or any part of the "structural components," appliances, or electrical, plumbing, heating, cooling, or air-conditioning systems of residential property containing not more than four dwelling units must meet the requirements of Iowa Code Supp. chapter 523C (1983), regulating residential maintenance service companies, unless it falls within an exception therein. Any individual or corporation issuing such a guarantee for work on appliances, electrical, plumbing, heating, cooling, or air-conditioning systems which does the work itself and not through a subcontractor is not subject to that Act. But an issuing individual or corporation which performs work on "structural components" is under chapter 523C, even though it does the work itself and not through a subcontractor. (Haskins to Foudree, Commissioner of Insurance, 2-9-84) #84-2-2

The Honorable Bruce W. Foudree, Commissioner of Insurance, Insurance Department of Iowa: You ask the opinion of our office regarding Iowa Code Supp. ch. 523C (1983), which creates an extensive regulatory scheme administered by the insurance commissioner (hereafter, the "commissioner") under the auspices of your office for "residential service contracts." (Chapter 523C was enacted as 1983 Iowa Acts, ch. 87.)

Under the regulatory scheme embodied in chapter 523C, a license must be obtained to issue a "residential service contract." *See* Iowa Code Supp. section 523C.2 (1983). A person issuing a "residential service contract" must become incorporated. *Id.* An extensive application for licensure must be filed with your office. *See* Iowa Code Supp. section 523C.3 (1983). A $100,000 minimum bond is required for licensure, *see* Iowa Code Supp. section 523C.5 (1983), a minimum net worth is required, *see* Iowa Code Supp. section 523C.6 (1983), and a reserve account must be maintained, *see* Iowa Code Supp. section 523C.11 (1983). The forms for "residential service contracts" must be filed with and approved by the commissioner. *See* Iowa Code Supp. section 523C.7 (1983). The rates charged for a "residential service contract" are likewise subject to review. *See* Iowa Code Supp. section 523C.14 (1983). In addition, a detailed annual report must be filed as a condition of continuing licensure. *See* Iowa Code Supp. section 523C.15 (1983).

You first ask whether home repair companies (which do not perform new construction), roofers, siders, pest control companies, basement waterproofers or other companies which provide repair services and offer a guarantee of their work fall under chapter 523C.

The scope of chapter 523C is delineated by §523C.1, which states in relevant part as follows:

> As used in this Act, unless the context otherwise requires:
>
> 1. "Residential service contract" means a contract or agreement between a residential customer and a service company which undertakes, for a predetermined fee and for a specified period of time, to maintain, repair, or replace all or any part of the structural components, appliances, or

electrical, plumbing, heating, cooling, or air-conditioning systems of residential property containing not more than four dwelling units.

2. "Service company" means a person who issues and performs, or arranges to perform, services pursuant to a residential service contract.

3. "Licensed service company" means a service company which is licensed by the commission [sic] pursuant to this Act.

As can be seen, subsection 1 of this section makes the following elements of a "residential service contract" essential:

1) A contract or agreement between

2) A residential customer and a "service company" (which, as seen, is merely circularly defined)

3) for a predetermined fee and for a specified period of time

4) to maintain, repair, or replace

5) all or any part of the structural components, appliances, or electrical, plumbing, heating, cooling, or air-conditioning systems of

6) residential property containing not more than four dwelling units.

A guarantee of the quality of work performed which entails an undertaking, for a predetermined fee and for a specified period of time, to maintain, repair, or replace all or any part of the structural components, appliances, or electrical, plumbing, heating, cooling, or air conditioning systems of a covered residence would fall under the definition of "residential service contract." Evidence that such a guarantee was intended to fall under this definition is the fact that in §523C.16, quoted below, specific references are made to certain types of excepted "guarantees." This implies that, in all but those excepted cases, chapter 523C is applicable to guarantees for the type of work set out in §523C.1(1). Accordingly, a company which issues such a guarantee would be covered by chapter 523C. Obviously, if a company simply fails to give such a guarantee for its work, then it would not be issuing a "residential service contract." Whether the types of specific entities which you mention fall under chapter 523C would depend upon whether the guarantees issued by them contain all of the elements of §523C.1(1) and do not fall under any exclusion contained in §523C.16. This is essentially a mixed question of law and fact upon which we decline to opine or give a categorical answer.

It should be noted that chapter 523C applies to a "person" who issues a "residential service contract" or who undertakes or arranges to perform services pursuant to such a contract. *See* §523C.2. Such a "person" is referred to as a "service company." *See* §523C.1(2). By virtue of Iowa Code section 4.1(13) (1983), unless the context indicates otherwise, the word "person" includes individuals as well as corporations. Since nothing in the context of chapter 523C indicates otherwise, unincorporated individuals must be deemed to be "persons," and hence can be a "service company," subject to the requirements of chapter 523C if they issue a "residential service contract."

Your next question is to what extent chapter 523C applies to general contractors and subcontractors and to general contractors who do not use subcontractors but perform the work themselves. For the answer to this question, §523C.16 is pertinent and provides:

This Act does not apply to any of the following:

1. A performance guarantee given by a builder of a residence or the manufacturer or seller or lessor of residential property if no identifiable charge is made for the guarantee.

2. A service contract, guarantee or warranty between a residential customer and a service company which will perform the work itself and not through subcontractors for the service, repair or replacement of appliances or electrical, plumbing, heating, cooling or air-conditioning systems.

3. A contract between a service company and a person who actually

performs the maintenance, repairs, or replacements of structural components, or appliances, or electrical, plumbing, heating, cooling, or air-conditioning systems, if someone other than the service company actually performs these functions.

4. A service contract, guarantee or warranty issued by a retail merchant to a retail customer, guaranteeing or warranting the repair, service or replacement of appliances or electrical, plumbing, heating, cooling or air-conditioning systems sold by said retail merchant.

(Home repair companies when not acting as the builder of new residences would not come under §523C.16(1).) It is clear from the scheme of exclusions created by §523C.16(2) and §523C.16(3) that when a subcontractor is used by a service company to perform the work, the service company is subject to the requirements of chapter 523C regardless of the type of work it performs (unless §523C.16(1) applies, of course). (The contract between the service company and its performing subcontractor would be excluded, though, by virtue of §523C.16(3).) The issue is to what extent service companies who do their own work and who do not use a subcontractor to perform the work are covered. Light is shed on this issue by a slight difference between the wording of §523C.16(2) and that of §523C.16(3). Section 523C.16(2) applies to work on appliances or electrical, plumbing, heating, cooling or air-conditioning systems. The exclusion contained in §523C.16(3) for the contract between a service company and the performing person, on the other hand, is somewhat broader and applies to work not only on those items but also on "structural components." From this difference in the language, it can be inferred that different types of contractors are to be treated differently. (There is no need at this time to consider potential Equal Protection issues raised by this differing treatment.) Thus, a service company executing a "residential service contract" for work on the "structural components" of a covered residence would be subject to chapter 523C, even though the service company does the work itself and not through a subcontractor, whereas a service company executing a "residential service contract" for appliance, electrical, plumbing, heating, cooling or air-conditioning system work which performs the work itself and not through a subcontractor would not be under chapter 523C. While this result may seem anomalous and unfair, it is clearly dictated by the language of the exclusions. When the meaning of the statute is clear, no duty of interpretation arises and the meaning of the statute may not be searched for beyond its terms. *See State v. Sharkey*, 311 N.W.2d 68, 72 (Iowa 1981); *State v. Sunclades*, 305 N.W.2d 491, 494 (Iowa 1981).

In sum, any individual or corporation issuing a guarantee to its customers which provides, for a predetermined fee and for a specified period of time, to maintain, repair, or replace all or any part of the "structural components," appliances, or electrical, plumbing, heating, cooling, or air-conditioning systems of residential property containing not more than four dwelling units must meet the requirements of chapter 523C unless it falls within an exception therein. Any individual or corporation issuing such a guarantee for work on appliances, electrical, plumbing, heating, cooling, or air-conditioning systems which does the work itself and not through a subcontractor is not subject to chapter 523C. But an issuing individual or corporation which performs work on "structural components" is under chapter 523C, even though it does the work itself and not through a subcontractor.

February 9, 1984

ELECTIONS: Ballot; Surname. Ch. 49; §§49.30, 49.31, 49.33, 49.38. The candidate's surname must be included on the election ballot. (Pottorff to Halvorson, State Representative, 2-9-84) #84-2-3(L)

February 9, 1984

MENTAL HEALTH; MENTAL RETARDATION; FUNDING; COUNTIES. Sections 4.1(36), 222.13, 222.60, 252.16, 331.425(13)(a)(2), 331.425(13)(b), Code of Iowa 1983. The discretionary language of §331.425(13)(b) does not modify the mandatory funding obligations imposed by §222.60, Iowa Code. Assuming that all of the conditions of §222.60 have been met in a given case, the board of supervisors of the county in which the

patient has legal settlement has no discretion regarding the funding for the care and treatment of patients either adjudicated mentally retarded and committed to a Chapter 222 facility or voluntarily admitted to a Chapter 222 facility. (Lynn to Burk, Assistant Black Hawk County Attorney, 2-9-84) #84-2-4(L)

February 9, 1984

GENERAL RELIEF: Conditions of Relief; Residency; Financial Status. Sections 252.2, 252.5, 252.6, 252.13, 252.25, 252.27. Counties may not imposed, as a condition for eligibility, income and net worth criteria for relatives of county relief applicants, nor may the county impose a requirement that each applicant disclose the financial status of relatives. Under certain specified conditions, the county may offer residence at a county care facility in lieu of direct county relief. (Williams to Vanderpool, Cerro Gordo County Attorney, 2-9-84) #84-2-5(L)

February 9, 1984

COUNTIES; Sheriff; Civil service for deputy sheriffs; Regular, reserve, and special deputies. Iowa Code Chs. 80D; 341A (1983); Sections 80B.3(3); 80D.1; 331.652(1); 331.903; 331.904(4); 341A.6; 341A.7; and 341A.10. (1) The civil service commission should adopt rules which specify when, how often, and in what manner examinations should be administered and interviews conducted for civil service positions; (2) The commission has the discretion to both set requirements for civil service positions, subject to statutory guidelines, and to reject applicants as unqualified; (3) Those employees in the sheriff's office who do not actually perform law enforcement duties are not covered by deputies subject to Ch. 341A; (4) Generally, the sheriff will be assisted by regular or reserve deputies appointed pursuant to Ch. 80D. The sheriff has authority pursuant to §331.652(1) to appoint special deputies, however that authority should be exercised only in very unusual circumstances. Special deputies may be compensated, but that decision is within the sole discretion of the board of supervisors. (Weeg to Krejci, Marshall County Attorney, 2-9-84) #84-2-6(L)

February 9, 1984

COUNTIES; Municipal Tort Claims; Duty of county to defend and indemnify employees of county boards. Iowa Code Chapter 613A (1983); Sections 613A.2; 613A.7; 613A.8. All appointees to county boards are county employees for the purposes of Ch. 613A, but the determination of which governmental entity has the duty to defend and indemnify a particular employee under Ch. 613A for acts and omissions occurring within the scope of his or her duties depends on an analysis of the specific statutory provisions governing each particular board and its employees. (Weeg to Murtaugh, Shelby County Attorney, 2-9-84) #84-2-7(L)

February 10, 1984

TAXATION: Assignment By County of Scavenger Tax Sale Certificate of Purchase. Iowa Code §§446.19, 446.31, 447.1, 447.12, 448.1 (1983). Board of Supervisors can compromise and assign certificate of purchase during the ninety day period after date of completed service of notice of expiration of right of redemption. Even if a compromise is not made, certificate of purchase can be assigned by board of supervisors for full amount. Where the notice of expiration is given by the holder of the certificate of purchase, a subsequent assignment of the certificate does not require the assignee to give such notice again. Where no compromise is involved, assignment by county of certificate of purchase should include all costs which are associated with the requirements of Iowa Code Chapters 446 and 447 and can include all other costs incurred by county. (Griger to Mahaffey, 2-10-84) #84-2-8(L)

February 10, 1984

PUBLIC RECORDS; Clerk of Court; Dissolution of Marriage. Iowa Code Ch. 68A (1983); §§68A.2; 598.26; 1983 Iowa Acts, Ch. 186, §9104 [Iowa Code §602.8104 (1985)]. The clerk of court is required by §598.26(3) to keep a separate docket for dissolution actions. The record and evidence in dissolution actions is to be kept confidential under §598.26(1) until a final dissolution decree is entered, unless the court orders portions of the record sealed

pursuant to §598.26(2). However, under §598.26(2) orders, decrees, and judgments are always public records once the final decree is entered. (Weeg to Martino, Greene County Attorney, 2-10-84) #84-2-9(L)

February 10, 1984

JUVENILE CODE, VICTIM RESTITUTION. Iowa Code Sections 910.1(1), 910.1(4), 232.29, 232.52, 232A. Although not expressly stated, the intent of the Legislature in providing for restitution alternatives in juvenile case disposition was to exclude insurers from the definition of victim, to whom restitution might be ordered, which is consistent with the Legislature's express exclusion in the adult restitution statute. (Hunacek to Roderer, Criminal & Juvenile Justice Planning Agency, 2-10-84) #84-2-10(L)

February 13, 1984

COUNTIES; Clerk of Court; Filing Fees; Waiver of fee for Department of Revenue distress warrants. Iowa Code §626.31 (1983); 1983 Iowa Acts, ch. 204, §14 [Iowa Code §602.8105 (1985)]. The Department of Revenue is not required to pay filing or docketing fees under §14 [when §602.8105] filing a distress warrant pursuant to §626.31. (Weeg to Richter, Pottawattamie County Attorney, and Bair, Director, Department of Revenue, 2-13-84) #84-2-11(L)

February 17, 1984

IOWA CONSUMER CREDIT CODE: IOWA INDUSTRIAL LOAN LAW: Restrictions on property insurance and rebates of insurance charges; §§537.2501(2)(b), 536A.23(3), 536A.31(3) and 537.2510(4)(b), Iowa Code, 1983. 1) The Iowa Consumer Credit Code §537.2501(2)(b) does not conflict with and therefore does not superside §536A.23(3) of the Industrial Loan Law. 2) Under the Iowa Consumer Credit Code, upon prepayment in full of a consumer credit transaction, rebates for unearned charges for insurance are not subject to the §537.2510(4)(b) definition of interval. (Lowe to Johnson, Auditor of State, 2-17-84) #84-2-12(L)

February 17, 1984

EMINENT DOMAIN; COUNTIES; Solid waste landfill facility. Iowa Code Chapter 28E, Iowa Code Sections 28F.1, 28F.11, 331.304(8), 455B.302 (1983). The county can acquire an existing solid waste landfill facility for its own use or for use by a 28E commission through eminent domain. (McGuire to Shoultz, State Representative, 2-17-84) #84-2-13(L)

February 23, 1984

CONSUMER PROTECTION: BOARD OF REGENTS: Negative options. Iowa Code §§262.7, 262.9(2), 262.12, 556A.1 (1983); Iowa Consumer Fraud Act, §714.16(2)(a). An offeror canferee's silence as acceptance only if the offeree intends silence to be acceptance. Absent adequate disclosure and circumstances sufficient to indicate intent to accept, a negative option could constitute a deceptive or unfair practice. The Board of Regents should determine in the first instance whether a specific negative option proposal for optional student fees is lawful and appropriate. (Osenbaugh to Varn, House of Representatives, 2-23-84) #84-2-14(L)

February 27, 1984

MUNICIPALITIES; Civil Service; Veterans' Preference. Iowa Code §400.10 (1983). A person who was not on active duty during the period set forth in §400.10 would not be entitled to a veteran's preference. (Weeg to Neighbor, Jasper County Attorney, 2-27-84) #84-2-15(L)

February 28, 1984

CONSTITUTIONAL LAW: Withdrawal of petition for a Constitutional Convention. Article V, United States Constitution. The General Assembly may withdraw a petition to Congress to convene a Constitutional Convention pursuant to Article V of the United States Constitution. (Miller and Appel to Deluhery, State Senator, 2-28-84) #84-2-16

The Honorable Patrick J. Deluhery, General Assembly; In 1980, the Iowa General Assembly, pursuant to Art. V of the United State Constitution, passed a resolution petitioning Congress to call a convention for the stated purpose of proposing an amendment to the United States Constitution that would generally

require Congress to enact a balanced federal budget, S.J.R. 1 (1979 Gen. Ass.) A bipartisan group of legislators has recently, however, introduced a resolution which purports to withdraw the request. S.J.R. 2003 (1984 Gen. Ass.) In this opinion, we consider the question of whether the Iowa Legislature may withdraw a petition asking Congress to call a Constitutional Convention. Based on the overwhelming body of scholarly authority and established historical precedent, we answer the question in the affirmative.

I.

Article V of the United States Constitution establishes two separate and distinct methods of amending the basic framework of our government. The first method provides that Congress, by a two-thirds majority, may propose amendments to the States. Congressionally proposed amendments must be ratified by a threefourths majority before they take effect. To date, all amendments to the Constitution have been enacted following this procedure.

The Framers, however, also provided an alternate method of amending the Constitution to be exercised in the event that Congress refused to support a change in the way we govern ourselves. Under the alternate method, two-thirds of the States, through their respective legislatures, may petition Congress to convene a Constitutional Convention for the purpose of proposing amendments to the States. The Framers thus provided a mechanism to allow the States to remove Congress from the amendment process.

A petition supported by two-thirds of the States calling for a Constitutional Convention, however, may have far reaching consequences beyond simply eliminating the substantive role of Congress in the amendment process. While States only have the power to ratify specific constitutional amendments proposed by Congress under the traditional method, there appears to be no institutional obstacle that would prevent a Constitutional Convention from considering a wide range of changes to the Constitution. *Cf. Whitehall v. Elkins*, 389 U.S. 54, 57 (while procedure for amendments is restricted, no restraints on the kind of amendment which may be offered) (1967). The lack of external restraint on the agenda of a Constitutional Convention is a factor in our consideration of a procedural question that may affect the ability of the political system to avoid a potentially destabilizing process in which many constitutional issues are considered and reconsidered.

II.

Most of the scholarly consideration of legal questions surrounding the convention alternative to proposing amendments to the Constitution was stimulated by efforts to overturn the Supreme Court's "one man - one vote" decision in *Reynolds v. Sims*, 337 U.S. 533 (1964). Forces led by Senator Everett Dirksen hoped to amend the Constitution to allow States to apportion one house of their legislature on a basis other than population. After unsuccessfully attempting to force Congress to propose the amendment, the Dirksen forces sought to persuade the required number of States to call a Constitutional Convention. Because the Dirksen forces, in one form or another, obtained up to 32 States in support of their position, the procedural questions were thoroughly explored in the resulting legal debate. Since a number of the States attempted to withdraw their petitions after opponents of the Dirksen approach became better organized, the precise question before us received considerable attention.

One of the distinguished academic commentators who explored the question was Professor Arthur E. Bonfield. Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 Mich. L. Rev. 949 (1968). Professor Bonfield wrote that any argument that a State could not effectively withdraw a petition was "entirely erroneous and untenable." 66 Mich. L. Rev. at 966. According to Bonfield, an approach which prohibited withdrawal "would base the presence of a sufficient number of applications solely upon a mechanical process of addition and ignore the extent to which each application reflects the existence of the requisite contemporaneous agreement." *Id.* Since a withdrawal resolution would

indicate lack of present intent to call a convention, Bonfield argued that it should be allowed. *Id.*

In addition, Bonfield noted that unlike ratification, a petition for a Constitutional Convention is not the final act of a sovereign body indicating agreement with a stated political principle. As a result, Bonfield argued that a mere petition to Congress did not share the dignity or finality of a ratification which might justify the latter's irrevocable nature. *Id.*, at 967.

Bonfield's view is buttressed by the support of nearly every constitutional scholar that has considered the issue. Widely respected authorities of varying political persuasions, including Professor Van Alstyne of Duke, Professor Gunther of Stanford, and Professor Bickel of Yale, and Senator Sam Ervin, a former chief justice of a State Supreme Court, have all argued forcefully that petitions for a Constitutional Convention may be rescinded by the States. *See Hearings on S.3, S.520, and S.1710 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 69-165 (1979), at 297-98 (views of Prof. Van Alstyne), at 308 (views of Prof. Gunther); *Hearings on S.2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong. 1st Sess. at 64 (views of Prof. Bickel); Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 Mich. L. Rev. 875, 889-90 (1968).

Historical precedent, though admittedly limited, tends to support the view of the scholars. In the early 1960's, the Senate Judiciary Committee refused to act on a claim that thirtyfour States had petitioned Congress to call a convention to limit federal income tax, at least in part because twelve States had withdrawn their petitions. *See* Graham, *The Role of the States in Proposing Constitutional Amendments*, 49 A.B.A.J. 1175, 1177 (1963). While historical experience alone generally is not determinative on constitutional questions, the undesirability of disturbing past practice is at least a factor to be considered in deciding sensitive questions surrounding the amendment process.

While the United States Supreme Court has not addressed the question, we doubt that the court would adopt an approach contrary to the views of the scholars. Indeed, the court would most likely decline to consider the question of whether Congress may constitutionally recognize withdrawal of state petitions. *Cf. Coleman v. Miller*, 307 U.S. 433, 453-54 (1939) (question of reasonable time for ratification of amendments is a political question not decided by the courts).

III.

In conclusion, we believe the General Assembly may withdraw a previous petition to Congress calling for a Constitutional Convention. In our view, the courts would not disturb a congressional determination to recognize such decision.

MARCH 1984

March 6, 1984

COUNTIES AND COUNTY OFFICERS. Mental Health, County Liability, County Reimbursement, Interstate Mental Health Compact. Ch. 218A, §218A.1, Ch. 229, §§229.1(2), 229.6, 230.10, 230.15. Pursuant to Iowa Code §229.6, the residents of other counties and states may be involuntarily committed in whatever Iowa county they may be located. While the county may elect to bill other states for the costs of mental health commitment, liability for those costs is governed by Iowa Code Ch. 230. Chapter 230 does not expressly impose such liability on other states. (Williams to McCormick, Woodbury County Attorney, 3-6-84) #84-3-1(L)

March 7, 1984

TAXATION: Real Estate Transfer Tax; Real Estate Transfers By Shareholders To Existing Corporation. Iowa Code §428A.2(15) (1983). A proposed transfer of real estate which is to be made to an existing corporation by shareholders in exchange for additional stock and which is not to be made in connection with the formation or dissolution of the corporation is not exempt from real estate transfer tax under §428A.2(15). (Griger to Noah, 3-7-84) #84-3-2(L)

March 9, 1984

MENTAL HEALTH. Involuntary Commitment. Iowa Code §§229.4(3), 229.11, 229.12, 229.14(2), 229.14(3), 229.15(2), 230.10. Iowa Code §229.15(2) does not authorize the hospitalization referee to enter an involuntary commitment order without a hearing. Where a committed mental health patient on out-patient status desires to enter a treatment facility for in-patient treatment, the patient may do so on a voluntary basis. In this situation, §229.15(2) requires the inpatient facility to notify the court of the change. However, the court may not change the patient's status to a more restrictive status absent proper notice and hearing. (Williams to Denefe, 3-9-84) #84-3-3

J. Terrence Denefe: You and Chief Judge Collett ask two related questions:

> 1) Whether Iowa Code §229.15(2) allows a committed mental health patient on out-patient status to be involuntarily returned to in-patient status without a hearing.
>
> 2) Whether §229.15(2) requires the issuance of an involuntary in-patient commitment order where a committed out-patient voluntarily returns for in-patient treatment.

Iowa Code §229.15(2) provides in pertinent part:

> If at any time the medical director reports to the court that in the director's opinion the patient requires full-time custody, care and treatment in a hospital, and the patient is willing to be admitted voluntarily to the hospital for these purposes, the court may enter an order approving hospitalization for appropriate treatment upon consultation with the chief medical officer of the hospital in which the patient is to be hospitalized. If the patient is unwilling to be admitted voluntarily to the hospital, the procedure for determining involuntary hospitalization, as set out in section 229.14, subsection 3, shall be followed.

Id.

In answer to your first question, a hearing is required before the patient may be involuntarily re-hospitalized. The final sentence quoted above expressly provides a procedure for involuntary hospitalization of a non-cooperative outpatient. This portion of §229.15(2) specifically requires that the involuntary hospitalization provisions of Iowa Code §229.14(3) be followed. Section 229.14(3), in turn, mandates that the notice and hearing provisions of Iowa Code §229.12 be observed before the court may order full-time involuntary hospitalization.

Section 229.14(3) was drafted to comply with the due process concerns expressed in *C. R. v. Adams*, 649 F.2d 625 (8th Cir. 1981). Those constitutional

concerns require that a hearing be held before a patient's out-patient status be revoked. *Id. See also, Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982); *Greenholtz v. Penal Inmates*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); *Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976); *State v. Grimme*, 274 N.W.2d 351 (Iowa 1977). As "it is presumed that [c]ompliance with the Constitutions of the State and of the United States is intended," Iowa Code §4.4, §229.15(2) should be construed to avoid constitutional infirmity.

With respect to your second question, we conclude that §229.15(2) does not require such an involuntary commitment where a committed out-patient voluntarily returns for in-patient hospitalization. Section 229.15(2) provides that you "*may* enter an order *approving* [the voluntary] hospitalization. . . ." (Emphasis supplied.) While "[t]he word 'may' confers a power," Iowa Code §4.1(36)(1), it normally connotes a permissive or discretionary action. *State v. Berry*, 247 N.W.2d 263, 265 (Iowa 1976). This discretionary language authorizing an approval order is inconsistent with an interpretation that would require the court to issue such an order.

Further, "an order approving hospitalization" is not an involuntary commitment order. Section 229.15(2) approval is distinguishable from a directive issued pursuant to §229.14(2) or §229.11. Approval connotes review of a past act, in this case, the voluntary admission of a mental health out-patient by a treatment facility. Directives, such as those issued pursuant to §§229.14(2) and 229.11, direct action to be taken in the future, like the involuntary restraint of a mental health in-patient. We believe that the object of the approval language in §229.15(2) is not the issuance of a directive. Each statute "shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice." Iowa Code §4.2.

Clearly, §229.15(2) facilitates the flow of information between the medical facility and the court. The court is kept apprised of the efforts of the facility in treating individuals over whom the court has exerted jurisdiction. Additionally, the approval provision also relates to the initial financial liability of the county of admission. Iowa Code §230.10. Neither of these purposes would be furthered by the entry of an involuntary commitment order where none was needed.

We note that an approval order may be entered merely "upon consultation with the chief medical officer of the hospital in which the patient is to be hospitalized." Iowa Code §229.15(2). To construe such an order as an involuntary commitment order would raise the due process concerns discussed in the answer to your first question. Thus, we conclude that §229.15(2) does not imply that a magistrate may involuntarily confine a former in-patient upon the ex parte statement of a third party (the chief medical officer).

This entire analysis is supported by the provisions of Iowa Code §229.4(3), which allows the *temporary* involuntary detention of voluntary patients upon the certification of the chief medical officer of the treating facility. Nevertheless, Section 229.4(3) parallels the immediate custody provisions of §229.11 by allowing treating facilities to obtain an involuntary commitment while retaining custody of the voluntary patient, but only after hearing. In this way, §229.4(3) ensures that detaining facilities afford voluntary inpatients proper due process before an involuntary commitment order is obtained.

In sum, Iowa Code §229.15(2) does not authorize the hospitalization referee to enter an involuntary commitment order without a hearing. Where a committed mental health patient on out-patient status desires to enter a treatment facility for in-patient treatment, the patient may do so on a voluntary basis. In this situation, §229.15(2) requires the inpatient facility to notify the court of the change. However, the court may not change the patient's status to a more restrictive status absent proper notice and hearing.

March 12, 1984

SCHOOLS: Special Education: School for the Deaf: Iowa Children's Home. Iowa Code chs. 244, 269, 270, 273, 281, 442 (1983); Iowa Code Supp. §§273.3; 281.9 (1983). The State Department of Public Instruction is the agency that holds primary responsibility to assure that each child in need of special education

receives a free appropriate education. The school district of residence should reimburse a school district that provides educational programs and services, pursuant to an Individual Educational Program, to a child who is enrolled at the Iowa Children's Home or the School for the Deaf. (Fleming to Benton, State Superintendent, 3-12-84) #84-3-4(L)

March 21, 1984

COUNTIES AND COUNTY OFFICERS: Authority of County Governments to Establish a Height Limitation on Vegetation and to Regulate Weeds Not Listed as Noxious. Iowa Const. art. III §38A; Iowa Const. art. III §39A; Iowa Code §§317.1, 317.3, 317.4, 317.6, 317.9, 317.13, 317.14, 317.15, 317.16, 317.18, 317.21, 331.301(1), 331.301(4), 331.301(5), 331.301(6), 331.302(1), 331.302(3)-(9) (1983). Under County Home Rule, county governments may, through an ordinance, establish a height limitation on vegetation on unoccupied land. The county may through an appropriate ordinance, provide that weeds not listed §317.1 are noxious. A landowner must mow or spray whatever area of the property is necessary to comply with the board's program of weed control under 317.13. (Benton to Palmer, State Senator, 3-21-84) #84-3-5(L)

March 26, 1984

LANDLORD-TENANT: Interest on Rental Deposits. Iowa Code §562.12(2) (1983). After five years of a tenancy, interest earned on a rental deposit is the property of the tenant. The manner of payment of the interest to the tenant is a matter of private contract between the tenant and landlord. (Peters to Baxter, State Representative, 3-26-84) #84-3-6(L)

March 26, 1984

TAXATION: Property Tax; Nature of Property Tax Liens on Machinery and Equipment and on Buildings Erected on Leased Land. Iowa Code §§427.A1(L)(e), 445.28, 445.32, 446.7 (1983). Where machinery and equipment is, by law, assessed and taxed as real property, along with other real property, a real property tax lien will attach to that machinery and equipment and to the other real property taxes as a unit. The enforced collection of delinquent real property tax attributable to machinery and equipment will generally be by the tax sale method. The real property tax lien attaches to buildings erected on leased land, but not to the underlying land. (Griger to Berl E. Priebe, State Senator, 3-26-84) #84-3-7(L)

APRIL 1984

April 2, 1984

COUNTIES AND COUNTY OFFICERS: Drainage Districts. Iowa Code Sections 455.4, 455.7, 455.10, 455.70, 455.92, 455.133, 455.135, 455.136, 455.164 (1983); Iowa Code Section 7559 (1939); 1949 Iowa Acts Ch. 202 §§21, 24. Preliminary expenses incurred by the governing body of a drainage district to determine whether to undertake an improvement to an already established district should be paid from drainage district funds pursuant to §455.136. 1980 Op.Att'yGen. 904 holding that petitioners for such preliminary expenses should bear liability for these costs if the improvement is not undertaken is overruled. (Benton to Lounsberry, 4-2-84) #84-4-1(L)

April 16, 1984

CITIES: Counties: Racing Commission: Ownership and Financing of Racetracks. Iowa Code §§331.442, 384.24, 384.26, 346.27 (1983), Iowa Code supplement §§99D.2, 99D.7, 99D.8, 99D.9 and 331.441 (1983), §§ 2, 7, 8 and 9. (1) Unless the Iowa State Racing Commission provides otherwise by rule, a private investor may construct a racetrack and lease it to a pari-mutuel licensee so long as all aspects of racing and wagering were under the sole control of the licensee. (2) A private investor who constructs a racetrack may operate concessions at that track so long as the investor meets all licensing requirements therefore set by the racing commission. (3) A pari-mutuel licensee may not issue any bonds, or create any obligations, on which the return is based or contingent in any manner upon the monies received as admissions to the track or pari-mutuel wagers. (4) Unless the racing commission requires that a pari-mutuel licensee own the track facility where it runs races, counties and cities may issue general purpose general obligation bonds for the construction of a racetrack. (5) Iowa Code §346.27 (1983) does not provide a vehicle for a joint county/city project for the construction of a racetrack. (Hayward to Michael Connolly, State Representative, 4-16-84) #84-4-2(L)

April 16, 1984

CONSERVATION; Docks; Preemption by State Conservation Commission Over Inspection of Commercial, Public, and Private Docks. Iowa Code Sections 106.17, 106.32(2), 107.24(5), 111.4, 111.5, 111.18, and 331.301(1), (3), (6) (1983); 1972 Iowa Acts, Ch. 1088, §199. Jurisdiction of the Conservation Commission does not totally preempt counties from inspecting privately-owned docks. State law would preempt a county ordinance where the county ordinance was less stringent than state law or it interfered with navigation and state ownership. (McGuire to Johnston, Polk County Attorney, 4-16-84) #84-4-3(L)

April 16, 1984

DEPARTMENT OF TRANSPORTATION: Iowa Railway Finance Authority Act. Chapter 307B. Chapter 307B does not authorize the Iowa Railway Finance Authority to finance a rail tourist passenger operation. (Hunacek to Dunham, Secretary, Iowa Railway Finance Authority, 4-16-84) #84-4-4(L)

April 23, 1984

MUNICIPALITIES: Newspapers; Official Publications; Eligibility of Additional Publication. Iowa Code Ch. 349; Iowa Code §§349.1, 349.2, 349.3, 362.3, 618.3, 618.4 and 618.5 (1983). Factors supporting a finding that an additional publication of a newspaper is, for the purpose of selecting an official newspaper for mandatory publication of notices and reports of proceedings, a separate newspaper include the appeal to separate reading interests and the maintenance of distinctive identities, as reflected in part by the existence of different editorial policies and articles or features. Joint ownership and the situs of production and publication are not determinative. (Walding to Copenhaver and Blanshan, State Representatives, 4-23-84) #84-4-5(L)

April 26, 1984

MUNICIPALITIES: Zoning: Developmentally Disabled Family Homes; Quarter-mile Restriction. Iowa Code Supp. §§358A.25, 358A.25(2)(b), 358A.25(3), and 414.22 (1983). The quarter-mile restriction in Iowa Code §358A.25(3) (1983) does not apply to a home for more than eight developmentally disabled persons. (Walding to Haverland, State Representative, 4-26-84) #84-4-6(L)

April 26, 1984

CRIMINAL LAW: Fines; Contempt. Iowa Code Chapter 665 and Section 909.5 (1983). Failure of a criminal defendant to make a payment of a fine or an installment of a fine may be enforced only under the contempt provisions of Iowa Code Chapter 665, requiring an Order to Show Cause, or if necessary, a warrant. (Hansen to Lloyd, Clarke County Attorney, 4-26-84) #84-4-7(L)

MAY 1984

May 1, 1984

SCHOOLS. 1983 Iowa Code Supp. §§257.28, 282.1, 282.7(1), 282.7(2) and 282.24 and 442.9(1)(a), When grades seven through twelve are discontinued, the tuition reimbursement figure for the school district receiving a nonresident pupil is determined by §282.24(2) and negotiation is limited by the extent to which the actual cost exceeds the maximum tuition rate. However, when a student is taking a course in another school district or when two districts combine their enrollment for a grade, the terms of §257.28 place no limit on their ability to negotiate for cost sharing. (Fleming to Benton, State Superintendent, 5-1-84) #84-5-1(L)

May 1, 1984

TAXATION: Value of Real Property Subject to Tax Levy. Iowa Code Ch. 441 (1983); Iowa Code §§441.21, 441.38, and 441.47 (1983). Assessment limitations contained in §441.21 are applicable to the actual value of all parcels of locally assessed realty. An equalization order of the director of revenue issued pursuant to §441.47 for a class of property would be applicable to a parcel of property whose actual value was established by a district court in the assessment appeal process. (Schuling to Glaser, Delaware County Attorney, 5-1-84) #84-5-2(L)

May 16, 1984

GAMBLING: Amusement Park. Iowa Code Ch. 99B (1983); Iowa Code §§99B.2, 99B.4 and 99B.15. A city council or board of supervisors does not have an unrestricted power to designate any location as an amusement park under §99B.4(2) in order to authorize amusement concession gambling. The usual and ordinary meaning of amusement park should be utilized for purposes of §99B.4(2). (Schuling to Gustafson, Crawford County Attorney, 5-16-84) #84-5-3

Mr. Thomas E. Gustafson, Crawford County Attorney: You have requested the opinion of this office concerning permitted locations of amusement concessions pursuant to Iowa Code §99B.4 (1983). The question posed was whether a city council or board of supervisors has an unrestricted power to designate any location as an amusement park under §99B.4(2) in order to authorize amusement concession gambling.

In answer to your question, a city council or board of supervisors does not have unrestricted power to designate any location as an amusement park. Gambling is a criminal activity under Iowa law. Iowa Code Ch. 725 (1983). The legislature has chosen to allow limited gambling by statute subject to regulation. Iowa Code § 725.15 (1983); Iowa Code §725.14 (Supp. 1983).

It is well recognized that a legislature has wide discretion in determining classifications to which its acts shall apply. *Cook v. Hannah*, 230 Iowa 249, 253, 297 N.W. 262, 265 (1941). The Iowa legislature exercised this discretion in legalizing certain forms of gambling. Iowa Code Ch. 99B (1983); Iowa Code Ch. 99D (Supp. 1983).

With regard to Ch. 99B, the legislature demonstrated its intent to allow gambling only in accordance with each individual section. *State ex rel Chwirka v. Audino*, 260 N.W.2d 279, 284 (Iowa 1977). The legislature stated in Ch. 99B, "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." Iowa Code §99B.15 (1983).

Section 99B.4 allows amusement concession games of skill or chance at specific locations if the person has been authorized as follows:

1. At a fair, by written permission given to the person by the sponsor of the fair.

2. At an amusement park so designated by resolution of the city council of a city or the board of supervisors of a county, by written permission given to the person by the respective city or county.

> 3. At a carnival, bazaar, centennial, or celebration sponsored by a bona fide civic group, service club, or merchants group when the event has been authorized by resolution of the city council of a city or the board of supervisors of a county, by written permission give to the person by the authorizing city or county. Section 99B.3, subsection 1, paragraph "b," notwithstanding, a license may be issued for an event held pursuant to this paragraph at a fee of twenty-five dollars, which shall enable the sponsor of the event to conduct all games and raffles permitted under section 99B.3 for a specified period of fourteen consecutive calendar days.

Statutory construction of Ch. 99B supports an interpretation which construes §99B.4 not to grant an unrestricted power of authorization to city councils and boards of supervisors to allow amusement concession gambling. First, Ch. 99B evidences the legislative intent to allow gambling only to the extent specifically permitted. Iowa Code §99B.15 (1983).

Second, in construing legislative enactments strained, impractical or absurd results are to be avoided. *Northern Natural Gas Co. v. Forst*, 205 N.W.2d 692, 695 (Iowa 1973). It would be a strained, impractical and absurd result to construe that when the legislature specifically limited amusement concession gambling to three types of locations, it intended to grant a city council or a board of supervisors unrestricted power for authorizing any location for amusement concession gambling by merely designating the location an amusement park. If the legislature had intended to grant unrestricted power to a city council or a board of supervisors to authorize any location for amusement concession gambling it could have used the language "At any location so designated" instead of "At an amusement park so designated."

Section 99B.4(2) must be construed to have a reasonable and practical result. Proper construction would not recognize unrestricted power to designate any location as an amusement park.

Third, the usual and ordinary meaning is to be given the language used. *Northern Natural Gas Co.*, 205 N.W.2d at 695. Amusement park is defined as "an outdoor place with various devices for entertainment, as a merry-go-round, roller coaster, etc., refreshment booths and the like." Webster's New World Dictionary of the American Language 48 (1972). The Department of Revenue has not defined the term pursuant to its rulemaking authority, but the Bureau of Labor has defined the term amusement park. "Amusement park means a tract, structures, area and equipment, including electrical equipment used principally as a location for supporting amusement rides, amusement devices and concession booths." 530 I.A.C. §61.1(3). Amusement rides, amusement devices and concession booths are defined as follows:

> "Amusement device" means any equipment or piece of equipment, appliance or combination thereof designed or intended to entertain or amuse a person.
>
> "Amusement ride" means any mechanized device or combination of devices which carries passengers along, around, or over a fixed or restricted course for the purpose of giving its passengers amusement, pleasure, thrills, or excitement.
>
> "Concession booth" means a structure, or enclosure, used at more than one fair or carnival from which amusements are offered to the public.

Iowa Code §88A.1(3), (4) and (7) (1983). The definition of amusement park adopted by the Bureau of Labor does not govern amusement park as used in §99B.4(2), but the definition is illustrative of a construction utilizing the usual and ordinary meaning.

Absent the manifest intent of the legislature that amusement park was intended to be congruent with any location, the usual and ordinary meaning will prevail. Proper construction would not presume the legislature intended to grant unrestricted power for authorizing any location as an amusement park.

Section 99B.4(2) must be construed to ascertain the legislative intent behind the enactment. An examination of the relevant sections used and the purposes for

which it was enacted supports the construction of §99B.4(2) limiting the authorization of amusement concession gambling to an amusement park as defined by its usual and ordinary meaning.

Your letter additionally expressed concern about city councils and boards of supervisors granting amusement park designations to nonamusement parks in order to qualify the location for gambling purposes. The Department of Revenue is the agency designated by the legislature to assume responsibility for ensuring that only licenses specifically permitted by a section of Ch. 99B are granted. Iowa Code §99B.2(1) (1983). The Department of Revenue has the responsibility to determine whether the designated amusement park qualifies under §99B.4. This provision for independent agency review should ensure conformity with the requirements of Ch. 99B.

Therefore, it is the opinion of this office that a city council or board of supervisors does not have unrestricted power to designate any location as an amusement park for purposes of Ch. 99B.4.

May 30, 1984

ELECTIONS: Qualification of Candidate; Mandatory Retirement. Ch. 97B; §§97B.42, 97B.46(3). No statutory procedures exist in the election process to disqualify a candidate for county sheriff on the basis of an impendent mandatory retirement. Aggrieved citizens may challenge a nominee's right to be placed on the ballot by an appropriate action in the courts where factual and legal issues concerning the application of §97B.46(3) can be resolved. (Pottorff to Franklin, Wayne County Attorney, 5-30-84) #84-5-4(L)

May 30, 1984

ENVIRONMENTAL QUALITY: Hazardous Wastes/Department of Water, Air and Waste Management. Iowa Code §§455B.415, 455B.417, 455B.420, 455B.301 (1983). Department of Water, Air and Waste Management is not authorized to allow disposal of small quantities of hazardous wastes at sanitary disposal projects which do not have hazardous waste permits under §455B.415. Nor is the Department authorized to create a new permit allowing such disposal. (Ovrom to Ballou, Executive Director, Iowa Department of Water, Air and Waste Management, 5-30-84) #84-5-5(L)

JUNE 1984

June 7, 1984

STATE OFFICERS AND DEPARTMENTS: Merit Employment Department; Pay Plan. Ch. 17A: §17A.2(7). Ch. 19A: §19A.9(2). The statutory obligation to promulgate rules regarding a "pay plan" pursuant to §19A.9(2) does not require that a memorandum establishing procedures for reinstitution of merit pay increases upon expiration of a merit pay freeze to be promulgated in rule form. Procedures for reinstitution of merit pay increases, moreover, are not required to be incorporated as part of the "pay plan" subject to the procedures outlined in §19A.9(2). A memorandum which is not promulgated in rule form or incorporated as part of the "pay plan," however, is not binding on administrative agencies. (Pottorff to Priebe, Chair, Administrative Rules Review Committee, 6-7-84) #84-6-1(L)

June 7, 1984

BEER AND LIQUOR CONTROL: Nature of Permit or License. Iowa Code §§123.1 and 123.38 (1983). A receiver cannot operate a business selling alcoholic beverages or beer with a debtor's permit or license. (Walding to Gallagher, Director, Iowa Beer and Liquor Control Department, 6-7-84) #84-6-2(L)

June 7, 1984

COUNTIES AND COUNTY OFFICERS: Prearranged Funeral Plans: County Recorder. Iowa Code Ch. 523A (1983); Iowa Code §§523A.2(1), 523A.2(6); Iowa Code Ch. 331 (1983); Iowa Code §§331.602, 331.604, 331.605, 331.606. 1) Documents filed with the county recorder under §523.2(1)(c) must be filed with the recorder but need not be recorded, and the proper recording fee must be paid. 2) When sellers and financial institutions give notice of documents to the recorder under §523A.2(1)(d) and (e), these documents do not have to be recorded. 3) Recording fees for documents filed under §523A.2(1)(c) should be paid by the seller. 4) If a seller refuses to pay the recording fees for documents filed under §523A.2(1)(c) this constitutes noncompliance with the Act. (Lowe to Tullar, 6-7-84) #84-6-3(L)

June 19, 1984

STATE OFFICERS AND DEPARTMENTS: Unclaimed Property: Safe Deposit Boxes. Iowa Code Ch. 556; Iowa Code §§556.1, 556.2, 556.11, 556.12, 556.13 (1983). Based on the provisions of the Iowa Unclaimed Property Act, the state treasurer has the authority to assume custody of the contents of unclaimed safe deposit boxes presently in the possession of the Comptroller of the Currency. (Lyman to Fitzgerald, State Treasurer, 6-19-84) #84-6-4(L)

June 21, 1984

CIVIL RIGHTS: Sex Discrimination: Retirement Plans. 1984 Iowa Acts, House File 323; Iowa Code §601A.13 (1983). House File 323, the amendment to Iowa Code §601A.13 (1983), prohibiting discrimination on the basis of sex in retirement or benefit plans, is to be applied prospectively from July 1, 1984, the effective date of the amendment. (Foritano to Branstad, Governor, State of Iowa, 6-21-84) #84-6-5

The Honorable Terry E. Branstad, Governor of Iowa: You have requested an opinion of the attorney general concerning an Act of the 70th General Assembly, 1984 session, H.F. 323 (hereinafter House File 323) which amends the Iowa Civil Rights Act to prohibit discrimination on the basis of sex in a retirement plan or benefit system of an employer.[1] Specifically, you inquire whether House File 323

[1] House File 323 provides:

Section 1. Section 601A.13, unnumbered paragraph 1, Code 1983, is amended to read as follows:

The provisions of this chapter relating to discrimination because of ~~sex~~ age ~~shall~~ *do* not ~~be construed to~~ apply to ~~any~~ a retirement plan or benefit system of ~~any~~ *an* employer unless ~~such~~ *the* plan or system is a mere subterfuge adopted for the purpose of evading ~~the provisions of~~ this chapter.

may be applied retroactively or whether it may only be applied prospectively from July 1, 1984, the effective date of the amendment.[2]

In our opinion, House File 323 applies prospectively only and thus all retirement benefits derived from contributions made after July 1, 1984 must be calculated without regard to the sex of the beneficiary.

The answer to your question is derived from an analysis of the amendment under the well settled rules of statutory construction. Of course, the polestar of statutory interpretation is legislative intent. *State v. Conner*, 292 N.W.2d 682, 684 (Iowa 1980). Iowa Code section 4.5 (1983) sets forth the general rule that "A statute is presumed to be prospective unless expressly made retrospective." This provision evinces a design on the part of the legislature that substantive enactments and amendments shall operate prospectively. *Cook v. Iowa Department of Job Service*, 299 N.W.2d 698, 702 (Iowa 1980). House File 323 contains no language indicating that it is to have retroactive application, thus the presumption of prospective operation found in section 4.5 is controlling.

Further support for this conclusion is found in the principle stated in *Hubbard v. State*, 163 N.W.2d 904 (Iowa 1969).[3]

> [Where a] state legislature adoptes a federal statute which had been previously interpreted by federal courts it may be presumed it knew the legislative history of the law and the interpretation placed on the provision by such federal decisions, had the same objective in mind and employed the statutory terms in the same sense.

163 N.W.2d 910-11 and citations. Moreover, the Iowa Supreme Court has long recognized that judicial interpretations of similar statutory language in other jurisdictions are entitled to great weight and that particular deference is due opinions of the Supreme Court of the United States. *E.G., Quaker Oats Co. v. Cedar Rapids Human Rights Commission*, 268 N.W.2d 862, 866 (Iowa 1978).

Applying the *Hubbard* principle analogously to the instant inquiry, it becomes immediately apparent that the Iowa legislature was aware of the recent developments in federal civil rights law and sought to make Iowa law consistent with those developments. By prohibiting discrimination on the basis of sex in retirement plans, House File 323 brings the Iowa Civil Rights Act into

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[2] A propsective statute is one which "operates on conduct, events and circumstances which occur after its enactment." 2 C. Sands, *Statutes and Statutory Construction*, section 41.01 (4th ed. 1973). A retroactive or retrospective statute, on the other hand, is one which acts on transactions which have already occurred or on rights and obligations that existed before the passage of the statute. *Id. See also Walker State Bank v. Chipokas*, 228 N.W.2d 49, 51 (Iowa 1975).

A retroactive application of House File 323 would change benefits that were based on contributions made before the effective date of the amendment. *See Arizona Governing Community for Tax Deferred Annunity and Deferred Compensation Plans v. Norris*, ____ U.S. ____, ____ 103 S.Ct. 3493, 3503, 77 L.Ed.2d 1236, 1254 (1983) (per curiam) (Marshall, J., concurring).

"This is true because retirement benefits under the plan used as that at issue here represent a return on contributions which were made during the employee's working years and which were intended to fund the benefits without any additional contributions from any source after retirement." *Id.*

[3] This doctrine take on added significance in the civil rights arena because the Civil Rights Act of 1964 preempts state legislation that is inconsistent with the federal act. 42 U.S.C. sections 2000e-7, 2000h-4 (1976); *Hays v. Potlach*, 465 F.2d 1081, 1082 (8th Cir. 1972). It must be remembered, however, that the Supreme Court of Iowa is the final interpreter of Iowa law, which can, in fact, offer broader protection than that offered by federal law. *Quaker Oats*, 268 N.W.2d at 866.

conformity with Title VII of the Civil Rights Act of 1964. *See Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 711, 98 S.Ct. 1370, 1377, 55 L.Ed.2d 657, 667 (1978) (held section 703(a)(1) of Title VII (42 U.S.C. section 2000e-2(a)(1) (1976) prohibits an employer from requiring women to make larger contributions in order to obtain the same monthly pension benefits as men).

The Supreme Court in *Manhart*, after finding a violation of Title VII, also examined the district court's award of retroactive relief to the entire class of female employees and retirees. The Court acknowledging the existence of the presumption in favor of retroactive relief once a judicial forum has determined that a violation of Title VII has been established, see *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280, 298 (1975), nevertheless held that the district court abused its discretion by awarding retroactive relief. *Manhart*, 435 U.S. at 723, 98 S.Ct. at 1383, 55 L.Ed.2d at 674. The Court stated, "The rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result." *Id.*, 435 U.S. at 721, 98 S.Ct. at 1382, 55 L.Ed.2d at 673.

The Court's decision was based on four factors. First, administrators of the pension fund at issue may have legitimately assumed that the program was entirely lawful. Second, the Court concluded that there was no reason to believe that the threat of backpay was needed to get other administrators to conform with the Court's decision. Third, the Court recognized that retroactive liability could have had a devastating financial impact on the economy, and finally, retroactive liability also could have been devastating for a pension fund.[4] 435 U.S. at 720-23, 98 S.Ct. at 1381-83, 45 L.Ed.2d at 672-674.

In *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, U.S., 103 S.Ct. 3492, 3493, 77 L.Ed.2d 1236, 1242 (1983) (per curiam), the Supreme Court reaffirmed *Manhart* holding that Title VII "prohibits an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay a woman lower monthly retirement benefits than a man who has made the same contributions." The Court further held that relief was to be prospective only; ". . . all retirement benefits derived from contributions made after the decision today must be calculated without regard to the sex of the beneficiary." *Id.*

Certainly, the Iowa legislature, in enacting House File 323, was aware of the *Manhart* and *Norris* cases and the reasoning behind those cases. The legislature is presumed to know existing law when it enacts a new statute. *State v. Rauhauser*, 272 N.W.2d 432, 434 (Iowa 1978). The failure to expressly make House File 323 retroactive further indicates a legislative intent to (1) invoke the presumption of Iowa Code section 4.5 (1983) that statutes be applied prospectively only and (2) amend the Iowa Civil Rights Act to make it consistent with current federal law.

It should be noted that judicial decisions and awards of relief deriving therefrom are normally applied retroactively, *see Albermarle*, 422 U.S. at 421, 95 S.Ct. at 2373, 45 L.Ed.2d at 298, whereas statutes generally are given prospective application only. The Court in *Manhart* and in *Norris*, however, abandoned the general rule of retroactive relief because of the overriding importance of the factors listed in *Manhart*. The Iowa legislature in enacting House File 323 could have recognized that the *Manhart* factors were equally applicable in the state of Iowa.

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[4] The factors listed in *Manhart* are consistent with the criteria normally used to determine when to apply a judicial decision of statutory interpretation prospectively. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296, 306 (1971) (whether decision establishes new principle of law; whether retrospective operation will further or retard the statute's operation; and whether inequitable results would occur if applied retroactively); *see also Norris*, U.S. at , 103 S.Ct. at 3512, 77 L.Ed.2d at 1265 (O'Connor, J., concurring) (applying *Chevron Oil*).

In sum, it is the opinion of the attorney general that House File 323 is to be applied prospectively from the effective date of the amendment and thus all retirement benefits derived from contributions made after that date must be calculated without regard to the sex of the beneficiary.

June 21, 1984

ADMINISTRATIVE LAW: Rulemaking. Iowa Code §17A.4 (1983); Iowa Code Supp. §25B.6 (1983); S.F. 475 (70th G.A.) [Iowa Code §17A.31-.33 (1985)], 1984 Iowa Acts, ch. 1007. Senate File 475, providing for a regulatory flexibility analysis for proposed rules which may have an impact on small businesses, requires issuance of an analysis only upon request as provided in section 1(4). (Osenbaugh to Ballou, Executive Director, Department of Water, Air and Waste Management, 6-21-84) #84-6-6

Stephen W. Ballou, Executive Director, Department of Water, Air and Waste Management: You have asked for our opinion concerning S.F. 475, which adds new sections to Chapter 17A and provides for a regulatory flexibility analysis in the promulgation of administrative rules. Your question is whether an agency must prepare a regulatory flexibility analysis under S.F. 475 for every rule which may have an impact on small business or only upon request. Section 1(3) states that an agency shall prepare the analysis upon request by authorized entities or groups. You ask whether section 1(2) implies that an analysis must be prepared in every case where a proposed rule may have an effect upon small business.

Section 1(2) states as follows:

> 2. If an agency proposes a rule which may have an impact on small business, the agency shall comply with the additional notice provisions of subsection 3 and the analysis requirements of subsection 4.

Section 1(3) provides for notice that a proposed rule may have an impact on small business. The third sentence of that section states:

> An agency shall issue a regulatory flexibility analysis of a proposed rule if, within twenty days after the published notice of proposed rule adoption, a written request for the analysis is filed with the appropriate agency by the administrative rules review committee, the governor, a political subdivision, at least twenty-five persons signing the request, *who qualify as a small business*, or a *registered* organization representing at least twenty-five persons.

The underlined language was added by amendment in the Senate.

Subsections 1(4)(a)-(l) set forth twelve factors the agency "shall consider for reducing the impact of the proposed rule on small business . . ." The last unnumbered paragraph of section 1(4) states that a summary of the regulatory flexibility analysis must be published prior to adoption of the proposed rule; the summary must state where persons may obtain a copy of the full text of the analysis. Section 1(4) further states:

> If the agency has made a good faith effort to comply with the requirements of subsections 3 and 4, the rule may not be invalidated on the ground that the contents of the regulatory flexibility analysis are insufficient or inaccurate.

Sections 1(2) and 1(4), if read in the absence of 1(3), suggest that the analysis requirements of section 1(4) must be met in every case where a proposed rule may have an impact upon small business. However, this result is inconsistent with the language in section 1(3) expressly triggering the analysis requirement upon the request of the designated entities.

It is a basic principle of statutory construction that statutes should be read to harmonize their provisions and to avoid rendering portions of the statute superfluous. *Robinson v. Department of Transportation*, 296 N.W.2d 809, 811 (Iowa 1980). "In enacting a statute, it is presumed that . . . [t]he entire statute is intended to be effective." Iowa Code §4.4(2) (1983). If the statute were construed to require the agency to issue the analysis in every case, the language defining those who are authorized to request an analysis would be superfluous.

It is also appropriate to examine the legislative history. The explanation to the bill stated:

> This bill requires agencies when promulgating an administrative rule that might affect small business to include in the notice of proposed rule making that the rules might have an impact on small business. *The agency shall issue a regulatory flexibility analysis if requested to do so by the governor, a political subdivision, the administrative rules review committee, at least twenty-five persons, or an organization representing at least twenty-five persons.* An agency is required to reduce the impact on small business if legal and feasible under the statute. The bill takes effect July 1 following enactment. [Emphasis added]

The explanation strongly supports the view that an analysis is issued only upon request.

Predecessor bills to S.F. 475 stated in section 1(4), "The analysis shall be prepared and presented if requested by a person who would be entitled to require an opportunity to make oral presentation on the rule." S.F. 2109 (69th G.A.); S.S.B. 43 (proposed Senate file, 70th G.A.). This language could have been confusing because §17A.4(1)(b) required 25 individuals, and not a single person, to request an opportunity to make oral presentation on a rule. S.F. 475 differed from these bills in listing the authorized requestors and significantly increasing the factors to be considered in the analysis by adding subsections 1(4)(f)-(l). The original language in S.F. 475 concerning eligible requestors was the same as that contained in §17A.4(1)(b) for requests for an opportunity to make oral presentation on a rule, except that state agencies were excluded. The sentence concerning requests was moved from section 1(4) to section 1(3); section 1(2) was not changed. The manifest intent of the changes between S.F. 475 and the predecessor bills was to clarify the requirements for requestors and not to require that the analysis be issued in every case.

Additionally, we would note that the Senate amended S.F. 475 to limit the potential requestors by requiring that the 25 persons requesting an analysis qualify as a small business and that an organization be registered with the agency. (Section 1(3) provides for notice to "organizations of small businesses who have registered with the agency requesting notification.") Passage of these amendments by the Senate indicates that the Senate regarded the request as significant. This confirms our view that the statute should be read as a whole so that an analysis need be prepared only upon request.

Other rulemaking provisions in Chapter 17A provide for other agency analyses only upon request. These provisions ard in similar lanuage to that in section 1(3). *See* §17A.4(1)(b) (statement of reasons); §17A.4(1)(c) (economic impact estimate). By contrast, Iowa Code Supp. §25B.6 (1983) imposed a requirement for fiscal notes to accompany any state administrative rule which necessitates additional expenditures by political subdivisions in a manner which makes it clear that this must be done without the requirement of a request.[1] The language used in section 1(3) indicates that the legislature intended to pattern this statute after others in chapter 17A which require analysis only upon request.

Construing all of the sections of the statute together, we believe a reasonable construction is that the agency should consider the factors listed in section 1(4)(a)-(l), to the extent known, for every proposed rule which may have an impact on small business. However, a written regulatory flexibility analysis need be prepared and issued only if a request is filed under section 1(3).

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[1] Section 25B.6, "State Rules," reads as follows:

> A state administrative rule filed pursuant to chapter 17A which necessitates additional expenditures by political subdivisions or agencies and entities which contract with a political subdivision to provide services beyond that which are explicitly provided by state law shall be accompanied by a fiscal note outlining the costs.

Construing the statute in this manner is, we believe, a just and reasonable result. *See* Iowa Code §4.4(3) (1983); *Hansen v. State*, 298 N.W.2d 263, 265-266 (Iowa 1980). The analysis as described in section 1(4) is extensive and would be burdensome if required in every case. We believe the legislature regarded this cost as justified only when there was sufficient interest expressed on the part of a number of affected small businesses, a political subdivision, the rules review committee, or the governor. The notice provisions in 1(3) put these entities on notice that they may request an analysis where needed. If there is not sufficient interest to do so, it would appear that preparing the full analysis would often be an unnecessary burden.

It is our conclusion that a regulatory flexibility analysis need be issued only upon request as provided in section 1(3), but that agencies should consider the factors in section 1(4)(a)-(1) for every proposed rule which may have an impact on small business. We recommend that agencies expand the required statement in notices of intended action for proposed rules subject to this act to specifically note that a regulatory flexibility analysis will be issued only upon request as provided in section 1(3).[2] This would advise any entity desiring the agency to issue an analysis that a request must be made so that action may be taken within twenty days provided.

June 7, 1984

JUDGES: Judicial Retirement System; Interest on Purchased Coverage. H.F. 2528 §28 [1984 Iowa Acts ch. 1285; Iowa Code §602.11115 (1985)]. Ch. 605A; §605A.5. A district associate judge who exercises the option to join the Judicial Retirement System and to cease to be a member of IPERS pursuant to House File 2528 is not obligated to pay interest in addition to the amount specified in House File 2528. (Pottorff to O'Brien, Court Administrator, 6-19-84) #84-6-7(L)

June 27, 1984

COUNTY HOME RULE: Provision of Representation for Indigent Criminal Defendants; Public Defender System. Iowa Code §§331.301(1), (3), (4), and (5); 331.776; 331.777; 331.778 (1983). A county's home rule authority to create an independent system for providing representation for indigent criminal defendants is preempted by §§331.776-778, which authorize the county to either create a public defender system or use the court-appointment system. However, the public defender system does allow the board of supervisors the discretion to appoint a private attorney as part-time public defender. This person could, with board approval, maintain a part-time private practice, operate the public defender officer out of the private law firm's office, and appoint a member of the firm as assistant public defender. (Weeg to Sandy, Dickinson County Attorney, 6-27-84) #84-6-8(L)

June 27, 1984

STATE OFFICERS AND DEPARTMENTS: Appointment of Mental Health Advocates. Iowa Code Chapter 229.19, §25A.2(3). Mental health advocates

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[2] The notice could read as follows:

> The agency has determined that this proposed rule may have an impact on small business. The agency has considered the factors listed in section 1(4)(a)(l) of S.F. 475 [1984 Iowa Act, ch.]. The agency will issue a regulatory flexibility analysis as provided in S.F. 475 [1984 Iowa Acts, ch.] if a written request is filed by delivery or by mailing postmarked no later than [20 days from publication of notice] to [office address]. The request may be made by the administrative rules review committee, the governor, a political subdivision, at least 25 persons who qualify as a small business under the Act, or an organization of small businesses representing at least 25 persons which is registered with this agency under the Act.

appointed pursuant to provisions of Chapter 229 are "employees of the state" within the meaning of §25A.2(3) and, as such, the state is obligated to defend and hold harmless those appointed as advocates for any acts or omissions by them while acting within the scope of their employment. *See* §25A.21. (Lavorato to Kimes, Clarke County Attorney, 6-27-84) #84-6-9(L)

June 27, 1984

TAXATION: Property Tax Refunds; Taxes Mistakenly Assessed To and Paid by Taxpayer on State-Owned Property. Iowa Code §§427.1(1), 441.37, 441.38, and 445.60 (1983). Where assessor mistakenly sent assessment notices to taxpayer after taxpayer's property had been condemned by State and where taxpayer did not appeal such assessments pursuant to available remedies in §§441.37 and 441.38, but instead voluntarily paid property taxes attributable to that property, taxpayer could not obtain a refund of the taxes under §445.60. (Griger to John S. Sandy, Dickinson County Attorney, 6-27-84) #84-6-10(L)

June 29, 1984

SCHOOLS: Business Schools: Associate Degrees. Iowa Code §§504.12, 714.17-714.22 (1983). A not-for-profit business school can offer an associate degree if that is a degree usually conferred by such an institution. This is a question of fact. A private business school may be subject to other statutory provisions. (Tobin to Senator Lee Holt, 6-29-84) #84-6-11

Honorable Lee W. Holt, State Senator: You have requested an Opinion of this office regarding the operation of Iowa Code Section 504.12 (1983). Specifically, you have inquired whether a not-for-profit business school is allowed to grant an associate degree to any student completing a two-year program of study under §504.12, which is a section within the Code chapter entitled "Corporations Not For Pecuniary Profit."

Section 504.12 in relevant part states:

> Power to confer degree. Any corporation of an academical character may confer the degrees usually conferred by such an institution. No academic degree for which compensation is to be paid shall be issued or conferred by such corporation or by any individual conducting an academic course unless the person obtaining the said degree shall have completed at least one academic year of resident work at the institution which grants the degree.

No requirements for an associate degree are set forth in the Iowa Code. The Iowa Administrative Code chapter dealing with graduation requirements from area vocational schools and community colleges states that associate degrees shall be given upon completion of certain curricular requirements. 670 I.A.C. §5.2(10). The curricular requirements are not outlined except in agreements between the State Board of Regents and the area schools. They vary depending on the type of degree involved, e.g., arts, science, applied arts, applied science or general studies.

Since no standards for associate degrees exist in the Code or the Administrative Code, the issue is whether an associate degree is one usually conferred by such an institution. This is a question of fact for any specific institution and, therefore, not a question that may be answered in an Attorney General's Opinion. However, for purposes of analysis, a not-for-profit business school providing a two-year program of study could be compared to other institutions providing two-year programs of study such as area schools. As described above, area schools definitely do offer associate degrees.

In comparing business schools to area schools a number of issues need to be considered. Among these would be whether such a school meets accreditation association regulations and standards and substantive course content. One may also consider whether the degree conferred is transferrable for course work to other institutions or whether the degree is to be a terminal degree denoting a prescribed and regularized course of study completed.

There may be other statutory provisions pertaining to private business schools. For example, under the Iowa Trade and Correspondence School Act, §714.17 to §714.22, private business schools not properly accredited must meet the require-

ments of the act. Because §714.19(1) mentions colleges and universities and §714.19(8) specifically refers to private business schools, we do not believe the legislature intended private business schools to be considered as colleges and universities authorized under this subsection.

In summary, a not-for-profit business school could issue associate degrees if those are degrees usually conferred by such an institution. This is a question of fact which cannot be answered without more information. A not-for-profit business school may need to comply with the Trade School Act.

June 29, 1984

APPROPRIATIONS: Public Funds: Pledging of Assets to Secure Public Funds; Continuation of State Sinking Fund. Iowa Code Ch. 454 (1983), as amended by Iowa Code Supp. Ch. 454 (1983); 1984 Iowa Acts, S.F. 2220, §§20 and 29. A public body which has not completed pledging to secure public funds by July 1, 1984, and which would otherwise be protected by the state sinking fund, will continue to be protected by the sinking fund until July 1, 1985. (Lyman to Carpenter, State Representative, 6-29-84) #84-6-12

The Honorable Dorothy Carpenter, State Representative: You have requested an opinion of the Attorney General regarding the continuing viability of the state sinking fund for public deposits, Iowa Code Chapter 454 (1983), as amended by Iowa Code Supplement Chapter 454 (1983). Specifically, you ask if a public body maintains its deposits in a bank and has not completed pledging to secure the deposit of public funds by July 1, 1984, whether the public body continues to have the protection of the state sinking fund until July 1, 1985.

Iowa Code Chapter 454 was conditionally repealed by 1984 Iowa Acts, S.F. 2220, section 29. The condition precedent for the repeal of Chapter 454—and the mandatory implementation of the pledging of assets to secure public funds—is contained in section 29:

> However, if pledging to secure the deposit of public funds has not been properly completed by July 1, 1984, then chapter 454 is not repealed until July 1, 1985.

A statute's taking effect may be conditioned upon the happening of a contingency. *Gannett v. Cook*, 245 Iowa 750, 61 N.W.2d 703 (1953); 2 Sutherland, *Statutory Construction* §33.07 (4th ed.). Such a mechanism is often employed by a legislature to ensure that the proper enforcement machinery is in place prior to the operation of a superseding statute.

In creating the contingency contained in section 29, the General Assembly took into account the inherent difficulties in instituting a state-wide system of pledging of assets to secure public funds. Uncertain as to how long a period would be necessary to achieve the transition from the sinking fund to a system of pledging for existing depositories of public funds, the legislature chose to continue the sinking fund to July 1, 1985, in the event that this transition was not completed by July 1, 1984.

A contrary conclusion would clearly vitiate the legislature's intent. The purpose for enacting a system of pledging was to provide security for the deposit of public funds. 1984 Iowa Acts, S.F. 2220, section 20. If the pledging of assets is not completed on July 1, 1984, and notwithstanding this fact the state sinking fund was deemed to be no longer operational, consequently public funds on deposit in banks would not enjoy the necessary security. The legislature clearly sought to avoid the absurd consequences and great inconvenience which would result, and thus this construction should not be adopted. *McGraw v. Seigel*, 211 Iowa 127, 263 N.W. 533 (1936).

We are advised that the State Treasurer has determined that the contingency provided in section 29 has not occurred—i.e., pledging to secure the deposit of public funds has not, and cannot possibly be, completed by July 1, 1984. It is therefore our opinion that chapter 454 is not repealed.

The legislature's provision for the continuation of the sinking fund until July 1, 1985, could not, however, be interpreted to relieve treasurers of public bodies of the responsibility to enter into pledging agreements with their respective depositories during the interim period. All public body treasurers should

undertake a good-faith effort to obtain a pledge of collateral in compliance with S.F. 2220 for their deposits at the earliest reasonable time. Additionally, public deposits would only be protected to the extent provided for by Iowa Code Chapter 454. The specific requirements of the chapter would need to be met, with deposits placed only in banks or savings banks, for a public body to avail itself of sinking fund security from July 1, 1984, through July 1, 1985.

In summary, it is our opinion that a public body which has not completed pledging to secure public funds by July 1, 1984, and which would otherwise be protected by the state sinking fund, will continue to be protected by the sinking fund until July 1, 1985.

JULY 1984

July 3, 1984

STATE OFFICERS AND DEPARTMENTS: Health; Cosmetologists: The Practice of Rendering Cosmetology Services to Residents of Nursing Homes in Iowa by Licensed Cosmetologists. Iowa Code §157.13(1) and 470 I.A.C. 58.31(3), 59.36(3), 58.32(2), 59.37(2), 61.6(1). Cosmetologists who provide cosmetology services with or without compensation in an intermediate or skilled nursing facility for residents who have a physical or mental disability are exempt from practicing cosmetology in an unlicensed salon under Iowa Code §157.13(1). (Hart to Pawlewski, Commissioner of Health, 7-3-84) #84-7-1(L)

July 3, 1984

MUNICIPALITIES: Council Members. Disqualification From Volunteer Fire Department. An ordinance which prohibits a city council member from serving on a volunteer fire department, assuming a legitimate intent, is valid. (Walding to Hutchins, State Senator, 7-3-84) #84-7-2(L)

July 9, 1984

INSURANCE: Taxation: Premium Tax on Workers' Compensation Group Self-Insurance Associations. Iowa Code Sections 87.1, 87.4, 87.11, 87.21, 432.1 (1983). An association of employers under Iowa Code Section 87.4 is subject to the tax under Iowa Code Section 432.1 on the premiums or assessments paid by its members for coverage from liability for workers' compensation benefits. (Osenbaugh to Foudree, Commissioner of Insurance, 7-9-84) #84-7-3(L)

July 11, 1984

OPEN MEETINGS LAW: Governmental Body, Area Agency on Aging. Iowa Code Sections 28A.2(1)(c); 249B.8, 45 C.F.R. 1321.61. By designation, the Iowa Commission on Aging formally created the Iowa Lakes Area Agency on aging to fulfill public policy-making and decision-making functions which requires its meetings to be open to the public. The Iowa Association of Area Agencies has not been created by the State Commission and its meetings may be closed to the public. (Allen to Zenor, 7-11-84) #84-7-4(L)

July 26, 1984

PUBLIC FUNDS: State Fish and Game Protection Fund; Interest Earned. Iowa Code Chapters 18 and 107; Iowa Code §§107.17, as amended by 1984 Iowa Acts [ch. 1262], H.F. 2401, §3; 453.7, and 453.7(2) (1983); Iowa Code Supp. §18.120 (1983); 1982 Iowa Acts, Ch. 1084 and 1979; Iowa Acts, Ch. 12 §6.3. Interest earned on fish and game protection fund payments to the motor vehicle dispatcher depreciation fund is to be credited to the state's general fund as opposed to being credited back to the fish and game protection fund. (Lyman to Wilson, Director, State Conservation Commission, 7-26-84) #84-7-5(L)

July 26, 1984

SCHOOLS: Redistricting. 1983 Iowa Code Supp. §275.23A(4). Where two school district directors reside in the same new director district after redistricting and were elected to terms extending beyond the effective date of redistricting, both directors' terms expire at the next regular election. (Fleming to Heeren, Tama County Attorney, 7-26-84) #84-7-6(L)

July 26, 1984

SECRETARY OF STATE: Corporation Division Duties. Senate File 510, 1984 Session, 70th G.A. Upon receiving, from an agricultural supply dealer, a request for a certificate showing any effective financing statements or verified lien statements naming a certain debtor and the crops to which a newly filed lien attaches, the secretary should supply a listing of all financing statements and verified lien statements which name the specified debtor and relate to crops or real property. Likewise, when a request for a certificate relates to livestock, the secretary should supply a listing of all financing

statements and verified lien statements which name the specified debtor and relate to livestock. (Galenbeck to Odell, Secretary of State, 7-26-84) #84-7-7(L)

July 26, 1984

STATE OFFICERS AND DEPARTMENTS: Human Services: Licensing; Funding; Foster Care; Substance Abuse; Juvenile. Senate File 2176, 70th G.A. [1984 Iowa Acts ch. 1050]; Chapters 125, 135B, 135C, 236; §§125.43, 125.44, 125.45, 218.1, 232.142, 234.35, 237.1, 237.1(3), 237.4, Code of Iowa, 1983; 498 Iowa Administrative Code §§202.1(5), 202.1(7), 202.2(1), 202.4(4). A juvenile substance abuse facility licensed under Ch. 125 need not be also licensed under Ch. 237 in order to receive foster care funds, assuming that the facility in a particular child's case meets the other criteria for payment for foster care. (Lynn to Rosenberg, State Representative, 7-26-84) #84-7-8(L)

July 26, 1984

SCHOOLS: Secretary of State. Redistricting of School Board Director Districts. 1983 Iowa Code Supp. §§275.12(2), 275.23A. When the Secretary of State is required to redistrict a school district because the board of directors has failed to do so, the criteria of 1983 Iowa Code Supp. §275.23A(1) must be applied. The method chosen by the district for electing directors from those authorized by 1983 Iowa Code Supp. §275.12(2) must be utilized. Expenses incurred by the Secretary of State in the redistricting process shall be assessed to the school district. (Fleming to Whitcome, Director of Elections, 7-26-84) #84-7-9(L)

July 31, 1984

CONSTITUTIONAL LAW: Corporations; Insurance: Constitutionality of Amended Section 514.4 and Validity of Rules Providing for Limited Role of Nominating Petitions for Subscriber and Provider Directors of Nonprofit Health Service Corporations. Iowa Code Supp. Section 514.1 (1983); Iowa Code Supp. Section 514.4 (1983), *as amended by* 1984 Iowa Acts [ch. 1282], S.F. 2277, §1; 510 I.A.C. §§34.7(2), 34.7(5). The insurance commissioner's rules 34.7(2) and 34.7(5), in limiting the role of the nominating petitions for subscriber and provider directors, initial and replacement, to a suggesting one are valid as a matter of administrative rulemaking and statutory construction. Amended Section 514.4 is constitutional under the due process, taking, and contract clauses of the state and federal constructions. (Haskins to Foudree, Commissioner of Insurance, 7-31-84) #84-7-10

The Honorable Bruce W. Foudree, Commissioner of Insurance: You have submitted to us the following request:

> Under Iowa Code Supp. Section 514.4 (1983), as amended by 1984 Iowa Acts, S.F. 2277, §1, at least two-thirds of the directors of a corporation under Iowa Code Ch. 514 must be subscribers. Existing corporations must have a simple majority of subscriber directors by August 1, 1984, with a two-thirds majority of those directors by August 1, 1985. *See* 1983 Iowa Acts, Ch. 27, §15. Under Section 514.4 as most recently amended, the commissioner of insurance is to promulgate rules under Chapter 17A which implement the process of election of subscriber directors. Through these rules, the commissioner has interpreted the amended section 514.4 as making the independent subscriber nominating committee the exclusive source of nominations of initial subscriber directors with replacement subscriber directors being nominated exclusively by the subscriber directors already placed on the board. *See* 510 I.A.C. §34.7(2). (Provider directors may be nominated in any manner permitted by the corporation's articles or bylaws. *See* 510 I.A.C. §34.7(5)(c).) Nominating petitions, either for subscriber or provider directors, are, under these rules, merely for the consideration of the nominating committee, in the case of initial subscriber or provider directors, or for the board of directors, in the case of replacement subscriber or provider directors, and are not an independent means of nomination of those types of directors. *Id*; 510 I.A.C. §34.7(5). The actual election of the subscriber and provider directors remains with the membership of the corporation. 510 I.A.C. §34.7(4).
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> Your opinion is sought on the following questions:

1. As a matter of administrative rulemaking and statutory construction, are the rules of the commissioner valid in the manner in which they treat the role of nominating petitions for initial and replacement subscriber and provider directors?

2. If the rules are valid in the manner in which they treat the role of the nominating petitions for subscriber and provider directors, does amended Section 514.4:

(a) deprive the Ch. 514 corporations of property without due process of law or take their property without just compensation in violation of the Fourteenth Amendment to the United States Constitution or Article I, Section 9 of the Iowa Constitution, or the Fifth Amendment to the United States Constitution or Article I, Section 18 of the Iowa Constitution, or

(b) impair the state's obligations of contract with the corporations, in violation of Article I, Section 10 of the United States Constitution or Article I, Section 21, of the Iowa Constitution?

3. If the rules are invalid in the manner in which they treat the role of the nominating petitions for subscriber and provider directors, are the constitutional provisions referred to in question 2 above violated?

In order to answer the first question, the pertinent portion of the amended Section 514.4, the fifth and sixth unnumbered paragraphs thereof, are set forth in full as follows:

> [1] The commissioner of insurance shall adopt rules pursuant to chapter 17A to implement the process of the election of subscriber directors of the board of directors of a corporation to ensure the representation of a broad spectrum of subscriber interest on each board and establish criteria for the selection of nominees. [2] The rules shall provide for an independent subscriber nominating committee to serve until the composition of the board of directors meets the percentage requirements of this section. [3] Once the composition requirements of this section are met, the nominations for subscriber directors shall be made by the subscriber directors of the board under procedures the board establishes which shall also permit nomination by a petition of at least fifty subscribers. [4] The board shall also establish procedures to permit nomination of provider directors by petition of at least fifty participating providers. [5] A member of the board of directors of a corporation subject to this chapter shall not serve on the independent subscriber nominating committee. [6] The nominating committee shall consist of subscribers as defined in this section. [7] The rules of the commissioner of insurance shall also permit nomination of subscriber directors by a petition of at least fifty subscribers, and nomination of provider directors by a petition of at least fifty participating providers. [8] *These petitions shall be considered only by the independent nominating committee during the duration of the committee. [9] Following the discontinuance of the committee, the petition process shall be continued and the board of directors of the corporation shall consider the petitions.* [10] The independent subscriber nominating committee is not subject to chapter 17A. [11] The nominating committee shall not receive per diem or expenses for the performance of their duties.
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> Population factors, representation of different geographic regions, and the demography of the service area of the corporation subject to this chapter shall be considered when making nominations for the board of directors of a corporation subject to this chapter.

[Emphasis added]. Iowa Code Supp. Section 514.4 (1983), *as amended by* 1984 Iowa Acts, S.F. 2277, §1.

In a previous opinion, our office declared that under Section 514.4, as it read prior to amendment by the 1984 session of the legislature, the nominating committee was not the exclusive source of nominations of the initial subscriber directors and that nominating petitions of subscribers or providers were an independent method for making nominations of those directors. *See* Op.Att'y.Gen.

#84-1-13(2). It also upheld the constitutional validity of the then existing nominating scheme against challenge on the same grounds as those considered here.

I.

The standard for reviewing the validity of a rule as a matter of statutory construction is as follows:

> [A] rule should be held to be within the agency's power when a rational agency could conclude that the rule is within its delegated authority. The burden is placed upon the party attacking the rule's validity to make a clear and convincing showing that it is ultra vires. This "rational agency" test is the means by which we intend, in rule review cases, to determine what weight should be given to an agency's interpretation of the statute which it administers. It is the standard by which an agency's use of its expert discretion is to be judged.

Hiserote Homes, Inc. v. Riedemann, 277 N.W.2d 911, 913 (Iowa 1979); *see also Davenport Community Sch. Dist. v. Iowa Civil Rights Comm'n*, 277 N.W.2d 907, 910 (Iowa 1979).

As indicated, it is your position, as embodied in rules 34.7(2) and 34.7(5), that nominating petitions for subscriber or provider directors, initial or replacement, are not an independent avenue of nomination but are merely for the consideration of the nominating committee or the board. Once received by the committee or board, they need not be automatically passed on to the corporate membership for a vote, as you read the statute.

There is another view of this language, however, held by the Ch. 514 corporations themselves. Under that view, the nominating petitions would be independent nominating devices and, if considered by the nominating committee or board, would have to be passed on to the membership for a vote. In support of this construction, it is argued that to treat nominating petitions as mere devices for suggestion of names would render them meaningless as "*nominating* petitions" and that mere suggestions could be made in a number of informal ways, even by a person who is not a subscriber. Thus to accord the nominating petitions mere suggestive effect is to emasculate them, under this view. Language from the former opinion is cited in support.

The difficulty with this view, though, is that it is directly contrary to the addition of the clear language of the eighth and ninth sentences. Thereunder, nominating petitions are to be "considered only by the independent nominating committee [or thereafter, the board]." Since the petitions are to be considered only by the nominating committee or board, arguably, they are to be considered by no one else. Moreover, to say that they are merely devices for suggesting names to the nominating committee is not to completely emasculate them. Suggestions in the form of a nominating petition carry a credibility which those in other more casual forms lack. In essence, the eighth and ninth sentences modify and limit the concept of "nomination by petition" referred to in previous sentences. It is axiomatic that the legislature may be its own lexicographer. *See Cedar Rapids Community School Dist. v. Parr*, 227 N.W.2d 486, 495 (Iowa 1975). Here "nomination by petition," when read in light of the eighth and ninth sentences, is implicitly defined as merely a formal device for submission of suggested names of subscriber or provider directors.

Using a dictionary definition, the corporations argue that the word "consider" does not imply a veto. But the word "considered," which is the word actually used in the statute, can be read to so imply:

> Deemed; determined; adjudged; reasonably regarded. For example, evidence may be said to have been "considered" when it has been reviewed by a court to determine whether any probative force should be given it.

Black's Law Dictionary 278 (5th ed. 1979). Thus, "considered" can imply the power to actually do something about the matter under consideration, that is, to accept or reject as does a court of law. In this context, your reading of the word "considered" as connoting the power to veto is not unreasonable.

Moreover, the underlying purpose of the restricted nominating procedure is to prevent providers from influencing the appointment process for subscriber directors. This purpose is not served by allowing direct nomination of subscriber directors by a petition of fifty subscribers. This is because in order to be a "subscriber director" one may not be employed by, related to, or financially interested in, a provider, *see* Iowa Code Supp. Section 514.4 (1983) (second unnumbered paragraph), yet a "subscriber" for general purposes, including being able to sign a nominating petition, can be any individual who has contracted with the corporation to receive services, including those persons employed by, related to, or financially interested in, a provider. *See* Iowa Code Supp. Section 514.1 (1983) (general definition of "subscriber"). Thus, if subscribers are allowed to nominate by petition, providers, their employees, relations, or affiliates, could sign those petitions and presumably influence the choice of subscriber directors. Of course, this rationale applies equally to initial and replacement subscriber directors and justifies the "perpetuation" of the limited role for nominating petitions for those directors.

Further, demographic and geographic factors are to be considered when making nominations of subscriber directors. *See* Iowa Code Supp. Section 514.4 (1983) (sixth unnumbered paragraph). Under the commissioner's rules, subscriber directors are also to have reasonably knowledge of the operation of the health service corporation. *See* 510 I.A.C. §34.7(3)(b)(4). An unbridled right to nominate by petition would hardly ensure that these requirements are met, in that great numbers of petitions could be submitted and the names actually chosen from them by the electing members could be totally unrepresentative, whereas if the nominating committee is exclusively in charge of final nominations, control and selectivity to ensure the desired representativeness can be maintained.

In interpreting a statute, the ultimate goal is to ascertain, and, if possible, give effect to the intention of the legislature. *See Hines v. Illinois Central Gulf R.R.*, 330 N.W.2d 284, 288 (Iowa 1983). Resort may be had to legislative journals. *See Unification Church v. Clay Central School Dist.*, 253 N.W.2d 579, 581 (Iowa 1977). Amendments made as bills pass through the legislative process are germane. *See Lenertz v. Municipal Ct.*, 219 N.W.2d 513, 516 (Iowa 1974).

The legislative history of S.F. 2277 is pregnant with significance. As initially passed by the Senate, it appeared to ratify the construction adopted in the previous attorney general's opinion that the nominating petition was to be an independent vehicle for nomination of the initial subscriber directors. (The opinion had also interpreted the earlier amended version of §514.4 as making the existing subscriber directors the sole source of nn of replacement subscriber directors. The Senate version modified this result and made the nominating petition an independent source of nomination of replacement subscriber directors too.) Under the Senate version, the pertinent paragraph of Section 514.4 read as follows:

> Once the composition requirements of this section are met, the nominations for subscriber directors shall be made by the subscriber directors of the board under procedures the board establishes which shall also permit nomination by a petition of at least fifty subscribers or participating providers. . . . The nominating committee shall consist of subscribers as defined in this section. The rules of the commissioner of insurance shall also permit nomination by a petition of at least fifty subscribers or participating providers.

But, when S.F. 2277 went to the House of Representatives, the pertinent paragraph quoted above was rewritten by that body. After a Senate amendment to the House amendment, the final version of this paragraph resulted. Language was also adopted by the House limiting the signing of petitions for subscriber directors to subscribers, thereby precluding providers from signing those petitions, unlike under the original Senate version. The corporations argue that the only effect of the House amendment is to limit the signing of petitions for subscriber directors to subscribers (and to introduce a parallel petition process whereby participating providers could nominate provider directors.) The difficulty with this argument, though, is that such a change could have been

accomplished without adding the eighth and ninth sentences. It is well established that all parts of a statute, including the eighth sentence of the pertinent paragraph of Section 514.4, are to be given meaning and effect. *See State v. Berry*, 247 N.W.2d 263, 264 (Iowa 1976).

In the construction of statutes, it is presumed that an amendment is intended to effect some change in the existing law. *See Mallory v. Paradise*, 173 N.W.2d 264, 267-268 (Iowa 1969). Clearly, it was the intent of the legislature, as demonstrated by the language of the House amendment as concurred in by the Senate, to effect more than simply a change in the identity of the signatory parties to a nominating petition. If that were simply the goal, it could have been accomplished without the eighth and ninth sentences in the pertinent paragraph of Section 514.4. The legislature was evidently aware of the result reached in the attorney general's opinion and intended to change it. *See Barnett v. Durant Community School District*, 249 N.W.2d 626, 630 (Iowa 1977) ("It appears the amendment was enacted in response to the attorney general's opinion and resulting controversy").

Another issue regarding the validity of the rules as a matter of statutory construction must be addressed here. Rule 34.7(5)(c) allows provider directors to be nominated by "any alternative means provided by the corporation's articles or by-laws." Clearly, this rule means that nomination of those directors need not receive the approval of the board. It cannot be said that this approach illogically prefers providers over subscribers in granting a right of direct nomination. As seen, amended Section 514.4 is concerned with the purity of the nominating process for subscriber directors; selection of provider directors is not central to the purpose underlying the statutory scheme, which is to ensure adequate representation of subscribers.

On the other hand, rule 34.7(3)(d) is not inappropriate in limiting the nominating committees to submitting "at least two and not more than three individuals" for each subscriber position. The nominating committee could hardly be said to be more than a credentials committee if it had to submit to the membership for a vote the names of all subscribers, suggested by nominating petition or otherwise, who met the qualifications for a subscriber director. Inherent in a nominating committee is the power of selectivity.

Thus, we conclude that rules 34.7(2) and 34.7(5) are valid as a matter of administrative rulemaking and statutory construction.

II.

Before discussing the constitutional issues, it is important to note that those who challenge the constitutionality of statutes undertake an awesome task. Statutes enjoy a strong presumption of validity; in order to prove it unconstitutional, a challenger bears the burden of negating every reasonable basis for a statute. *See State ex rel. Iowa Dept' of Health v. Van Wyk*, 320 N.W.2d 599, 605 (Iowa 1982). Where the statute is merely doubtful, a court will not interfere. *See Chicago Title Ins. Co. v. Huff*, 256 N.W.2d 17, 25 (Iowa 1977). Legislative enactments will not be held unconstitutional, unless they are shown to clearly, palpably, and without doubt infringe the constitution. *Id.*

The essence of the corporations' argument that the amended Section 514.4 takes its "property" without due process or just compensation is that they possess a property right to maintain control in the hands of their members, who are providers of health care services, and that this right to maintain control in the hands of their members, who are providers of health care services, and that this right is negated by amended Section 514.4. The source for this alleged right is Section 514.4 as it appeared in the 1983 Code. That Section provided that the board of directors of a corporation under Ch. 514 was to be comprised of providers of health care services. Thus, the "right" in question was purely statutory in the first place. Amended Section 514.4 merely changes this statutory feature of the corporations. Corporations in general are purely creatures of statute. *See* 19 C.J.S. *Corporations* §935, at 369 (1940); *Schmid v. Automobile Underwriters, Inc.*, 215 Iowa 170, 174 244 N.W. 729, 731 (1932). This is true of Ch. 514 corporations in particular. *See* O.A.G., #79-3-10(L), *quoted with approval in Health Care*

Equalization Comm. v. Iowa Medical Soc'y, 501 F.Supp. 920, 991 (S.D. Iowa 1980) ("Being creatures of statutes, service corporations under Section 514.1 can contract for these services only and only with those persons or entities listed in chapter 514:. . . ."); *Health Care Equalization Comm.* at 989 ("Iowa Code chapter 514 governs the activities of any corporation organized under that chapter . . ."). Being merely statutory creations in the first place, it cannot be said that there is an indefinite right on the part of Ch. 514 corporations to continued statutory provision for provider control. This is because the state exercises "reserve" authority over these corporations, a power embodied in Iowa Const. Art. VIII, §12:

> Subject to the provisions of this article, the General Assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two third of each branch of the General Assembly; and no exclusive privileges, except as in this article provided, shall ever be granted.[1]

St. John v. Iowa Business Men's Bldg. and Loan Ass'n, 136 Iowa 448, 454, 113 N.W. 863, 865 (1907) ("a corporation under our laws has no absolute right to do business in this state, and its articles of incorporation are at all times subject to amendment by the General Assembly. Conditions may at any time be imposed upon a corporation and enforcement thereof assured by revoking their privileges in the event of noncompliance"). There is authority to the effect that the "reserve" power is limited to corporate alterations of a non-fundamental nature. *See State v. Barker*, 116 Iowa 96, 89 N.W. 204 (1982). Later cases have de-emphasized this limitation. *See St. John; Wall v. Banker's Life Co.*, 208 Iowa 1053, 223 N.W. 257 (1929). Indeed, in high court cases under the federal constitution, it is purely judicial dicta. *See* Library of Congress, *Constitution of the United States of America*, 392 (1964). In any event, even where the "reserve" power is inapplicable, it is clear that the police power of the state can authorize a fundamental corporate alteration. *Id.* at 393 ("Private corporations, like other private persons, are always presumed to be subject to the legislative power of the State").

A proper exercise of the police power merely requires a rational relationship of the legislative means to the legislative end. *See MRM, Inc. v. City of Davenport*, 290 N.W.2d 338, 343 (Iowa 1980); *Green v. Shama*, 217 N.W.2d 547, 554 (Iowa 1974). Under the due process clause, there need only be a "rational basis" for the regulation. Pursuant to the customary standard for review of economic and social legislation, it is enough, in order to sustain the constitutionality of amended Section 514.4, that a rational legislature could believe it to be necessary. *See North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973); *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 70 L.Ed.2d 93 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488, 75 S.Ct. 461, 464, 99 L.Ed. 563, 572 (1955). ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); *Huff* at 23-24 ("[I]n the federal due process field, the presumption of statutory validity is especially protected.") This is because the modern tendency is to extend rather than restrict economic policy regarding enactment of police power legislation. *See State v. Miner*, 331 N.W.2d 683, 688 (Iowa 1983). The kind of statute here, dealing as it does with an economic issue, is one peculiarly within the province of the legislature. That is, the regulation need not be able to withstand "strict scrutiny." *See State ex rel. Iowa Dep't of Health v. Van Wyke*, 320 N.W.2d 599, 605

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[1] 1983 Iowa Act, Ch. 27 (H.F. 196), §§12, 15 (codified as 1983 Iowa Code Supp. Section 514.4 (1983)) was enacted by a vote of 45 to 1 (four not voting) in the Senate and 95 to 0 (five not voting) in the House of Representatives. 1984 Iowa Acts, S.F. 2277, §1, which produced amended Section 514.4 discussed here, was passed by a margin of 45 to 0 (five not voting) in the Senate and 99 to 0 (one not voting) in the House. Thus, the procedural check on the legislature's exercise of the "reserve" power has been met.

(Iowa 1982); *MRM, Inc.*, at 342; *Richards v. City of Muscatine*, 237 N.W.2d 48, 57 (Iowa 1975). Here, the end of the legislation is clearly permissible: reduction of health care costs. The means chosen — a super-majority of subscribers on the boards of directors of Ch. 514 corporations — is rationally related to achieving that end. This is because providers of health services can be viewed as having an inherent conflict of interest in serving on the boards of health service corporations, a conflict which significantly affects health care costs. Health service corporations are not mere "conduits" for passing on providers' costs. They can exercise leverage over providers' costs through the reimbursement mechanism for provider services. But if they are dominated by providers, they will presumably have no reason to do so. Thus, inflated provider health care costs will simply be passed on to the subscribers of Ch. 514 corporations through the rates charged them. But if ordinary subscribers dominate their boards, it is more likely that restraint will be exercised over provider reimbursement.[2] Or so a reasonable legislature could believe, and that fact is all that is necessary to sustain the constitutionality of the legislation. In other words, provider domination of Ch. 514 corporations originally served the interest of promoting low cost health insurance and for that reason was mandated by the legislature. *See* 1939 Iowa Acts, Ch. 222, §4 (precursor of unamended Section 514.4).

Provider domination is now seen to contribute to rising health care costs and the legislature could thus reasonably desire to end it as a facet of the corporations which no longer serves the legislative end. To accomplish this, the legislature simply changed the statutory provision relating to the boards of directors of Ch. 514 corporations.

The existence of "less drastic alternatives" to restructuring board composition in achieving the legislative end of restraining runaway health care costs would not render the statute unconstitutional. *See Miner* at 689. ("We do not believe that the availability of a less restrictive alternative is a relevant consideration in the context of a substantive due process challenge to economic legislation"). Hence, it is beside the point that the state can (and has) directly regulated Ch. 514 corporations' provider contracts from a utilization and a cost-containment standpoint. *See* Iowa Code Section 514.8 (1983). (It is true that some Ch. 514 corporations have already instituted new utilization and cost-containment oriented provider contracts. But such action was not taken without considerable prodding from the commissioner. Further, the legislature, by mandating subscriber domination, might reasonably wish to ensure that utilization and cost-containment efforts continue by those corporations which have already commenced them and begin by those which have not.) Nor is it of any consequence that a less intrusive procedure for implementing the subscriber director board composition requirement itself could have been adopted. "[A] legislature need not 'strike at all evils at the same time or in the same way.'" *Minnesota v. Clover Leaf Creamer Co.*, 449 U.S. 456, 466, 101 S.Ct. 715, 725, 66 L.Ed.2d 659, 670 (1981). The purpose of the exclusive role of the independent subscriber nominating committees is not some insidious one of taking control of Ch. 514 corporations on the part of the state. It is to ensure the choosing of subscriber directors who are truly independent of providers. As seen, a nominating petition process by subscribers can be manipulated to thwart this independence. Therefore, the role of nominating petitions is appropriately limited, in light of the legislative end.

In addition, Ch. 514 corporations have traditionally been subject to a special regulatory scheme and amended Section 514.4 is merely part and parcel of that scheme. The insurance business in general is peculiarly subject to special supervision and control. *Huff* at 29. "Those who do business in the regulated field

[2] The fact that there may be some question as to the ability of certain, smaller, Ch. 514 corporations to exercise market leverage over providers does not undermine the justification for amended Section 514.4. Under a "rational basis" test, the legislature can categorize all Ch. 514 corporations the same for purposes of their ability to influence provider costs.

cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end. . . ." *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 91-92, 79 S.Ct. 141, 3 L.Ed.2d 132, 138 (1958). In other words:

> When one devotes his property to a use, 'in which the public has an interest,' he in effect 'grants to the public an interest in that use' and must submit to be controlled for the common good. . . . The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which [the] public interest demands shall be regulated, he must know regulation will ensue.

Nebbia v. New York, 291 U.S. 502, 533-534, 54 S.Ct. 505, 514, 78 L.Ed. 940, 955 (1933). Chapter 514 corporations have historically been accorded special treatment. Originally, these corporations were organized as part of a nationwide movement to allow the creation of hospital and physician service plans which would offer the equivalent of health insurance to those who could not otherwise afford it. *See Blue Cross and Blue Shield of Mich. v. Demlow*, 270 N.W.2d 850-851 (Mich. 1983). To achieve that end, they were given certain regulatory advantages, such as an exemption from the premium tax and all other provisions of the insurance laws. *Id.* at 852; *see* Iowa Code Sections 432.1, 514.1 (1983). As a result of these advantages, together with their unique relationship to health care providers, they have been able to achieve a significant competitive advantage over commercial insurers. This special exemption is enough to "vest them with a public interest." Hence, even aside from the effect on health care costs of their provider contracts, the legislature could reasonably decide to make Ch. 514 corporations uniquely accountable to the state and their subscribers.

We accordingly conclude that due process is not violated by amended Section 514.4.

Turning to the next issue, the corporations contend that amended Section 514.4 amounts to an uncompensated "taking" of their property by placing "control" of their boards of directors in the hands of the state. First, it should be noted that the "control" of the state over the independent subscriber nominating committees is rather indirect. While the commissioner does appoint them and sets the standards (which are somewhat general, *see* 510 I.A.C. §34.7(3)(e)) for their selection of subscriber nominees, he does not (and could not under amended Section 514.4) review or override their selections. And, of course, it is the subscriber directors placed on the board through the statutory procedure who nominate their successors and not the commissioner. Moreover, any realignment of "control" of the Ch. 514 corporations, either to the state or to non-provider affiliated or related subscribers, is bottomed in the police power. A regulation under the police power of the state is not a "taking" so as to require compensation. *See Woodbury County Soil Conservation Dist. v. Ortner*, 279 N.W.2d 276, 278 (Iowa 1979). It has been recognized that all government regulation involves the adjustment of rights for the public good and that to require compensation in every case in which property rights had been limited "would effectively compel the government to regulate by *purchase*." *Andrus v. Allard*, 444 U.S. 51, 65, 100 S.Ct. 318, 327, 62 L.Ed.2d 210, 222 (1979) (emphasis in original). Nevertheless, even the exercise of the police power may amount to a taking if it deprives a property owner of the substantial use and enjoyment of his property. *Ortner*. The point at which the police power becomes so oppressive that it results in a "taking" is impossible of general definition and must be determined on the facts of each case by weighing the public and private interests. *See Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 2646, 2659, 57 L.Ed.2d 631, 648 (1978).

As indicated, we believe that there is no "property," and hence nothing to be "taken," in the mere expectation that Ch. 514 would continue to provide for provider domination of the boards of directors. Nor can there be any expectation of return on capital on the part of providers because the Ch. 514 corporations are nonprofit in nature. (They differ from a public utility in this regard). Thus, amended Section 514.4 does not "frustrate [any] distinct investment-backed expectations" of providers regarding profit or rate of return. *Penn Central* at 124, 98 S.Ct. at 2659, 57 L.Ed.2d at 648. It is true that providers did place some "seed money" in the corporations when they were formed. It is difficult to see how this

statute could affect any loss of the initial outlay. But loss of that small amount of money, if any, as a result of amended Section 514.4 is outweighed by the public interest behind the statute. Amended Section 514.4 does not amount to a "taking" of property.

Finally, we arrive at the contract clause issue. Because there is no "property" right on the part of the corporations to the continuation of the laws under which it was formed, there is no "contract" between them and the state. The Ch. 514 corporations were formed under the general laws of the state and that is their only relationship to the state. A generally chartered corporation has no vested property right in the continuance *in perpetuo* of the laws under which it was formed. "[A] right is not vested unless it is something more than a mere expectation based on an anticipated continuance of present laws." *Schwarzkopf v. Sac County Bd. of Supervisors*, 341 N.W.2d 1, 8 (Iowa 1983). Far from the state warranting that the underlying laws will never change, it cautions that they may be altered at any time. *See* Iowa Const. Art. VIII, §12 ("reserve" power over corporations). There is thus no real "contract" to be impaired.

But even if there were a contract, the "impairment" of it here was grounded in the public necessity. It is well established that one session of the legislature may not bind a successor session of the legislature. *See Green v. City of Cascade*, 321 N.W.2d 882 (Iowa 1975); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135, 3 L.Ed. 162 (1810) ("one legislature cannot abridge the powers of a succeeding legislature."). Stated somewhat differently, "the legislature cannot bargain away the police power of a state." *Stone v. Mississippi*, 101 U.S. 814, 817, 25 L.Ed. 1079 (1880); *see also Atlantic Coast Line v. Goldsboro*, 232 U.S. 548, 558, 34 S.Ct. 364, 368, 58 L.Ed. 721, 726 (1914) ("[I]t is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise." "[O]ne of the 'rules' that can be read into every contract at its inception is the rule that all *other* rules are subject to change if and when the legislature reasonably concludes that such change is needed." (Tribe, *American Constitutional Law*, §9-6, at 468 (1978) (emphasis in original) *discussing Home Bldg. and Loan Ass'n v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 LEd. 413 (1934).

The modern-day treatment of the contract clause is exemplified by *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983). There, a Kansas statute was upheld which had the effect of abrogating a "price redetermination clause" on natural gas in a contract between a public utility and a gas supplier. The redetermination clause allowed the price of gas under the contract to rise to the federally set level, which was deregulated after the contract was signed. The Court stated that a threshold inquiry was whether the state law operated as a substantial impairment of the contractual relationship and that "[i]n determining the extent of the impairment, [it would] consider whether the industry the complaining party has entered has been regulated in the past." *Id.* at , 103 S.Ct. at 705, 74 L.Ed.2d at 580. The court found that while "Kansas did not regulate natural gas prices specifically, its supervision of the industry was exclusive and intensive." *Id.* at , 103 S.Ct. at 706, 74 L.Ed.2d at 582. The Court also indicated that if a state regulation constitutes a substantial impairment, there must be a significant public purpose behind the regulation, "such as the remedying of a broad and general social or economic problem." *Id.* at , 103 S.Ct. at 705, 74 L.Ed.2d at 581. The Court found that the Kansas statute "rests on, and is prompted by, a significant and legitimate state interest." *Id.* at , 103 S.Ct. at 708, 74 L.Ed.2d at 584. "[T]he public purpose need not be addressed to an emergency or temporary situation." *Id.* at , 103 S.Ct. at 705, 74 L.Ed.2d at 581. In determining its existence, "[u]nless the State itself is a contracting party . . . '[a]s is customary in reviewing economic and social regulation . . . courts properly defer to legislature judgments as to the necessity and reasonableness of a particular measure.'" *Id.* at , 103 S.Ct. at 705-706, 74 L.Ed.2d at 581. The state had exercised its police power to protect consumers, particularly those on fixed incomes, from the escalation of prices caused by federal deregulation. Indeed, the

state may impair even financial contrasts to which it is a party if there is a public necessity for so doing (although the standard is higher). *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 35, 97 S.Ct. 1505, 1519, 52 L.Ed.2d 92, 111-112 (1977). The reference in *Energy Reserves* to deferring to the legislative judgment as to the necessity for an impairment is particularly significant because it means that the rationale for the "impairment" is measured by a "rational basis" standard, as in the due process area. *See* Op.Att'yGen. #83-4-6 (Iowa mortgage foreclosure moratorium statute not violative of contract clause because state could properly encourage farmers to remain on their land in order to discourage urban unemployment, etc.). As indicated, there is indeed a rational basis for amended Section 514.4 in the need to restructure board composition in order to produce a more receptive attitude toward provider cost containment measures.

Furthermore, the members of a Ch. 514 corporation still retain a not insignificant degree of control over the selection of the required subscriber directors, because it is the members who elect any persons nominated by the nominating committees. The subscribers or the state can hardly block the actual appointment of the subscriber directors by refusing to vote for them. Thus, even if the original law under which Petitioners were formed somehow constituted a "contract," the "impairment" of it here is insubstantial. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978) ("Minimal alteration of contractual obligations may end the inquiry. . . ."); *see also Energy Reserves Group, id.* at , 103 S.Ct. at 706, 74 L.Ed.2d at 582 ("fact that parties are operating in a heavily regulated industry" is also relevant to the degree of impairment).

Turning to the status of the corporate members as affected by amended Section 514.4, they are merely participating providers who agree to be subject to certain financial conditions in supplying their services and may withdraw as participating providers, and thus as members, at any time. In *Berger v. Amana Soc'y*, 250 Iowa 1060, 95 N.W.2d 909 (1959), the court held that since there was a reservation of authority to change the stock and voting rights, that change was not fundamental. The only alteration which was found unlawful affected the redemption value of the stock. Here, by contrast, there is no expectation of economic gain from membership. Moreover, Ch. 514 corporations were formed pursuant to the statute for special purposes and not for associational reasons. Chapter 514 corporations, unlike profit and nonprofit corporations in general, were an exercise of the police power in the first instance and amended Section 514.4 is merely a further exercise of that power.

The case of *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) and its state court progeny, heavily relied upon by the corporations, are not dispositive. Those cases involved specifically chartered corporations and not ones which were formed under laws like Ch. 514, which is available to any corporations which meets the requirements of that chapter. Formation by special law is precluded by Iowa law, *see* Iowa Const. Art. VIII, §1, and it is not enough that the articles of incorporation of Ch. 514 corporations are subject to the approval of the state under Iowa Code Section 514.3 (1983). The state reviews the articles of incorporation of all insurance companies. *See* Iowa Code Sections 508.2, 515.2 (1983). To say that those articles, once having been approved, thereby create an inviolable "contract" or promise on the part of the state that the laws at time of the adoption of the articles will never be changed in a fundamental manner is too much to indulge. Moreover, in none of the *Dartmouth College* cases was there even the pretext of a rationale in the police power for what was in essence the blatant takeover of a private educational institution. The court, in *Board of Regents v. Trustees of the Endowment Fund*, 112 S.2d 678 (Md. 1955), described the action of the legislature there as "simply a case where the Legislature has attempted to remove a private self-perpetuating board and replace it by a public one appointed from time to time by the Governor, *without any necessity to effectuate the general purpose or to protect the public interest.*" [Emphasis added]. 112 A.2d at 684. The present-day equivalent of *Dartmouth College* would be the state arbitrarily incorporating Grinnel College into the Regents' system. Such a situation is a far cry from the crisis in health care costs faced by the legislature when the amended Section 514.4 was enacted. In light of

today's limited judicial role in reviewing economic and social legislation, the continuing validity of *Dartmouth College* is questionable in any event. At best, it must be sharply limited to its facts. Certainly, the mere fact of the corporations' nonprofit status does not shield them under *Dartmouth College* and its progeny. A nonprofit entity whose conduct affects the public is subject to whatever regulation a legislature reasonably deems appropriate. *Cf. Roberts v. United States Jaycees*, 52 U.S.L.W. 5076 (1984) (young men's civic association subject to state human rights law despite claim of infringement of first amendment association rights). Placed in perspective, the *Dartmouth College* cases are, in essence, vestiges of the pre-Fourteenth Amendment era when the contract clause reigned supreme and served as a substitute for other constitutional provisions such as the due process clause. Originally, the due process clause was given an expansive construction in the economic area. *See Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). Since then it has withered. *See* Tribe, *supra*, §8-7, at 450. Recent revival of the contract clause finding an impairment has only involved conventional contracts between private parties or the financial obligations of the state and not changes in the laws underlying the articles of a generally chartered corporation or even the *Dartmouth College* special charter situation. *See generally* Tribe, *supra*, at 43-44 (Supp. 1979).

III

We are asked to consider the effect on the constitutional issues of the invalidity of rules 34.7(2) and 34.7(5), that is, the limited role of nominating petitions for subscriber and provider directors. Because we conclude that the rules are valid, we need not addresss this question.

To summarize, rules 34.7(2) and 34.7(5), in limiting the role of the nominating petitions for subscriber and provider directors, initial and replacement, to a suggesting one are valid as a matter of administrative rulemaking authority and statutory construction. Amended section 514.4 is constitutional under the due process, taking, and contract clauses of the state and federal constitutions.

AUGUST 1984

August 1, 1984

ADMINISTRATIVE LAW: Open Meetings; Public Records. Independent Subscriber Nominating Committees. Iowa Code Chapter 17A; Iowa Code Sections 28A.2, 68A.1 (1983); 1984 Iowa Acts [cj/ 1282], S.F. 2277, §1; Iowa Code Supp. Section 514.4 (1983). The independent subscriber nominating committees under Iowa Code Supp. Section 514.4 (1983), as amended by 1984 Iowa Acts, S.F. 2277, §1, are subject to both the Open Meetings Law and the Public Records Act. (Haskins to Priebe, Chair, Administrative Rules Review Committee, 8-1-84) #84-8-1(L)

August 1, 1984

SOIL CONSERVATION DISTRICTS: Construction of an Office Building. Iowa Const. Art. XI, §3; Iowa Code §§346.24, 467A.2, 467A.7(5) (1983). It may be appropriate for a soil conservation district to construct an office building if the particular circumstances further the legislative policies prescribed for districts. A promissory note and a mortgage may be entered to finance the acquisition so long as the debt created does not exceed the appropriate limitation or is secured solely by the real property itself. (Norby to Gulliford, Director, Department of Soil Conservation, 8-1-84) #84-8-2(L)

August 1, 1984

CIVIL RIGHTS: Public Accommodation. Iowa Code §§601A.2(10) and 601A.7 (1983); 1984 Iowa Acts [ch. 1096], House File 2466. A private club must be considered a public accommodation, within the meaning of Iowa Code §601A.2(10) as amended, 1984 Iowa Acts, House File 2466, and is therefore subject to all the requirements of Iowa Code §601A.7 (1983) for the duration of all time periods when guests are allowed on the premises. In addition, the use of the facilities on a trial basis by prospective members will also subject a private club to all requirements of Section 601A.7 for the duration of that prospective member's presence on the premises. The issue of whether a prospective member receives an offer for the services, facilities or goods by the club while touring the premises would require a determination of the facts surrounding such a tour and is thus an issue which should be entrusted in the first instance to the Iowa Civil Rights Commission. (Hamilton to Pavich, State Representative, 8-1-84) #84-8-3(L)

August 7, 1984

COUNTIES AND COUNTY OFFICERS: Iowa Code §252.24 Does Not Allow Each County to Limit Its Liability to Counties Rendering Relief. Iowa Code Ch. 252, §§252.24, 252.25, 252.27. The county of legal settlement is responsible for all reasonable charges and expenses incurred in the relief and care of a poor person, regardless of whether those expenses would have been incurred within the county of legal settlement. (Williams to Poppen, Wright County Attorney, 8-7-84) #84-8-4(L)

August 7, 1984

GAMBLING; REVENUE, DEPARTMENT OF: Revocation of Gambling Licenses. Iowa Code §§99B.2, 99B.14. Even if a gambling license is revoked for a period of less than two years, a gambling license may not be issued for the location at which the violation occurred for two years. A gambling licensee whose license was revoked permanently under the statute prior to July 1, 1984, may not have the period of revocation shortened to the two year maximum revocation which is effective after July 1, 1984. (Williams to Bair, Director, Department of Revenue, 8-7-84) #84-8-5(L)

August 7, 1984

ENVIRONMENTAL LAW: Drainage Districts. Iowa Code §§455.128, 455.202(1), 457.28 (1983). The joint boards of supervisors of the counties forming a drainage district organized under chapter 457 of the Iowa Code or the District Trustees have authority to levy taxes to fund the District's portion of a fish tagging study which will not be paid by the federal government where the study is a cost either incident to the district's adoption of a plan for original

construction of an improvement or the repair or alteration of an existing structure to be undertaken by a proper agency of the United States government or incident to the construction itself. (Hamilton to Ballou, Executive Director, Department of Water, Air and Waste Management, 8-7-84) #84-8-6(L)

August 21, 1984

STATE OFFICERS AND DEPARTMENTS: Incompatibility of Officers. Iowa Code Chs. 280 and 331 (1983). The positions of member of the board of directors of an area vocational school and member of the county board of supervisors are not incompatible. (Weeg to Tofte, State Representative, 8-21-84) #84-8-7(L)

SEPTEMBER 1984

September 10, 1984

HEALTH: Certificate of Need. Iowa Code Sections 135.61(19), 135.61(19)(d), 135.61(19)(e), 135.63 (1983); 42 U.S.C. §1395tt; 470 I.A.C. 202.2(3), 470 I.A.C. 202.2(8). The Department of Health need not require CON review for participation in the swing-bed program. (McGuire to Waldstein, State Senator, 9-10-84) #84-9-1(L)

September 10, 1984

STATE OFFICERS AND DEPARTMENTS: Comptroller. Iowa Code §§8.6(16), 8.13(1) and 79.1; 1983 Iowa Acts, Ch. 205, §§16.4 and 17.1; I.A.C. Ch. 570 and §570-1.1(36). The Comptroller has the authority to permit professional and managerial employees to defer salary increases until the last six months of Fiscal Year 1985, pursuant to 1983 Iowa Act, Ch. 205, §16.4. (Lyman to Harbor and Swearingen, State Representatives, 9-10-84) #84-9-2(L)

September 13, 1984

GAMBLING: Candidate Committees; Qualified Organizations; Political Fund Raising. Iowa Code Ch. 99B (1983 Supplement) as amended by 1984 Session, 70th G.A., H.F. 2015 [1984 Iowa Acts, ch. 1220]. A committee for an individual political candidate is eligible to hold an annual raffle with a $10,000 prize provided it meets the general requirements. A candidate's committee which does not hold a gambling license may not contract with another qualified organization which does have a license to conduct games with the proceeds being turned over to the candidate. In order to obtain a two-year gambling license a candidate's committee must meet the requirement that it must have been in existence for five years. A candidate committee conducting games as a qualified organization may divide the proceeds between its candidate and a candidate whose committee does not meet the five year requirement. (Hansen to McIntee, State Representative, 9-13-84) #84-9-3(L)

September 21, 1984

NEWSPAPERS: Official Publications. Review. Iowa Code §§349.1, 349.2, 349.3, 349.4, 349.11 and 618.3 (1983). A board of supervisors has no authority to reconsider the factual basis for its prior non-contested, non-appealed selection of an official county newspaper during the year the selection is in effect. (Walding to Miller, Guthrie County Attorney, 9-21-84) #84-9-4(L)

September 25, 1984

LICENSING: Cosmetologists. Iowa Code §§157.1, 157.5. A person who is licensed to practice electrolysis must possess a license to practice cosmetology as well. (Hart to Jay, State Representative, 9-25-84) #84-9-5(L)

September 26, 1984

HIGHWAYS: Road Use Tax Fund; Primary Road Fund; Payment of Tort Claims. Iowa Constitution, Article VII, §8; Iowa Code Ch. 25A (1983); §§4.4(1), 312.1, 312.2, 313.3, 313.16. Article VII, §8, does not prohibit payment of tort claims against the Department of Transportation from the primary road fund pursuant to §313.16. (Weeg to Rodgers, State Senator, 9-26-84) #84-9-6

The Honorable Norman Rodgers, State Senator: You have requested an opinion of the Attorney General as to whether Iowa Constitution, Article VII, §8, prohibits the use of road use tax funds for payment of tort claims against the Iowa Department of Transportation. It is our opinion that Article VII, §8, does not prohibit payment of these tort claims from the road use tax fund.

I. INTRODUCTION

In order to address your question, we believe a review of the relevant constitutional and statutory provisions is necessary.

Article VII, §8, otherwise known as the Eighteenth Amendment or the "antidiversion" Amendment, was adopted at the general election in 1942 and provides as follows:

> All motor vehicle registration fees and all licenses and excise taxes on

> motor vehicle fuel, except cost of administration, *shall be used exclusively for the construction, maintenance and supervision of the public highways* exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds.

(emphasis added)

Iowa Code §312.1 (1983) provides that the road use tax fund is to include the following:

> 1. All the net proceeds of the registration of motor vehicles under chapter 321.
>
> 2. All the net proceeds of the motor vehicle fuel tax or license fees under chapter 324.
>
> 3. All revenue derived from the use tax, under chapter 423 on motor vehicles, trailers, and motor vehicle accessories and equipment, as same may be collected as provided by section 423.7.
>
> 4. Any other funds which may by law be credited to the road use tax fund.[1]

Accordingly, the fees and taxes subject to the limitations of Article VII, §8, constitute a portion of the road use tax fund. Section 312.2(1) subsequently provides that forty-five percent of the road use tax fund is to be allocated to the primary road fund on a monthly basis, subject to the remaining allocations specified in §§312.2(2) through (13).

Section 313.3 creates the primary road fund, which includes the following:

> 1. All road use tax funds which are by law credited to the primary road fund.
>
> 2. All federal aid primary and urban road funds received by the state.
>
> 3. All other funds which may by law be credited to the primary road fund.
>
> 4. All revenue accrued or accruing to the state of Iowa on or after January 26, 1949, from the sale of public lands within the state, under Acts of Congress approved March 3, 1845, supplemental to the Act for the admission of the states of Iowa and Florida into the Union, chapters 75 and 76 (Fifth Statutes, pages 788 and 790), shall be placed in the primary road fund.
>
> *Unless otherwise provided, the primary road fund is hereby appropriated for highway construction.*[2]

(emphasis added) Specific provisions for use of monies in the primary road fund are found in §313.4. However, express authorization for use of primary road fund monies to pay tort claims is subsequently found in §313.16, which provides:

> There is hereby appropriated from the primary road fund to the department a sum sufficient for the purpose of paying any award or

[1] We note that not all of the funds which constitute the road use tax fund are subject to the constitutional limitations of Article VII, §8.

[2] We note that not all of the monies in the primary road fund are road use tax funds, and as set forth in footnote 1, *supra*, not all the road use tax fund is subject to the limitations of Article VII, §8. Therefore, only a portion of the primary road fund is subject to Article VII, §8. However, the Iowa Supreme Court has noted that "the primary road fund is made up partially from sources which this constitutional provision [Article VII, §8] limits to use exclusively within this state." *Frost v. State*, 172 N.W.2d 575, 582 (Iowa 1969). Accordingly, we will assume for the purpose of this opinion that, once the funds are commingled, the entire primary road fund is subject to the provisions of Article VII, §8.

> judgment to a claimant under chapters 25 and 25A [the State Tort Claims Act] on a claim arising out of activities of the department [of transportation] when such an award cannot be charged to a current appropriation.

To summarize, the legislature has authorized payment of tort claims arising out of activities of the Department of Transportation from the primary road fund, which contains monies subject to the limitations of Article VII, §8.[3] The question thus becomes whether such payments, and the statute authorizing them, are unconstitutional because they do not fall within the meaning of the constitutional language which requires primary road funds to "be used exclusively for the construction, maintenance, and supervision of the public highways."

II. ARGUMENT

When this office reviews the constitutionality of a legislative act, two well-established principles are to be followed. *See* 1980 Op.Att'y.Gen. 107, 108-109. The first principle is that statutes are presumed to be constitutional. *Id.* (and cases cited therein). *See also* §4.4(1) (in enacting a statute, it is presumed that "[c]ompliance with the Constitutions of the state and of the United States is intended"). The Iowa Supreme Court has consistently held that the presumption of constitutionality can only be overcome when every reasonable basis upon which the statute may be sustained is negated. *Incorporated City of Seniors v. Clabaugh*, 306 N.W.2d 748, 751 (Iowa 1981), and that every reasonable doubt must be resolved in favor of the constitutionality of the statute. *Zilm v. Zoning Board of Adjustment*, 260 Iowa 787, 150 N.W.2d 606, 609-610 (1967). If the constitutionality of a statute is merely doubtful or debatable, the courts will not interfere. *State v. Vick*, 205 N.W.2d 727, 729 (Iowa 1973); *Graham v. Worthington*, 259 Iowa 245, 146 N.W.2d 626, 631 (1966). In sum, the power to declare legislation unconstitutional is exercised with great caution, and only when such conclusion is unavoidable. *State v. Ramos*, 260 Iowa 590, 149 N.W.2d 862, 865 (1967); *State v. Rivera*, 260 Iowa 320, 149 N.W.2d 127, 129 (1967).

The second principle we believe relevant to your question was also discussed in 1980 Op. Att'y Gen. 107, 109, as follows:

> ... 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.

This principle, in conjunction with strong presumption of constitutionality to be accorded statutes, militates heavily in favor of finding §313.16 constitutional. We also believe prior decisions of the Iowa Supreme Court and prior opinions of this office support a finding of constitutionality.

In 1980 Op.Att'y.Gen. 107, 110-111, we reviewed the Supreme Court's consistently broad reading of Article VII, §8, and a number of opinions of this office which followed the lead of the Supreme Court. We first discussed the Supreme Court's decision in *Edge v. Brice*, 253 Iowa 710, 113 N.W.2d 755 (1962), where a statute authorizing reimbursement from the primary road fund for the cost of relocating utilities facilities was challenged as unconstitutional under Article VII, §8. In upholding the statute, the Court first noted the conflicting case law from other states on the question of construction of similar state antidiversion amendments, and concluded that a "liberal, living, and practical view" of Article VII, §8, was preferable to a "narrow, strict one." *Id.* at 759. The Court next reviewed the purpose and intent of §8:

> From the language used, needs, and circumstances, we think it is fair to say the intent and purpose was to assure adequate highways and that a source of funds be available for that purpose; and at the same time limit the

[3] *See* footnote 2, *supra*.

> use of the funds, not to maintain the status quo of highway construction but to keep such fees and taxes at a reasonable rate and not to allow the same to become a general revenue measure to be used for governmental purposes totally foreign to highways. The necessity for the removal of utility facilities was not then totally foreign to highway construction, although the statute had not yet assumed the cost of relocation. *It is fair to say the intent of the term "construction" as used in the amendment includes all things necessary to the complete accomplishment of a highway for all uses properly a part thereof.*

(emphasis added) *Id.* In addition to defining the term "construction" as emphasized above, we note the Court referred twice to the intent of the constitutional language being to prevent the use of protected funds for purposes "totally foreign to" highway purposes, again emphasizing the Court's broad interpretation of the constitutional language in question.

The Supreme Court again rejected a challenge to the constitutionality of a statute which permitted expenditure of municipal road use tax funds for surveys, studies, and the selection of routes for proposed roads in *Slapnicka v. City of Cedar Rapids*, 258 Iowa 382, 139 N.W.2d 179 (1965). In *Slapnicka*, the Court cited its prior decision in *Edge v. Brice* and the broad reading it gave the term "construction" as that term is used in Article VII, §8, in support of its conclusion that the proposed expenditures were related to highway construction and therefore not barred by §8.

These cases thus establish the Supreme Court's view that liberal interpretation of the term "construction" in §8 is appropriate. One case which appears on its face to be inconsistent with this precedent is *Frost v. State*, 172 N.W.2d 575 (1969). In *Frost*, the Supreme Court held that primary road funds could not be used for an interstate bridge project because such expenditures would violate Article VII, §8. The project in question involved a bridge between Iowa and Illinois. The Supreme Court concluded that because these funds would be spent for a project located partially outside the state, the expenditure would violate that portion of Article VII, §8, which limits the use of certain funds to highway purposes "exclusively within the state." In 1980 Op.Att'y.Gen. 107, 110, we distinguished the *Frost* decision as follows:

> 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.

A broad reading of the terms "construction, maintenance, and supervision" as used in Article VII, §8, is also consistent with prior opinions of this office. We concluded in 1980 Op.Att'y.Gen. 107, 110, that the *Edge v. Brice* and *Slapnicka* decisions established that a broad reading of Article VII, §8, would be preferred by the Iowa courts over a narrow one. In that opinion we also cited a number of opinions where we followed the Supreme Court's lead in broadly construing §8 to uphold various statutes as constitutional. 1980 Op.Att'y.Gen. at 110-111.

For example, in 1968 Op.Att'y.Gen. 494 we concluded the weight of authority required Article VII, §8, to be given a liberal interpretation. Applying this interpretation, we then concluded that construction of safety rest areas along interstates was a part of highway "construction" and therefore its costs could be paid from the primary road fund without violating §8. In 1972 Op.Att'y.Gen. 115 we again referred to the broad construction historically given §8 and concluded that state highway patrol salaries were sufficiently related to highway purposes that they could properly be paid from the primary road fund.[4] Finally, in 1980 Op.Att'y.Gen. 107, we overruled 1978 Op.Att'y.Gen. 542, finding that the 1978

[4] The legislature's response to this result was the enactment of §312.9. *See* 1981 Iowa Acts, 2nd Sess., Ch. 2, §4.

opinion's narrow construction of §8 was contrary to the weight of authority. We then concluded that a wind erosion control program for state highways constituted a part of the "construction, maintenance, and supervision" of state highways, and therefore the statute authorizing use of road use tax funds for this program was not unconstitutional under Article VII, §8. *Cf.* 1970 Op.Att'y.Gen. 162 (primary road funds cannot be spend on flood control projects entirely unrelated to the protection of highways or other highway purposes).

An inconsistent conclusion is found in 1972 Op.Att'y.Gen. 362, where we held that §8 prohibited the use of primary road funds for the removal of billboards, signs, and junkyards along state highways because this project was unrelated to the "construction, maintenance, or supervision" of these highways. In 1980 Op.Att'y.Gen. 107, 111, we noted this opinion with disapproval but factually distinguished it from the question at hand. For the reasons expressed in our 1980 opinion, we again find our 1972 opinion to be unpersuasive.

We thus believe that the weight of authority mandates a broad reading of the constitutional language "construction, maintenance, and supervision of the public highways." In construing this language, we also refer to the Supreme Court's definition of "construction" as that term is used in §8 as including "all things necessary to the complete accomplishment of a highway for all uses properly a part thereof." *Edge v. Brice*, 113 N.W.2d at 759. Applying these guidelines, it is our opinion that payment of tort claims against the department of transportation does constitute a part of the "construction, maintenance, and supervision of the public highways."

First, tort claims against the department could arise from any number of situations involving highway construction and maintenance. The underlying acts giving rise to these potential tort claims are a direct part of the construction and maintenance of the public highways under even the narrowest reading of those terms.[5] The fact that a tort claim against the department arises from these same facts does not divert these activities of their characterization as part of the construction and maintenance of the highways. We believe the very undertaking of highway construction and maintenance necessarily and unavoidably encompasses the possibility of claims against the department for torts involving these activities.[6]

> . . . it would only seem logical that since such funds are set up for road purposes, any expense caused by the maintenance of the roads should properly be borne from the road and bridge fund. . . . Therefore, it would seem only proper that the road and bridge fund and gasoline tax fund would be subject to the payment of a judgment or settlement of this claim, as it was the work of repairing the roads that gave rise to the claim.

Roop v. Byer, 171 N.E.2d 222, 224 (Ohio Ct. Comm. Pl. 1959). *See also* Opinion of the Michigan Attorney General, No. 6132, March 7, 1983. *But see Automobile Club of Washington v. City of Seattle*, 346 P.2d 695, 701 (Wash. 1959); *State ex rel. Wharton v. Babcock*, 232 N.W. 718, 720 (Minn. 1930); *State ex rel. Varmado v. Louisiana Highway Commission*, 147 So. 361 (La. 1933). We believe the Iowa

[5] In concluding that a tort claim arising from an accident involving a township truck performing highway maintenance could be paid from a comparable constitutionally-protected fund, one court has stated:

[6] The adoption of Chapter 25A, waiving the State's sovereign immunity in tort, establishes the legislative conclusion that compensation of covered torts arising from governmental functions serves a public purpose. In the Washington and Minnesota cases cited in note 2, there was no general waiver of sovereign immunity for tort claims; this may have affected those courts' view that the payment of tort claims was not part of the construction, supervision, or maintenance of highways.

Supreme Court decisions cited above apply different interpretive standards for Iowa's "anti-diversion" amendment than were applied in these contrary decisions.

Further, we believe the term "supervision" is more expansive in nature and encompasses an even broader scope of activities than do the terms "construction" and "maintenance." Supervision of the public highways necessarily includes supervision of the actual construction and maintenance activities related to the highways. It is our opinion this term also includes supervision of the overall operation of the highway system. Accordingly, if a question exists as to whether a particular activity giving rise to a tort claim constitutes a part of highway construction or maintenance, it is likely that activity may be included within the broad definition of the term "supervision."

In sum, we believe the terms "construction, maintenance, and supervision" as used in Article VII, §8, are to be construed broadly. Further, we believe that tort claims arising from activities relating to the construction, maintenance, and supervision of public highways are not "totally foreign to" highway purposes and are instead inextricably related to these activities. Thus, it is our opinion that tort claims against the department are part of the construction, maintenance and supervision of the public highways for the purpose of Article VII, §8.

This conclusion appears to conflict with two previous opinions of this office in which we held that tort judgments could not be paid from the primary road fund. 1970 Op.Att'y.Gen. 459; 1946 Op.Att'y.Gen. 7. First, in 1946 Op.Att'y.Gen. 7, we were asked to decide whether tort claims against the former State Highway Commission could be paid from the primary road fund without violating Article VII, §8. We initially concluded that the entire primary road fund was subject to the limitations expressed in §8. We then addressed the question of tort claim payments in a single sentence:

> Clearly appropriations made for the payment of claims against the state sounding in tort, do not fall within the category of "construction, maintenance, and supervision of the public highways" as contemplated by [Article VII, §8].

Id. at 8. No rationale was provided in support of this conclusion, nor did we cite any authority or discuss a legal standard to be applied in reaching this conclusion. Further, no statutory provision authorizing such an expenditure then existed as it does today. *See* §313.16. Finally, we note that at the time this opinion was rendered, the state had not yet waived the protections of sovereign immunity. Chapter 25A, the Iowa Tort Claims Act, in which the state expressly waived sovereign immunity as to certain tort claims, was not enacted until 1965. *See* 1965 Iowa Acts, Ch. 79. Accordingly, the conclusion that the payment of tort claims from the primary road fund did not constitute a part of the "construction, maintenance, and supervision of the public highways" was not inconsistent with the intent of Article VII, §8, as construed in 1945, for at that time the state was generally protected from all tort claims under the principle of sovereign immunity. However, as discussed above, constitutional provisions are to be "flexibly interpreted to meet changing times." 1980 Op. Att'y Gen. at 109, citing *Bechtel v. City of Des Moines*, 225 N.W.2d 326, 332 (Iowa 1975). In light of subsequent developments, in particular, the state's express waiver of sovereign immunity in Ch. 25A and the considerable authority broadly construing Article VII, §8, we believe our 1946 opinion is no longer persuasive and for that reason is hereby overruled.

Most recently, in 1970 Op.Att'y.Gen. 459, we again held that tort claims filed under Ch. 25A could not be paid from the primary road fund and in support of that conclusion stated as follows:

> The Primary Road Fund was not appropriated for such purpose, i.e., the payment of tort claims. It is a standing appropriation for the purposes set forth in Section 313.4 and Amendment 18 of the Iowa Constitution. Both Section 313.4 and said 18th Amendment proscribe the use of Primary Road Funds for the payment of tort claims, *unless specifically appropriated for that purpose.* The Primary Road Fund is "otherwise appropriated."

(emphasis added) *Id.* at 461. Our conclusion, as emphasized above, was thus based

solely on the fact that at the time of our opinion there was no specific statutory appropriation for payment of tort claims. This opinion was issued on March 2, 1970. Section 313.16, which appropriates primary road funds for payment of tort claims, was enacted shortly thereafter by the 63rd General Assembly and became effective by publication on May 7, 1970. *See* 1970 Iowa Acts, Ch. 1135, §1. *See also* §3.7. Enactment of §313.16 was a specific appropriation as required by 1970 Op.Att'y.Gen. 459, and consequently we do not believe that opinion affects our present conclusion that §313.16 is not unconstitutional under Article VII, §8.

We note that §313.16 expressly provides for payment from the primary road fund of tort claims "arising out of the activities of the department" of transportation. The primary road fund is specifically "appropriated for highway construction" unless otherwise provided, §313.3, and Article VII, §8, limits expenditures to "construction, maintenance, and supervision of public highways." However, some of the activities of the department under Ch. 307 appear unrelated to highway purposes. *See, e.g.*, §307.26 (division of railroad transportation). While we note that a question could arise as to whether it is constitutional under Article VII, §8, to pay tort claims under §313.16 for certain department activities, we have only been asked whether §313.16 is constitutional on its face. The constitutionality of this statute as applied in various factual circumstances is not in issue at the present time.

III. CONCLUSION

In conclusion, given the strong presumption in favor of a statute's constitutionality, the rule that constitutional provisions are generally to be interpreted broadly and flexibly, the considerable precedent specifically favoring a broad and liberal construction of Article VII, §8, and the fact that tort claims are an unavoidable and closely-related function of the construction, maintenance, and supervision of state highways, it is our opinion that it is not unconstitutional under Iowa Constitution, Article VII, §8, to pay tort claims against the state department of transportation from the primary road fund pursuant to §313.16.

OCTOBER 1984

October 1, 1984

COMMERCE CLAUSE: Motor Vehicles. Iowa Code §321.46(3) (1983 Interim Supplement); U.S. Const. art. I, §8. Statute which allows fee credit when motor vehicle is sold, traded or junked "within the state" is unconstitutional under Commerce Clause because it directly burdens interstate commerce and furthers no legitimate local interest. (Ewald to Van Camp, State Representative, 10-1-84) #84-10-1

The Honorable Mike Van Camp, State Representative: You have requested the Attorney General's opinion as to the constitutionality of Iowa Code Supp. section 321.46(3) (1983), which deals with fee credits for motor vehicles which are sold, traded or junked. The sentence in question reads: "The applicant shall be entitled to a credit for that portion of the registration fee of the vehicle sold, traded or junked within the state which had not expired prior to the transfer of ownership of the vehicle." Your specific concern is that the phrase "within the state" might be unconstitutionally discriminatory, because it denies the benefit of a fee credit to persons who sell or trade their cars outside the state.

The Commerce Clause of the United States Constitution prohibits a state from directly regulating or burdening interstate commerce. U.S. Const. art. I, 8. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. , 82 L.Ed.2d 200, 104 S.Ct. 3049 (1984); *Kassel v. Consol. Freightways*, 450 U.S. 662, 669 (1981). It even precludes a state from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between states. *See Great Northern R.R. v. Thompson*, 304 F.Supp. 812, 816 (D.N.D. 1969); *Baltimore Shippers & Receivers Assoc. v. Pub. Util. Comm'n*, 268 F.Supp. 836 (N.D. Cal. 1967).

On the other hand, if state legislation affects interstate commerce only incidentally, indirectly, or remotely, and is no more than a bona fide, legitimate and reasonable exercise of the state's reserved police power, it would not offend the Commerce Clause, at least if it did not operate to discriminate against interstate commerce or to disrupt its uniformity. *See, e.g., Head v. N. M. Bd. of Examiners in Optometry*, 374 U.S. 424 (1963); *Can Mfrs. Inst., Inc. v. State*, 289 N.W.2d 416, 420 (Minn. 1979).

A number of balancing tests have been devised to determine the constitutional validity of such statutes. *See, e.g., Kassel*, 450 U.S. at 670, *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Atkins v. Clements*, 529 F.Supp. 735, 744 (N.D.Tex. 1981); *Int'l Packers Ltd. v. Hughes*, 271 F.Supp. 430, 432 (S.D. Iowa 1967). These tests focus on a state's inherent police power to protect the life, liberty, health or property of its citizens as compared to the burden imposed on interstate commerce. Under the general rule we must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. *Hughes v. Oklahoma*, 441 U.S. at 336.

Applying the first prong of this test we must conclude that the statute has a direct rather than incidental effect on interstate commerce. By virtue of its "within the state" provision it confers a direct and immediate economic benefit on persons who sell or trade their cars in-state, but denies the same benefit to persons who sell their cars outside the state. This constitutes facial discrimination. Moreover, the practical effect is that some persons, acting in their own economic best interests, will be induced by the statute to sell their cars within the state rather than outside the state, thereby reducing the used car trade in other states.

Such facial discrimination by itself may be a fatal defect, regardless of the state's purpose, because "the evil of protectionism can reside in legislative means as well as legislative ends." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626

(1978). At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives. 437 U.S. at 622.

This brings us to the second prong of the test, a closer examination of the legislative purpose behind the "within the state" provision. Unlike trial or appellate courts, the attorney general in issuing opinions is not aided by a comprehensive factual record and legal arguments developed in adversarial proceedings. Nevertheless, we have explored potential justifications for this classification, such as ease of enforcement, with administrators of the implementing agency, the Iowa Department of Transportation. Our inquiry to date, limited as it may be by the absence of a factual record and by the finitude of our imagination, has revealed only two possible rational bases for the provision, both of which relate to mere economic benefits. Absent any convincing evidence or arguments to the contrary, we assume for the purpose of this opinion that these are essentially the only rational bases.

One possible basis for the provision is that it is an attempt to economically benefit the state by indirectly increasing the number of Iowa registration fees on new vehicles, based on the assumption that a person who sells his or her car within the state is more likely to purchase a new car within the state than is a person who sells his or her car outside the state. A second possible rational basis is that the legislature intended by the "within the state" provision to increase the quantity of cars on the local used car market, which would arguably benefit Iowa consumers and Iowa automobile dealers.

However, having found no legislative intent to safeguard the health or safety of the state's citizens, we must conclude that the statute is basically a protectionist measure. And, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. *Bacchus Imports*, 468 U.S. at , 82 L.Ed.2d at 208, 104 S.Ct. at (1984); *City of Philadelphia v. New Jersey*, 437 U.S. at 624; *Int'l Packers*, 271 F.Supp. at 433.

Furthermore having found no compliance with the first two prongs of the test, we do not even reach the third prong, which relates to less discriminatory alternative means of achieving legitimate local objectives. Since we have found the local objective to be discriminatory economic protectionism, no alternative means of achieving this impermissible objective could possibly redeem the statute.

CONCLUSION

Iowa Code Supp. 321.46(3) (1983) by virtue of its "within the state" provision, is unconstitutionally protectionistic. It violates both on its face and by its effect the Commerce Clause of the U.S. Constitution. It fails the Commerce Clause balancing tests because it directly burdens interstate commerce and furthers no apparent legitimate local interest.

October 9, 1984

COUNTIES AND COUNTY OFFICERS: Civil Service; Probationary Period for Deputy Sheriffs. Iowa Code Ch. 341A (1983); Sections 341A.11-.12. 1) The county sheriff is to determine the length of a deputy sheriff's probation, subject to the express limitations of §341A.11. 2) The term of probation commences the date a deputy is hired. If the deputy attends the law enforcement academy or other certified training facility within the first six months of employment, the probationary period cannot exceed six months. If the deputy attends the academy or other certified facility after the first six months of during the probationary period if the sheriff has a proper reason for the termination and notifies the deputy of the termination in a reasonable manner. (Weeg to Handorf, State Representative, 10-9-84) #84-10-2(L)

October 9, 1984

TAXATION: Property Tax; Acquisition and Disposition of Property Acquired by County by Tax Deed and Merger of Delinquent and Special Assessment into County's Tax Exempt Status. Iowa Code §§331.361(2), 427.18, 446.7, 446.19, 569.8 (1983). The effect of a tax deed property acquisition by a county is to extinguish liens for delinquent taxes and special assessments. The

provisions of Iowa Code §427.18 (1983) do not apply when a county acquires property by tax deed. When the Board of Supervisors dispose of tax deed property, lots included in the same tax deed may be severed and sold separately for less than the delinquent property taxes and special assessments. (Nelson to Martens, Iowa County Attorney, 10-9-84) #84-10-3

Mr. Kenneth R. Martens, Iowa County Attorney: You have requested the opinion of the Attorney General concerning the power of the Board of Supervisors to sell property pursuant to Iowa Code §§659.5 and 331.61(2)(1), (b) (1983). Based upon our review of the statutes, it would appear that you are requesting an opinion pursuant to Iowa Code §§569.8 and 331.361(2)(a), (b) (1983).

In the situation you pose, the Board of Supervisors of Iowa County have taken title to certain real property in the town of North English, located on the south central border of Iowa County, by tax deed pursuant to Iowa Code §448.1 (1983). Two tax deeds were issued for four lots of property. One tax deed included lots 2, 3 and 4. The other deed included lot 5. Lot 3 included the former owner's homestead which he now wishes to purchase for back taxes.

The tax sale deeds indicate that lot 5 was sold at scavenger sale on June 18, 1979, for taxes in years 1973, 1974 and 1975. The tax deed was filed with the County Recorder on July 13, 1984. The tax deed issued on July 12, 1985. Lots 2, 3 and 4 were also sold at tax sale on June 18, 1979, for taxes in years 1973, 1974 and 1977. This deed was filed on July 13, 1984, as well.

You presented several questions in your written request for an Attorney General's opinion. They are:

1. Where the county has acquired a tax deed to lots 2, 3 and 4 may the supervisors convey lot 3 alone.

2. Can the supervisors sell lots 2, 3, 4 and 5 for less than the real property taxes and special assessments against the property.

3. Are the subsequent taxes for 1978 to date on lot 5 and the subsequent taxes for 1975, 1976, and 1978 to date on lots 2, 3 and 4 liens against the property.

4. Are the subsequent special assessments for 1978 to date on lot 5 and the subsequent special assessments for 1975, 1976 and 1978 to date on lots 2, 3 and 4 liens against the property.

5. If the property is subject to taxes, would they be immediately due and payable along with the current taxes upon sale.

Iowa Code Chapter 446 (1983) describes the procedures that must be followed when property is sold for taxes. Section 446.7 sets the date for the annual tax sale for all lands, city lots or other real property on which taxes are delinquent. The sale is to be made for the total amount of taxes, special assessments, interest and costs due. If the property is not sold for two successive years, the real estate is sold to the highest bidder at a scavenger sale. Iowa Code §446.18 (1983). If there is no bidder at a scavenger sale, or the bid is less than the tax owed, then the county must bid in the value of the delinquency. Iowa Code §446.19 (1983). The delinquency includes the amount of special assessments, costs, penalty and interest, along with the delinquent tax owed against the property.[1] If after two years and nine months, the property is not redeemed, the original owner is notified that the redemption period has run and that the treasurer shall issue a tax deed for the property. Iowa Code §448.1 (1983). Until the tax deed is issued, the holder of a tax sale certificate has no interest in the property. *Carrington v. Black Hawk County*, 184 N.W.2d 675 (Iowa 1971).

[1] Section 446.19 was amended in 1979 to include in the amount bid by the county all delinquent general taxes, special assessments, interest, penalties and costs. 1979 Iowa Acts Ch. 68 §16. Former §446.19 provided that the county bid in an amount equal to all delinquent general taxes, interest, penalties and costs. The effect of this former statute preserved the special assessment lien. *See* 1970 Op.Att'yGen. 452. The 1979 amendments to §446.19 change this result and the lien is not preserved. *See also*, Iowa Code §569.8(4) (1983).

The effect of the deed is to vest the county with all the rights, title, interest and estate of the former owner. Iowa Code §448.3 (1983).

Iowa Code §331.361(2) (1983), describes how a county board of supervisors can sell property owned by the county. It provides in pertinent part:

> 2. In disposing of an interest in real property for sale or exchange, by lease for a term of more than three years, or by gift, the following procedure shall be followed, except as otherwise provided by state law:
>
> a. The board shall set forth its proposal in a resolution and shall publish notice of the time and place of a public hearing on the proposal, in accordance with section 331.305.
>
> b. After the public hearing, the board may make a final determination on the final proposal by resolution.

Iowa Code §569.8 (1983) provides the procedure for disposition of realty which a county acquires by tax deed. The statute provides:

> 1. Disposition by a county of property acquired by tax deed shall comply with the requirements of section 331.361(2).
>
> 2. When title to property acquired by tax deed is transferred, the auditor shall immediately record the deed and the assessor shall enter the property to be assessed following the assessment date.
>
> 3. Property the county holds by tax deed shall not be assessed or taxed until transferred.
>
> 4. The transfer of property acquired by tax deed gives the purchaser free title as to past general taxes and special taxes which are past due on any special assessment already certified to the county.
>
> 5. After deducting any expense the county incurred in the sale, the proceeds of the sale including penalty, interest and cost shall be divided and prorated to the several taxing districts for general taxes and special assessments owed to the taxing districts in the proportion that the amounts of general taxes and special assessments owed to each taxing district are of the total amount of general taxes and special assessments owed to all taxing districts.

These two sections, when read together, are designed to implement the general intent of Iowa Code Chapter 331, which is to integrate home rule into county government. Section 331.361(2) permits county supervisors to dispose of real property in any way they choose as long as the board puts its proposal in the form of a resolution and it publishes notice of the time and place of a public hearing concerning the resolution. Thus, Iowa Code §569.8(1) (1983) permits the supervisors to dispose of property obtained by tax sale in any manner they choose since the sale is governed by Iowa Code §331.361(2) (1983).

Formerly, as you point out in your letter (reference to a November 8, 1939 Attorney General Opinion to Mr. Pearl W. McMurray), the Board of Supervisors would have been limited by statute from disposing of property in any method they chose. By a 1937 Attorney General's opinion, for example, the Attorney General opined that a county board could not sell property obtained by tax deed for less than the taxes owed against it because Iowa Code §5130(13) (1935) was mandatory and required:

> When the county acquires title to real estate by virtue of a tax deed such real estate shall be controlled, managed, and sold by the board of supervisors . . . except that any sale thereof shall be for a sum not less than the total stated in the tax sale . . . without the written approval of a majority of all the tax levying and tax certifying bodies. . . . 1937 Op.Att'yGen. 2.

However, this has not been the case since 1981. *See*, 1981 Iowa Acts Ch. 117, §360; 1981 Iowa Acts Ch. 117, §1094. Therefore, in answer to question 1, where the county has acquired a tax deed to lots 2, 3 and 4, the supervisors may convey lot 3 alone. The only criteria that must be met are set out in Iowa Code §331.361(2)(a), (b) (1983).

Likewise, in answer to question 2, the supervisors may dispose of the property for less than the real property taxes and special assessments levied against the property as long as the requirements of Iowa Code §§331.361(2) (1983) are met.

With respect to your third question, three additional statutory provisions should be considered in regard to whether subsequent taxes and special assessments are liens against property owned by a county as a result of the issuance of a tax deed.

Iowa Code §427.18[2] (1983) provides:

> If property which may be exempt from taxation is acquired after July 1, by a person or the state or any of its political subdivisions the exemption shall not be allowed for that fiscal year and the person or the state or any of its political subdivisions shall pay the property taxes levied against the property for that fiscal year, and payable in the following fiscal year. However, the seller and purchaser may designate, by written agreement, the party responsible for payment of the property taxes due.

The second provision is included in Iowa Code §445.28 (1983). The section states:

> Taxes upon real estate shall be a lien on the real estate against all persons except the state. However, taxes upon real estate shall be a lien on the real estate against the state and any political subdivision of the state which is liable for payment of property taxes as a purchaser under provisions of section 427.18.

A final Code section which affects the county's actual liability for the payment of delinquent taxes is found at Iowa Code §446.7 (1983). Section 446.7 provides in pertit:

> . . . when delinquent taxes are owing against property owned or claimed by any municipal or political subdivision of state of Iowa or property held by a city or county agency . . . the treasurer shall give notice to the governing body of the agency, subdivision or authority which shall then pay the amount of the due and delinquent taxes from its general fund. If the governing body fails to pay the taxes, the board of supervisors shall abate the taxes as provided in chapters 332 (repealed 1981 Iowa Acts Ch. 117 §1097), 427 and 445 and section 569.8.

When a tax exempt governmental entity purchases or obtains property by condemnation, the tax liens are merged into the tax exempt status of the governmental entity and extinguished. 1964 Op.Att'yGen. 426; Op.Att'yGen. 409; 1970 Op.Att'yGen. 766; 1972 Op.Att'yGen. 36; 1980 Op.Att'yGen. 579; *State ex rel Peterson v. Maricopa County*, 38 Ariz. 347, 300 P. 175 (1931); *Hoover v. Minidoka County*, 50 Idaho 419, 298 P. 366 (1931); 85 CJS Taxation §833 (1954).

There is no question that Iowa Code §427.18 (1983) would apply to an outright purchase or land condemnation by a county government. The county would be liable for taxes during the first fiscal year of the county's acquisition by purchase or condemnation. If property is acquired by tax deed, then the question remains whether or not Iowa Code §427.18 (Iowa Code) is applicable. In this regard §427.18 would facially be in conflict with Iowa Code §569.8(3) which provides that tax deed property owned by a county is not to be taxed.

In resolving this conflict Iowa Code §4.7 (1983) gives some guidance. It provides:

> 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 provisions prevails as an exception to the general provision.

[2] Section 427.18 was rewritten in 1980 to make the language of the statute clearer. 1980 Iowa Acts Ch. 1141, §3. The statute was also broadened somewhat. However, the main thrust of the provision did not change. Thus, an opinion that this section would retain in the taxable status all taxable property acquired by political subdivisions after July 1, 1979 is still valid. *See* 1980 Op.Att'y Gen. 579.

Iowa Code §569.8(3) (1983) is concerned with the tax status of a more specific circumstance (acquisition of property by tax deed) than in Iowa Code §427.18 (1983) (any type of acquisition). To the extent that these two statutes conflict, Iowa Code §4.7 would require that Iowa Code §569.8(3) control. *See also, Goergen v. Iowa State Tax Commission*, 165 N.W.2d 182 (Iowa 1969).

In addition, Iowa Code §4.8 (1983) provides in relevant part:

> If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment by the general assembly prevails.

Tax exempt provisions of Iowa Code §569.8(3) (1983) were enacted later than the taxable provisions in Iowa Code §427.18 (1983). This fact lends further support to the conclusion that where Iowa Code §569.8(3) (1983) is in conflict with Iowa Code §427.18 (1983) Iowa Code §4.8 would require that §569.8(3) control.

By reason of the foregoing discussion, the provisions of §569.8(3) are controlling. Therefore, property acquired by tax deed by a county is not subject to taxation based upon prior tax liens which merge into the tax exempt status of the county. Further, Iowa Code §569.8(3) (1983) exempts the tax deed property from taxation so that the provisions of Iowa Code §427.18 (1983) with respect to current fiscal year taxes do not apply. Finally, it would be relevant to point out that §427.18 was enacted to preclude the provisions of §427.1(2) (1983) from application in the first fiscal year of property acquisition. There is no indication that §427.18 was intended to also override §569.8(3).

In regard to question 3, the taxes for years 1975 and 1977 to present, due on lots 2, 3 and 4, were extinguished when title to the property vested in the county on July 12, 1984. Similarly, the tax liens against lot 5 for 1976 to present are also extinguished.

The answer to question 4 is no. Special assessments are treated in much the same way as subsequent taxes. A special assessment is the cost of construction and repair of public improvements within a city assessed to private property. Iowa Code §384.38 (1983). A public improvement includes sewers; drainage conduits, channels or levies; street grading, paving, graveling, macadamizing, curbing, guttering, and servicing with oil, oil and gravel or chloride; street lighting fixtures, connections, and facilities; sewage pumping stations and disposal and treatment plants; underground gas, water, heating, sewer and electrical connections for private property; sidewalks and pedestrian underpasses and overpasses; drives and driveways in the public right-of-way; waterworks and water mains; plazas, arcades, and malls, parking facilities and the removal of diseased or dead trees from public or private property. Iowa Code §384.37(1)(a-1) (1983). Special assessments are not taxes. *Bennett v. Greenwalt*, 226 Iowa 1113, 286 N.W.2d 722 (1939); *Munn v. Board of Supervisors of Greene Co.*, 161 Iowa 26, 141 N.W. 711 (1913).

The effect of the county's tax deed is that the past due special assessments which are liens against the property are cutoff because the lien merges with the count's tax-exempt status.[3] This result was suggested in an Attorney General Opinion and, in essence, adopted by the legislature in 1979 when Iowa Code §446.19 (1983) was amended. 1970 Op.Att'yGen. 452; *see supra* n.1, p. 2. Special assessment installments that have not been certified to the county would not be cutoff by the county's acquisition, however. As a result, when the property is resold, the current special assessment installment would be payable. Iowa Code §§569.8(4); 331.361(2) (1983).

In answer to the last question you have posed, it is clear from the foregoing that there would be no past taxes or special assessments due when the property is disposed of by the county because the tax liens and the special assessment liens

[3] The cutoff of past due special assessments when the county acquires the property by tax deed is implicit in Iowa Code §§569.8(4) (1983).

along with costs, interest, and penalty were extinguished when the county took title to the property.[4] A new purchaser would only be responsible for current and future special assessment installments and current and future taxes.[5] Iowa Code §569.8(4) (1983).

October 11, 1984

HUMAN SERVICES: Medicaid; Confidentiality. Iowa Code §§68A.7, 217.30, 249A.3, 249A.4; 498 I.A.C. §75.1(1), 498 I.A.C. Ch. 79, 498 I.A.C. §79.2(2)-(4), 498 I.A.C. §79.3; 42 U.S.C. §1396a(A)(30). The Department of Human Services may compel Medicaid providers to make Medicaid patient records available for program review either through program sanctions or through enforcement of an administrative subpoena. Such review does not breach the patient's confidentiality. (Williams to Reagen, Commissioner, Human Services, 10-11-84) #84-10-4(L)

October 12, 1984

COUNTIES AND COUNTY OFFICERS: Board of Supervisors; County Sheriff; Chapter 28E Agreements; Law Enforcement Communications Systems; Authority of Board of Supervisors to Enter into Ch. 28E Agreements for Performance of Law Enforcement Functions Without Sheriff's Approval. Iowa Code Chs. 28E; 331; 356; 356A; 693 (1983); §§28E.1; 28E.4; 331.651-331.660; 331.903; 356.1; 356A.1-356A.2; 356A.7; 693.1; 693.4. 1) A county board of supervisors is required by §693.4 to provide the sheriff with at least two radio receiving sets even if the supervisors have already provided a number of such sets to a Ch. 28E joint county-city law enforcement center, unless the Ch. 28E agreement otherwise provides; 2) this conclusion is unaffected by the fact that the Ch. 28E entity's radio sets are operated by independent contractors rather than by employees of the Ch. 28E organization; 3) the supervisors may not enter into a Ch. 28E agreement with a city to share a radio receiving set for law enforcement purposes in the county without the approval of the sheriff because performance of law enforcement duties is within the sole jurisdiction of the sheriff's office; and 4) the supervisors may not enter into a Ch. 28E agreement regarding the employment of jailers at a Ch. 356 county jail facility without the approval of the sheriff, because Ch. 356 expressly authorizes the sheriff to operate such jails; but the supervisors may enter into such an agreement for a Ch. 356A county detention facility because that chapter provides for the facility to be operated by the board of supervisors. (Weeg to Jensen, Monona County Attorney, 10-12-84) #84-10-5

Mr. Michael P. Jensen, Monona County Attorney: You have requested an opinion of the Attorney General on several questions regarding the sheriff's office and the county jail. Your questions are as follows:

> (1) Under Iowa Code section 693.4, can a sheriff require the board of supervisors to install a different radio broadcasting system in the sheriff's office and at least one motor vehicle when adequate radio broadcasting facilities, belonging to a joint county-city law enforcement center organized under Chapter 28E, are already available in the law enforcement center and all motor vehicles belonging to the sheriff's department?

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[4] Of course, pursuant to §569.8(5) (1983) the net proceeds from the sale of tax deed property by the county must be divided and prorated to the several taxing districts as provided in the statute. This disposition of the net proceeds of the sale by the county of tax deed property is not inconsistent with the doctrine of merger of tax liens and special assessments by reason of the county's title.

[5] This conclusion assumes that the new purchaser is not entitled to a property tax exemption. Further, this conclusion assumes that upon disposition, the new purchaser's current tax liability would commence with the property assessments made as of January 1 of the assessment year following the year in which disposition occurred.

(2) Would the answer to question number one change if the existing radio facilities belonging to the Chapter 28E organization were operated by an independent contractor instead of employees of the Chapter 28E organization?

(3) Can the Board of Supervisors make a valid 28E Agreement with a city government to share a radio receiving set against the wishes of the sheriff?

(4) Can an agency created by a Chapter 28E agreement between the city and county, employ persons to perform jailers' duties without the sheriff's express permission under a contract with private individuals if the private persons remain under the sheriff's control, or does the contract with such independent persons violate Chapter 356, Chapter 331 or the jail standards?

We shall address each question in turn.

I.

Your first question concerns the scope of the supervisors' authority to provide radio receiving sets to the sheriff's office pursuant to Iowa Code §693.4 (1983). That section provides as follows:

> It *shall* then be the duty of the board of supervisors of each county to install in the office of the sheriff, such a radio receiving set and a set in at least one motor vehicle used by the sheriff, for use in connection with said state radio broadcasting system. The board of supervisors of any county may install as many additional such radio receiving sets as may be deemed necessary. The cost of such radio receiving sets and the cost of installation thereof shall be paid from the general fund of the county.

(emphasis added). As emphasized above, the supervisors are required by law to install a radio receiving set in the sheriff's office and in at least one sheriff's vehicle. *See* §4.36(a) ("The word 'shall' imposes a duty.") Section 693.4 then provides that additional sets may be installed at the supervisors' discretion. We believe this language authorizes the purchase of such additional sets only for installation in the sheriff's office or other appropriate entity, such as a joint county-city law enforcement center established pursuant to a Ch. 28E agreement with the approval of the sheriff. *See* part III and IV, below. We do not believe the supervisors' obligation to provide the sheriff with the two sets referred to in §693.4 is relieved by the fact that the supervisors have provided a number of sets to a Ch. 28E joint county-city law enforcement center unless the Ch. 28E agreement specifies otherwise *and* the sheriff has expressly approved that agreement. In sum, in the absence of the sheriff's express approval of the Ch. 28E agreement in question, §693.4 requires the supervisors to provide the sheriff with the two radio receiving sets in question.[1] A final answer to your question will thus require reference to the specific terms of your Ch. 28E agreement.

II.

Your second question asks whether our answer to your first question would be affected by the fact that the radio receiving sets provided to the joint county-city

[1] Your question specifically asks whether the sheriff may require the board "to install a *different* radio broadcasting system in the sheriff's office and at least one motor vehicle" when adequate broadcasting facilities exist by virtue of a Ch. 28E agreement. (emphasis added) Section 693.4 grants the supervisors the authority to provide radio receiving sets to the sheriff in accordance with the requirements of Ch. 693. We believe this authority encompasses the authority to decide what type of receiving set should be installed. Of course, the receiving sets must be compatible and the state radio broadcasting system. *See* §§693.1, 693.4. Thus, if two radio receiving sets have been installed pursuant to §693.4, the sheriff may not require the supervisors to provide a different type of receiving set.

law enforcement center were operated by an independent contractor instead of by employees of the Ch. 28E entity. The answer to your question is no: the statutory requirement of §693.4 that the supervisors provide the sheriff's office with at least two radio receiving sets is absolute and is not affected by the status of the persons operating those sets. Similarly the supervisors' discretionary authority to provide additional sets is unaffected by the status of the persons who operate those sets.[2]

III.

Your third question asks whether the supervisors may enter into a Ch. 28E agreement with a city to share a radio receiving set for county law enforcement purposes against the wishes of the sheriff.

Chapter 28E provides guidelines for the joint exercise of governmental powers. Section 28E.1 provides that:

> The purpose of this chapter is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to co-operate in other ways of mutual advantage. This chapter shall be liberally construed to that end.

Section 28E.4 further provides:

> Any public agency of this state may enter into an agreement with one or more public or private agencies for joint or co-operative action pursuant to the provisions of this chapter, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force.

In *Barnes v. Department of Housing and Urban Development*, 341 N.W.2d 766 (Iowa 1983), the Supreme Court discussed the scope of a municipality's authority to enter into a Ch. 28E agreement. There the Court held that while a Ch. 28E agreement authorizes a municipality to exercise a designated statutory function jointly with another agency, Ch. 28E does not authorize that municipality to exercise powers it does not have. The Court stated:

> ... the powers exercised by [parties to a Ch. 28E agreement] in connection with this project are not independent powers arising under Ch. 28E, but a joint exercise of powers already vested in the members.

341 N.W.2d at 768.

We concluded in 1978 Op.Att'yGen. 668 that the supervisors were authorized to enter into a Ch. 28E agreement to establish a county communications commission to obtain police radios and maintain law enforcement communications system pursuant to the authority provided in §693.6.[3] *See also* 1974 Op.Att'yGen. 753 (Ch. 28E is an excellent management foundation for endeavors like county-wide radio networks). While this opinion discusses the supervisors' authority to enter into such an agreement, it does not discuss the question of the supervisors' authority to enter into such an agreement in the absence of the express approval of the sheriff.

It is our opinion that Ch. 331, the County Home Rule Act, establishes a statutory scheme whereby elected county officials, such as the treasurer, auditor, and county attorney, have been delegated jurisdiction over their offices which is generally separate and independent of the general supervisory authority over other county matters to be exercised by the board of supervisors. *See* §§331.303-331.402. Specifically, we believe the sheriff is the elected county official solely responsible for performance of law enforcement duties in the county. *See* §331.651-331.660.

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[2] We do not address the question of whether a Ch. 28E joint county-city law enforcement center may hire independent contractors to operate radio receiving sets for the center.

The Supreme Court has recently affirmed the principle that for the most part elected county officials are to exercise their statutory duties independently of the board of supervisors. In *McMurry v. Board of Supervisors of Lee County*, 261 N.W.2d 688 (Iowa 1978), a case involving the validity of board resolutions concerning personnel matters in another elective county office, the Court began its opinion with the following statement:

> The board appears to have proceeded as though out 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.

261 N.W.2d at 690. *See also* Op.Att'yGen. #83-11-4(L) (board of supervisors does not have the authority to initiate discipline against employees of elected county officials).

On the basis of this general rule of law, we conclude that the board of supervisors does not have the authority to assume county law enforcement functions statutorily delegated to the sheriff. What the board cannot do directly cannot be done indirectly through a Ch. 28E agreement. *See Barnes v. Department of Housing and Urban Development, supra*, 341 N.W.2d at 767 ("Chapter 28E does not confer any additional powers on the cooperating agencies; it merely provides for their joint exercise.") Therefore, it is our opinion that absent a specific statute to the contrary, the supervisors may not enter into a Ch. 28E agreement for the exercise of a function specifically delegated to an elected county officer without that officer's express approval of that agreement. In particular, it is our opinion the supervisors do not have the authority to enter into a Ch. 28E agreement for the performance of law enforcement functions that are within the exclusive province of the sheriff. *See* 1976 Op.Att'yGen. 671 (county board of supervisors are not "required or authorized by the Code to perform as their principal function the apprehension, et cetera, of criminal offenders and are, therefore, not criminal justice agencies as defined in Chapter 759B").

For the purposes of this particular situation, we refer back to the requirement of §693.4 that the supervisors provide the sheriff with two radio receiving sets, and may further "install as many additional such radio receiving sets as may be deemed necessary. *See also* §331.322(12). This section provides that the radio receiving sets are to be used "in connection with the state radio broadcasting system." Section 693.1 authorizes the commissioner for public safety to implement "a special radio broadcasting system for law enforcement and police work and for direct and rapid communication with the various peace officers of the state." Thus, it is clear that the radio receiving sets referred to in §693.4 were intended to be used for law enforcement purposes.

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[3] Section 693.6 (former § 750.6) formerly provided as follows:

> The board of supervisors of any county shall have in addition to the foregoing the discretionary authority:
>
> 1. To purchase, lease, own, and maintain additional radio, electronic communications and telecommunications systems as may be deemed necessary by said agency for the efficient operation of the law enforcement agencies under its jurisdiction, and to pay the cost thereof from the general fund of said county.
>
> 2. To enter into lease or contract arrangements for the joint ownership, maintenance, acquisition or leasing of said equipment with any other county and may jointly operate the same with such cooperating agency for the mutual economy and efficiency of both.

This section was repealed by 1981 Iowa Acts, Ch. 117, §1097. Chapter 117 was the Act which implemented county home rule and recodified the various statutes relating to county government. Arguably, §693.6 was repealed because, given home rule authority, the supervisors no longer needed express statutory authority to perform the functions described in that section.

As set forth above, the sheriff is the elected county official responsible for the performance of law enforcement duties in the county. We believe §693.4 was intended to aid the sheriff in the performance of his or her duties by requiring the supervisors to provide a minimum number of radio receiving sets to the sheriff for law enforcement purposes. However, the legislature did impose a limitation on the sheriff's authority by providing for the supervisors to retain the discretion to decide how many additional sets are needed by the sheriff. We do not believe this discretion extends to allow the supervisors to unilaterally assume responsibility for creating and equipping pursuant to a Ch. 28E agreement of a county-city law enforcement center to perform certain law enforcement functions without the sheriff's approval. If permitted, such an act would result in the supervisors usurping statutory duties which have been expressly delegated to the sheriff.

Thus, we conclude that §693.4 was intended to provide the sheriff with a minimum number of radio receiving sets to be used by the sheriff in performing law enforcement functions. The supervisors are not authorized by this section to acquire additional sets for use by county-related law enforcement entities apart from the sheriff's office without the sheriff's approval.[4] Nor is the board of supervisors authorized to enter into a Ch. 28E agreement with another governmental entity to share a radio receiving set for law enforcement purposes without the sheriff's approval.[5/6]

We believe this conclusion is consistent with public policy. As the county officer elected by residents of the county to perform law enforcement duties, the sheriff is the county officer presumed to be most expert in law enforcement matters. Further, the sheriff is responsible to the electorate for all decisions relating to law enforcement. The decision of whether the county's interests would be best served by entering into a Ch. 28E agreement to share law enforcement communications functions with another governmental entity is such a law enforcement-related decision and one that is best committed to the expert discretion of the sheriff, subject to review by the electorate.

IV.

Your fourth question asks whether the county may enter into a Ch. 28E agreement to employ persons to perform jailers' duties without the sheriff's permission, if the persons remain under the sheriff's control.

If the facility in question is a jail governed by Ch. 356 it is our opinion the county may not enter into a Ch. 283 agreement to employ persons as jailers without the express permission of the sheriff. A review of Ch. 356 makes clear that the sheriff

[4] We do not address the question of the supervisors' authority under home rule to purchase radio receiving sets to be used by the county for purposes unrelated to law enforcement, such as ambulance or fire department operations.

[5] We note that in the event the sheriff agrees to enter into a Ch. 28E agreement for a joint county-city law enforcement center a question may arise as to the sheriff's authority to enter into such an agreement for a period of time longer than the sheriff's term of office. A question involving a board of supervisors' authority to bind successor boards was addressed in Op.Att'yGen. #83-6-4(L).

[6] Sections 28E.21-.28 do authorize a county board of supervisors to establish a unified law enforcement district among various governmental entities upon approval of the voters of the proposed district. However, we have been informed that such a statutorily-authorized district was not created in the present case and therefore is not the subject of this opinion.

is responsible for operation of the county jail. *See, e.g.*, §356.1 ("The jails in the several counties in the state *shall be in charge of the respective sheriffs* and used as prisons . . ."). (emphasis added) Supervision of the county jails under Ch. 356 is made one of the express statutory duties of the sheriff's office. Section 331.653(36). The sheriff is authorized by §331.903 to "appoint, with approval of the board, one or more deputies, assistants, clerks . . . for whose acts the principal officers shall be responsible." It is our opinion this authority, in conjunction with the sheriff's general authority over county jails, makes the sheriff primarily responsible for the hiring and supervision of jailers for the county jail. For these reasons, and for the reasons set forth in Part III, above, we do not believe the supervisors are authorized to enter into a Ch. 28E agreement for the performance of duties that are clearly within the exclusive jurisdiction of the sheriff's office, unless the sheriff expressly approves this agreement.[7]

However, if the facility in question is a county detention facility governed by the provisions of Ch. 356A, a different answer to your question is required. Chapter 356A authorizes the board of supervisors to establish and maintain a county detention facility, which is to be operated in lieu of, or in addition of, a county jail. Section 356A.1. The board of supervisors is expressly designated as the governing body for such a facility. Sections 356A.1-.2. Inherent in the supervisors' authority to operate a county detention facility is the authority to hire personnel to oversee the day-to-day operation of the facility. Accordingly, we believe the supervisors are authorized to enter into a Ch. 28E agreement with another governmental entity for the employment of persons to serve as jailers at a Ch. 356A county detention facility without obtaining the sheriff's approval of this agreement.[8]

In conclusion, it is our opinion that: 1) a county board of supervisors is required by §693.4 to provide the sheriff with at least two radio receiving sets even if the supervisors have already provided a number of such sets to a Ch. 28E joint county-city law enforcement center, unless the Ch. 28E agreement otherwise provides and the sheriff has approved the agreement; 2) this conclusion is unaffected by the fact that the Ch. 28E organizations radio sets are operated by independent contractors rather than employees of the Ch. 28E organization; 3) the supervisors may not enter into a Ch. 28E agreement with a city to share a radio receiving set for law enforcement purposes without the approval of the sheriff because performance of law enforcement duties is within the sole jurisdiction of the sheriff's office; and 4) the supervisors may not enter into a Ch. 28E agreement regarding the employment of jailers at a Ch. 356 county jail facility without the approval of the sheriff, because Ch. 356 expressly authorizes the sheriff to operate such jails; but the supervisors may enter into such an agreement for a Ch. 356A county detention facility because that chapter provides for the facility to be operated by the board of supervisors.

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[7] *See* footnote 4, *supra*.

[8] We note that §356A.7 provides as follows:

> A county board of supervisors may contract with another county or a city maintaining a jail meeting the minimum standards for the regulation of jails established pursuant to section 356.36 for detention and commitment of persons pursuant to section 356.1. *A person detained or confined in the jail shall be in the charge and custody of the governmental unit maintaining the jail.* The cost of detention and confinement shall be levied and paid by the city or the county to which the cause originally belonged.

(emphasis added) We do not believe this provision affects our conclusion that the sheriff must agree to any Ch. 28E agreement regarding employment of jailers at a Ch. 356 county jail. Instead, this provision addresses the situation where a county's prisoners are to be housed in a facility other than the county jail under the sheriff's supervision. In any case, the supervisor's authority to enter into agreements under this section is limited: as emphasized above, §356A.7 suggests that the governmental unit maintaining the jail retains sole responsibility for its operation.

October 23, 1984

COUNTIES AND COUNTY OFFICERS: Assessor and Auditor. Iowa Code §§441.17, 441.26, 558.8, 558.57, 558.61, 558.62, 558.63, 558.67 (1983). In maintaining records of real property ownership for tax purposes, county assessors and auditors have little discretion to question the validity of instruments of conveyance filed with the county recorder. (Smith to Criswell, Warren County Attorney, 10-23-84) #84-10-6(L)

October 23, 1984

AUDITORS: Real Estate Transfers. Iowa Code Chapters 355, 409, 589, 592; §§306.21, 331.507(2)(a), 441.65, 714.16 (1983); 1984 Iowa Acts [ch. 1198], H.F. 4. Under amendment to Section 331.507(2)(a) the auditor is to charge a fee for each separate platted lot, as well as each separate parcel, which is conveyed in a single instrument of transfer, with a fifty dollar maximum. "Platted lot" refers to lots contained in a subdivision plat and referred to by lot number in an instrument of transfer. The definition of "parcel" under the prior statute is relevant under the statute as amended. (Ovrom to Huffman, Pocahontas County Attorney, 10-23-84) #84-10-7(L)

October 29, 1984

GENERAL ASSEMBLY: Statutes; Titles. Iowa Const. Art. III, §29; House File 2472 (1984 Session) [1984 Iowa Acts, ch. 1275; Iowa Code §602.6405(1)(1985)]; Iowa Code §§123.47, 123.49(2)(h), and 321.281 (1983). House File 2472 (1983 Session), an act providing for the enforcement of certain alcoholic liquor and beer laws, is, in part, unconstitutional as a violation of Art. III, §29 of the Iowa Constitution. Section 7 of the act, as it pertains to the jurisdiction of magistrates to hear §§321.281 and 123.49(2)(h) violations, is not sufficiently expressed in the title. (Walding to Huffman, Pocahontas County Attorney, 10-29-84) #84-10-8

The Honorable H. Dale Huffman, Pocahontas County Attorney: You have requested an opinion as to whether House File 2472 (1983 Session), an act providing for the enforcement of certain alcoholic liquor and beer laws, is unconstitutional, in part, as a violation of Article III, §29, of the Iowa Constitution. Specifically, you question whether section 7 of the act, altering the jurisdiction of magistrates, is sufficiently expressed in the title.

House File 2472 was introduced by the House Committee on State Government on March 6, 1984. The bill was passed in the House on March 9, 1984, and sent to the Senate on March 13, 1984. The Senate, on March 29, 1984, passed an amended version of the bill, which was approved by the House. The bill was enacted on April 20, 1984, the last day of the 1984 session. The Governor signed the bill on May 14, 1984, and the bill became effective July 1, 1984. House File 2472, as passed, is entitled:

> An act relating to [1] the transportation of open containers of alcoholic beverages and beer, [2] the hours of sale of alcoholic beverages and beer, [3] the notification of parents or legal guardians of a child that appears before the court for a violation of section 123.47, [4] the motor vehicle license or nonoperator's identification card issued to a person under nineteen years of age, and [5] providing penalties. [Numbers inserted]

Iowa Const. Art. 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 provision can be divided into three categories: the one subject rule, sufficiency of title, and separability.

1. ONE SUBJECT RULE

The one subject rule refers to the content of the legislation and limits it to "one subject, and matters properly connected therewith...." Stated in the alternative,

the constitutional requirement of one subject prohibits legislative duplicity of subjects. The purpose of the one subject rule is to prevent political "logrolling" which could result from attaching unrelated and unpopular riders to bills certain of passage. *Long v. Board of Supervisors of Benton County*, 258 Iowa 1278, 1284, 142 N.W.2d 378, 382 (1966). Your request does not question whether this requirement has been met.[1]

2. SUFFICIENCY OF TITLE

The constitutional provision also provides that the subject of the act must be expressed in its title. Certain well established and noncontroverted principles regarding the sufficiency of title are succinctly stated in *State v. Talerico*, 227 Iowa 1315, 290 N.W. 660 (1940). That landmark case, frequently cited, states:

> The decisions involving the sufficiency of titles to legislative enactments lay down certain general rules. It is held this constitutional provision [Art. III, §29] should be liberally construed so as to embrace all matters reasonably connected with the title and which are not incongruous thereto or have no connection or relation therewith. It was designed to prevent surprise in legislation, by having matter of one nature embraced in a bill whose title expressed another. However, the title need not be an index or epitome of the act or its details. The subject of the bill need not be specifically and exactly expressed in the title. It is sufficient *if all the provisions relate to the one subject indicated in the title and are parts of it or incidental to it or reasonably connected with it or in some reasonably sense auxiliary to the subject of the statute*. . . . [Emphasis added]

State v. Talerico, 227 Iowa at 1322, 290 N.W. at 663.

Two of the principles stated in *State v. Talerico* require elaboration. First, the constitutional requirement as to the sufficiency of the title is to be liberally construed in favor of legislation because of the presumption of constitutionality. A statute will not be declared unconstitutional unless it "clearly, palpably, and without doubt infringes the constitution." *Lee Enterprises, Inc. v. Iowa State Tax Comm.*, 162 N.W.2d 730, 737 (Iowa 1968). Every reasonable doubt is to be resolved in favor of constitutionality. *Id.* Certainly, we are aware that declaring an act of the legislature unconstitutional is a "delicate function" and to be avoided if possible. *Miller v. Schuster*, 277 Iowa 1005, 289 N.W. 702 (1940); 1976 Op.Att'yGen. 149, 150; 1968 Op.Att'yGen. 132, 139. The second principle we emphasize concerns the purpose of the sufficiency of title requirement. The primary purpose of the constitutional requirement that the subject matter be expressed in the title of the act is to prevent surprise and fraud upon the people and the legislature. *Long*, 258 Iowa at 1283, 142 N.W.2d at 381. In determining the sufficiency of a title, courts examine whether anyone reading the title of an act could reasonably assume that the reader would be apprised of all of its material provisions. *See Hines v. Illinois Central Gulf Railroad*, 330 N.W.2d 284, 290 (Iowa 1983); *State v. Nickelson*, 169 N.W.2d 832, 836 (Iowa 1969); 1978 Op.Att'yGen. 144, 145.

In examining whether a provision is expressed in an act's title, the court closely an omissin where the title is drafted with specific language. For instance, in *In Re Breen*, 207 Iowa 65, 222 N.W. 426 (1928), the Iowa Supreme Court held a provision for the suspension of the license of a physician because of a conviction of the federal statutes related to narcotics unconstitutional as not expressed in a title which professed to amend, revise, and codify statutes relating to the sale and transportation of intoxicating liquors. The case involved a title drafted with

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[1] For the applicable law in determining whether an act complies with the one subject requirement, *see Long*, 258 Iowa at 1282-83, 142 N.W.2d at 381-82. An example of legislation being upheld as part of one subject is *State v. Bahl*, 242 N.W.2d 298 (Iowa 1976) (held an act relating to the flight of aircraft over state lands and waters and prohibiting the operation of aircraft while intoxicated embraced but one subject, the proscription of the dangerous operation of aircraft — the "common denominator."). *See also* 1976 Op.Att'yGen. 292. Whole recodifications have been upheld as embracing but one subject: code revision. *Rains v. First National Bank of Fairfield*, 201 Iowa 140, 206 N.W. 821 (1926).

specific language. The court, in *State v. Nickelson, supra*, held unconstitutional a provision which prohibited and proscribed punishment for the disposal of collateral with the intent to defraud. According to the court, the lengthy and comprehensive title to the act, which concerned the Uniform Commercial Code, contained nothing indicating criminal responsibility and thus, the criminal provision was not sufficiently expressed in the title.

The court also examines, where a provision is not expressed in an act's title, whether the provision is germane to the subject expressed in the title. For instance, in *Long*, the court held a section providing that courthouses be open for business on Saturday mornings was related and germane to the expressed subject of compensation of county officers. The court noted that which "it might have been better to have stated the act related to *duties and* salaries of county officers," nevertheless the court found that county officers' duties were sufficiently tied to compensation so that the title was "sufficient, and reasonably would not mislead the legislators or the public." In *Stanley v. Southwestern Comm. College Merged Area, Etc.*, 184 N.W.2d 29 (Iowa 1971), the court held a provision authorizing the issuance of bonds and the imposition of a tax to be germane to "an act to provide for the establishment and operation of area vocational schools and area community colleges." The court observed that the power to tax and issue bonds was inherent in authorizing an educational facility.

Applying the relevant principles, we do not think §7, except as to the addition of §123.47 violations to magistrates' jurisdiction, is sufficiently expressed in the act's title. The title of H.F. 2472 is very specific, referencing provisions for the enforcement of alcoholic liquor and beer laws, including: the open container law, the hours of sale, parental and guardian notification for §123.47 violations, the issuance of nonoperator's identification cards,[2] and provision for penalties.

Section 7 alters the jurisdiction of magistrates over, *inter alia*, proceedings concerning violations of §§321.281 and 123.49(2)(h). A review of §§321.281 and 123.49(2)(h) reveals that alteration of the jurisdiction for a violation of either section is not sufficiently expressed in the act's title. Section 321.281 prohibits the operation of a motor vehicle upon Iowa's public highways in an intoxicated or drugged condition. Section 123.49(2)(h) prohibits a licensee or permittee from providing alcoholic liquor or beer to any person under legal age. A violation of §123.49(2)(h) constitutes a simple misdemeanor, Iowa Code §123.50(1)(1983), and subjects the violator's license or permit to a suspension or revocation, Iowa Code §123.50(3)(1983), while the penalty for a §321.281 violation ranges from a serious misdemeanor to a class "D" felony depending on the number of offenses. Iowa Code §321.281(2)(1983). No mention is made in the title of H.F. 2472 that the act alters the jurisdiction for violations of either §§321.281 or 123.49(2)(h). Neither does the act's title make express reference to the alteration of either section, as neither section is amended by the act. Nor does the title expressly refer to drunk driving or the sale of alcoholic liquor or beer to individuals under 19 years of age. Clearly, the alteration of magistrates' jurisdiction to hear §§321.281 and 123.49(2)(h) violations is not expressly referred to in the title of H.F. 2472. Similarly, alteration of magistrate's jurisdiction for such violations is not reasonably connected to the subject expressed in the act's title. While the title does reference the provision for penalties, H.F. 2472 does not alter or address the penalties for §§321.281 or 123.49(2)(h) violations. None of the other provisions expressed in the title, *supra* at 5, are reasonably connected to those portions of

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[2] The manner in which the title was drafted for final passage is evidenced by reference in the title to a provision for Section 7 deletes the jurisdiction of magistrates over portions of the criminal proceedings in §§123.47 and 123.49(2)(h) (sale of alcoholic liquor or beer to persons under legal age). "the motor vehicle license or nonoperator's identification card issued to a person under nineteen years of age." That provision, albeit a part of the original bill, was removed from the act and incorporated in House File 2486 (1983 Session) (the drunk driving bill). The fact that the title contains matters outside of the subject of the act, however, does not invalidate the act. *Knorr v. Beardsley*, 240 Iowa 828, 38 N.W.2d 236 (1949).

section 7. Moreover, the title to H.F. 2472 does not contain anything from which one, by reading the title, would know or have reason to think that there was any provision in the act affecting magistrates' jurisdiction by eliminating their authority to hear certain proceedings in drunk driving cases under §321.281, while expanding their domain to include offenses under §123.49(2)(h). Anyone reading the title could reasonably assume that no such change was contained therein. The sufficiency of title requirement of Art. III, §29, is intended to avoid that kind of problem.

A contrary result is dictated as to the title's sufficiency to include section 7's expansion of magistrates' jurisdiction of §123.47 violations by a review of that section. Section 123.47 prohibits the provision of alcoholic liquor or beer to any person under legal age by any person. Although similar to §123.47(2)(h), §123.49 is general in its coverage, while §123.49(2)(h) is applicable only to licensees and permittees. A violation of §123.47 constitutes a serious misdemeanor, subject to minimum and maximum fines, for any non-licensee or non-permittee who has attained the age of eighteen, and a simple misdemeanor for minors.[3] Iowa Code §§123.50(4), as added by H.F. 2472, §4, and 123.90. Noteworthy is the fact that that penalty is provided for in §4 of H.F. 2472. Provision for penalties is expressed in the act's title. The legislature, in an effort to assure that magistrates retained jurisdiction to hear §123.47 violations, enacted §7 of H.F. 2472. Section 7, as it relates to the jurisdiction for §123.47 violations, reflects an effort to coordinate the jurisdiction with the penalty provision. Thus, the provision in §7 as to the jurisdiction of §123.47 violations is reasonably connected to the provision of penalties, as expressed in the title. Cer-tainly, the connection between the jurisdiction of §123.47 violations and the increase in the penalty for a violation of the same section is as close as was the connection in *Long, supra* at 5, between a provision for courthouse Saturday office hours and county officers' salaries, the subject expressed in the title. The finding of a reasonable connection between the applicable provision and the subject expressed in the title makes moot an examination as to whether the provision itself is expressed in the act's title. Finally, we observe that anyone reading the title to H.F. 2472, noting that it provided for penalties, could reasonably assume that the act alters the jurisdiction for the particular offense affected. Thus, the provision for the jurisdiction of §123.47 violations in §7 is sufficiently expressed in the act's title.

Accordingly, it is our opinion that H.F. 2472, an act providing for the enforcement of certain alcoholic liquor and beer laws, is, in part, unconstitutional as a violation of Art. III, §29, of the Iowa Constitution. Section 7 of the act, as it pertains to the jurisdiction of magistrates to hear §§321.281 and 123.49(2)(h) violations, is not sufficiently expressed in the title.

3. SEPARABILITY

The conclusion that H.F. 2472 §7 is unconstitutional as a violation of Art. III, §29 leads to the final aspect of this constitutional provision: separability. Article III, §29 provides that legislation containing a provision insufficiently expressed in the title is "void only as to so much thereof as shall not be expressed in the title. Thus, the remainder of H.F. 2472 would remain unaffected by the conclusion that §7 of the act is unconstitutional as not sufficiently expressed in the title.

In order to avoid constitutional challenges, we urge the use of titles expressed in general language. Generality of wording is not an objection to the sufficiency of a title if it is not so general as to be meaningless or deceptive. 1A *Sutherland on Statutory Construction*, §18.10 (Sands 4th ed. 1972). In fact, generality is more desirable because it provides a more adequate warning concerning the subject matter, in addition to reflecting more satisfactorily the policy involved in the statute. *Id.* at §18.09.

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[3] Formerly, a violation of §123.47 constituted a misdemeanor, except for any person under legal age who was guilty of a simple misdemeanor. Iowa Code §123.90 (1983). The effect of the recent legislation, therefore, was to increase the penalty of §123.47 violators, age eighteen to nineteen, from a simple to a serious misdemeanor.

If the legislature perceives an advantage to specificity, such as the enhancement of germaneness objections, we suggest the inclusion of language at the outset of a title expressing, in general terms, the subject matter of the legislation. For example, H.F. 2472 could have been drafted as such:

> An act relating to the enforcement of certain alcoholic liquor and beer laws by prohibiting the transportation of open containers of alcoholic liquor and beer, expanding the hours of sale of alcoholic liquor and beer, requiring the notification of parents or legal guardians of a child that appears before a court for a violation of section 123.47, altering the jurisdiction of magistrates, and providing penalties.

The combination of general and specific language in a title will better survive an Art. III, §29 constitutional challenge.[4]

[4] The two constitutional requirements of Art. III, §29 — the one subject rule and sufficiency of title — are often at odds in drafting titles. If the drafter is too general in writing a title, the bill may be subject to a challenge as to the sufficiency of title. Conversely, a title too specifically drafted may be subject to a one subject rule objection. A title combining general and specific language will resolve this conflict.

NOVEMBER 1984

November 1, 1984

COUNTIES AND COUNTY OFFICERS: Regulation of Motor Vehicles on Park Roads. Iowa Code §§111A.5, 306.4, 321.235, 321.236, 321.275 (1983). County conservation board regulation denying licensed motorcycles access to park roads generally open to four-wheeled motor vehicles is inconsistent with Iowa Code Chapter 321 and therefore is prohibited by §§111A.5, 321.235 and 321.236. (Smith to Angrick, Citizens' Aide/Ombudsman, 11-9-84) #84-11-1(L)

November 2, 1984

SECRETARY OF STATE: Crop and Livestock Liens. Senate File 510 [1984 Iowa Acts, ch. 1072; Iowa Code §23.21 (1985)], 1984 Session, 70th G.A., new Iowa Code Chapter 570A; Iowa Code §68A(3); §554.9407(3). Combined verified lien form and request for information complies with statute and provides administrative efficiency. Uniform fee for certificate of information complies with §554.9407(3) of the Iowa Code (1983). (Galenbeck to Small, State Senator, 11-9-84) #84-11-2(L)

November 3, 1984

MUNICIPALITIES: Public Contracts; Bid Preference. Iowa Code Ch. 23 (1983); Iowa Code §23.1; 1983 Iowa Acts, Chapter 96, §157; Senate File 2160, 1984 Session [1984 Iowa Acts ch. 1045; §1; Iowa Code §23.21 (1985)]. Cities are subject to the bid preference requirement contained in Senate File 2160, 1984 Session. (Walding to O'Kane, State Representative, 11-20-84) #84-11-3(L)

November 4, 1984

HOSPITALS: Iowa Code Ch. 145A (1983); §§145A.1, 145A.3, 145A.5 - 145A.7. 1) A school district and city may merge to establish an area hospital; 2) a board of supervisors may exclude townships from a proposed merged area created by a city and a school district; 3) portions of a township may not be excluded from a proposed merged area without excluding the entire township; 4) the question of whether it is advisable for a county board of supervisors to participate in a plan by a city and school district to create a merged area is left to the discretion of the entities involved; 5) the only procedure for submitting a question to the voters concerning a proposed merged area is filing a petition of protest pursuant to §145A.6. (Weeg to Hines, Jones County Attorney, 11-28-84) #84-11-4(L)

DECEMER 1984

December 5, 1984

IOWA CONSUMER CREDIT CODE: Exemptions for charges authorized by the Iowa Higher Education Loan Authority. Iowa Code §§261A.23, .24, 537.2401, .2509, and .2510 (1983). I.H.E.L.A. loans to participating educational institutions are not subject to the consumer credit code because they do not meet the definition of a consumer loan. Assuming that loans made by participating institutions to their students are subject to the consumer credit code, said institution may nevertheless charge and receive any amount or rate of interest or compensation for these loans provided that said charges are pursuant to reasonable rules adopted by the I.H.E.L.A. (Brammer to Williams, 12-5-84) #84-12-1(L)

December 11, 1984

RACING COMMISSION: Horse Track Pari-Mutuel Tax. Iowa Code Supp. §99D.15 (1983), as amended by the Acts of the 70th General Assembly, 1984 Session, Senate File 2328, Section 17 [1984 Iowa Acts ch. 1266]. The tax credit created by Acts of the 70th General Assembly, 1984 Session, Senate File 2328, Section 17, would be applicable to the tax on all wagers made under the auspices of a license granted a single licensee for dog and horse races at the same facility. Any distinction between dog and horse racing in tax provisions arguably based upon policy or practical distinctions between such racing would be constitutional. (Hayward to Davis, Scott County Attorney, 12-11-84) #84-12-2(L)

December 11, 1984

INSURANCE: Public Employees: Group Health Insurance Plans. Iowa Code §§97B.41(3), 97B.42, 97B.45-.47 (1983); House File 2528 §25 (1984 Session) [1984 Iowa Acts ch. 1285, §509A.13 (1985)]. The meaning of "retired," as used in House File 2528 §25 (1984 Session), is defined by the applicable retirement systems for which a particular public employee is eligible. (Walding to Bauch, Black Hawk County Attorney, 12-11-84) #84-12-3(L)

December 14, 1984

STATE OFFICERS AND DEPARTMENTS: Government Contracts: Retained Funds. 1983 Iowa Code Supp. Ch. 593. The law limits the retainage for payment of claims of subcontractors on public contracts to five percent. A governmental body could provide expressly by contract for a greater amount but such a requirement is unnecessary. (Fleming to Richey, Executive Secretary, 12-14-84) #84-12-4(L)

December 14, 1984

STATE OFFICERS AND DEPARTMENTS: Tort Liability: Liability of Governmental Units for Injuries to Offender Performing Unpaid Community Service. Iowa Code sections 25A, 85.59, 907.13 (1983). Governmental units or other entities using offenders performing unpaid community service work may be liable for workers' compensation or under general tort law for injuries to such workers. Offenders performing unpaid community service work are not relieved of all liability for torts they commit while performing the work. (Peters to Herrig, Dubuque County Attorney, 12-14-84) #84-12-5(L)

December 14, 1984

LICENSING: Duplicate Licenses for Health Professionals. Iowa Code §§147.7 and 147.80(19) (1983). The Code does not prohibit the issuance of a duplicate license to be displayed in a branch office. (Hart to Pawlewski, Commissioner of Health, 12-14-84) #84-12-6(L)

December 14, 1984

ADMINISTRATIVE LAW: Schools: Appeals. Iowa Code §290.1 (1983). Iowa Code §290.1 is a statute of limitation for filing appeals with the State Board of Public Instruction. The word "filed" in §290.1 means actually received by the agency in the absence of a rule that an affidavit of appeal is deemed to be filed when mailed. The State Board could provide by rule that an affidavit of

appeal is deemed to be filed when mailed. (Fleming to Benton, State Superintendent of Public Instruction, 12-14-84) #84-12-7(L)

December 20, 1984

CRIMINAL LAW: Public Records; Public Safety, Department Of: Criminal history in control of youth service agencies. Iowa Code §§692.6 and 692.7 (1983); Acts of the 70th General Assembly, 1984 Session, House File 2380. Nothing in Iowa Code Ch. 692 (1983) permits youth service agencies receiving criminal history data pursuant to Acts of the 70th General Assembly, 1984 Session, House File 2380, to redisseminate such data. Any redissemination of criminal history data by a youth service agency would violate Iowa Code §692.7 (1983) and could subject the persons to civil liability under Iowa Code §692.6 (1983). Youth service agencies receiving criminal history data are subject to applicable rules promulgated by the Iowa Department of Public Safety. The agency should seek advice of counsel to determine whether grounds exist to resist legal process or subpoena of criminal history data. (Hayward to Taylor, State Senator, and Varn, State Representative, 12-20-84) #84-12-8(L)

December 20, 1984

HUMAN SERVICES, DEPARTMENT OF: Custodians; Foster Care. Iowa Code Supplement sections 232.2(10), 232.2(18), 600A.2(7), 600A.2(8) (1983). The Department of Human Services, as custodians for a child, has the authority to sign the consent forms necessary for the child to take part in school activities, get a driver's license and obtain certain types of medical care. (Phillips to Mayer, Assistant Clinton County Attorney, 12-20-84) #84-12-9(L)

December 20, 1984

COUNTIES AND COUNTY OFFICERS: Prisoners; Board and Care Costs. Iowa Code §§356.30 as amended by S.F. 2269, Acts of the 70th G.A. 1984 [1984 Iowa Acts, ch. 1144], 331.322(10), 331.658(2), 356.26, and 356.31 (1983). The statutory authorization in §356.30 (1983) for a sheriff to charge a prisoner released on work release under §356.26 (1983) for the cost of "board" allows the sheriff to charge the prisoner for lodging and other expenses. Such charges are subject to the restrictions imposed by §§356.30 and 356.31. (Hansen to Zenor, Clay County Attorney, 12-20-84) #84-12-10(L)

December 20, 1984

MUNICIPALITIES: Utility Boards. Authority. Iowa Code Chapter 388 (1983); Iowa Code §§28.25-.29, 384.80(6), 384.84, 384.89, 388.1(2), 388.4, and 388.5 (1983); 250 I.A.C. §16.2(8). A utility board may participate in activities of a local non-profit development corporation but cannot provide financial contributions to the local development corporation. (Walding to Van Gerpen, State Representative, 12-20-84) #84-12-11(L)

December 26, 1984

TAXATION: Property Tax; Property Acquisition by Farmer's Home Administration. 42 U.S.C. §1490h, 7 C.F.R. §§1955.63, 1955.107, Iowa Code §§427.1(1), 445.37 (1983). The interaction of Iowa Code §427.1(1) and 42 U.S.C. §1490h requires Farmer's Home Administration to pay current taxes on property acquired by it through foreclosure proceedings. These provisions also require Farmer's Home Administration to satisfy any delinquent property tax liens that are outstanding against the property when it is acquired by foreclosure. If such current and delinquent taxes are not paid, they continue to constitute liens upon the property and the taxes are collectible by the tax sale procedure in Iowa Code Ch. 446 (1983). (Nelson to Wibe, Cherokee County Attorney, 12-26-84) #84-12-12(L)

UNITED STATES CONSTITUTION

IOWA CONSTITUTION

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CODE OF IOWA, 1975

CODE OF IOWA, 1981

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427A.1(3)	83-1-1(L)
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442.4(1)	83-1-8(L)
507B.2	83-3-3(L)
507B.6	83-3-3(L)
507B.7	83-3-3(L)
522.3	83-3-3(L)
542.3(4)(b)	83-2-7(L)
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542.9	83-2-7(L)
542.10	83-2-7(L)
543.2	83-2-7(L)
543.6(4)	83-2-7(L)
543.10	83-2-7(L)
543.37	83-2-7(L)
548.2	83-3-8(L)
558.65	83-1-7(L)
598.22	83-1-4(L)
601A.6(1)(a)	83-3-4
613A.4	83-3-7(L)
711.4	83-3-9(L)
725.12	83-1-3(L)
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4.1(36)	84-2-4(L)
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4.7	84-1-13(L)
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4.13	83-6-11(L)
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8.32	84-1-1
9.1	84-9-2(L)
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18.8	83-12-4(L)
18.9(1)	83-12-4(L)
18.132	83-12-4(L)
18.135(2)	83-12-4(L)
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20	84-1-3(L)
23.1	84-11-3(L)
24	83-12-1(L)
25A	84-12-5(L)
25A.2(3)	84-6-9(L)
25B.6	84-6-6
28.25-.29	84-12-11(L)
28A.2(1)(c)	84-7-4(L)
28E.1	84-10-5(L)
28E.4	84-10-5(L)
28E.5	84-1-4(L)
28E.21	83-6-1
28F.1	84-2-13(L)
28F.11	84-2-13(L)
29A.28	83-4-7(L)
29A.43	83-4-7(L)
47.7	83-11-6(L)
48.6	83-11-6(L)
49.30	84-2-3(L)
49.31	84-2-3(L)
49.33	84-2-3(L)
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68A.2	83-10-3(L)
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68A.8	83-10-3(L)
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74A.2(1)(2)	83-9-2(L)
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79.23	83-5-7(L)
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80D.1	84-2-6(L)
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85.61	83-5-9(L)
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87.11	84-7-3(L)
87.21	84-7-3(L)
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93A.5	83-6-7(L)
93A.6	83-3-20(L)
93A.6	83-5-1
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97A.1	83-5-4(L)
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97A.8	83-5-4(L)
97B.7(2)(b)	83-10-5(L)
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97B.42	84-5-4(L)
97B.42	84-12-3(L)
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99D.15	84-12-2(L)
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107.17	84-4-3(L)
107.17	84-7-5(L)
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111.5	84-4-3(L)
111.18	84-4-3(L)
111A.5	84-11-1(L)
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123.38	84-6-2(L)
123.45	83-9-3(L)
123.47	83-10-3(L)
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125.37	83-11-3
125.43	84-7-8(L)
125.44	83-4-8(L)
125.44	84-7-8(L)
125.45	83-4-8(L)
125.45	84-7-8(L)
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125.77	83-6-13
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145A.5-.7	84-11-4(L)
147.7	84-12-6(L)
147.7	84-12-6(L)
157.1	84-9-5(L)
157.5	84-9-5(L)
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217.30	84-10-4(L)
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222.60	84-2-4(L)
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225C.6(1)(d)	84-1-2(L)
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229.14	84-3-3
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229.19	84-6-9(L)
230.10	84-3-1(L)
230.10	84-3-3
230.15	84-3-1(L)
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230A.17	84-1-2(L)
230A.18	84-1-2(L)
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232.21(2)(b)	83-11-2(L)
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232.44	83-11-2(L)
232.52	84-2-10(L)
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232.73	83-11-3
232.74	83-11-3
232.75	83-11-3
232.78	83-11-2(L)
232.79	83-11-2(L)
232.95(2)	83-11-2(L)
232.141	83-4-3(L)
232.142	84-7-8(L)
232.145	83-4-3(L)
232.148	83-8-5(L)
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251.27	84-2-5(L)
252.2	84-2-5(L)
252.5	84-2-5(L)
252.6	84-2-5(L)
252.13	84-2-5(L)
252.16	84-2-5(L)
252.24	84-8-4(L)
252.25	84-2-5(L)
252.25	84-8-4(L)
252.27	84-2-5(L)
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262.7	84-2-14(L)
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262.12	84-2-14(L)
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270	84-3-4(L)
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274.1	83-8-7

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275.12(2)	84-7-9(L)
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277.23	83-5-5(L)
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279.8	83-9-1(L)
279.12	84-1-12(L)
279.29	83-7-3(L)
279.30	83-7-3(L)
279.32	83-7-3(L)
279.42	83-8-4
279.42	83-9-1(L)
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282.1	84-5-1(L)
282.4	83-8-7
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282.7(2)	84-5-1(L)
282.24	84-5-1(L)
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285.1(2)	83-4-9(L)
285.1(14)	83-4-9(L)
285.1(16)	83-4-8(L)
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290.1	84-12-7(L)
291.13	83-12-1(L)
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306.4	84-11-1(L)
306.8	84-2-1(L)
306.21	84-10-7(L)
306.27	83-7-2(L)
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317.6	84-3-5(L)
317.9	84-3-5(L)
317.13	84-3-5(L)
317.14	84-3-5(L)
317.15,16	84-3-5(L)
317.18	84-3-5(L)
317.21	84-3-5(L)
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321.231	84-11-1(L)
321.235	84-11-1(L)
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331.424(3)(q)	83-5-8(L)
331.425(13)	83-4-8(L)
331.425(13)	84-2-4(L)
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331.443	84-1-4(L)
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331.605	84-6-3(L)
331.606	84-6-3(L)
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331.705	84-6-11(L)
331.776	84-6-8(L)
331.777	84-6-8(L)
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331.906	83-6-9(L)
331.907	83-6-9(L)
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