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)

January 27, 1983

The Honorable Berl E. Priebe
R.F.D. 2, Box 145 A
Algona, Iowa 50511

Dear Representative Priebe:

You have asked for our interpretation of Iowa Code § 282.2 (1981) in connection with tuition charges for private school students who attend shared-time classes at a public school district outside the district in which they reside.

Section 282.2 is as follows:

> Offsetting tax. The parent or guardian whose child or ward attends school in any district of which he is not a resident shall be allowed to deduct the amount of school tax paid by him in said district from the amount of tuition required to be paid.

The facts that gave rise to your question are: Garrigan High School is an approved nonpublic school and is located within the Algona Community School District. Garrigan students attend shared-time classes at Algona High for instruction in agriculture, industrial arts, and driver education pursuant to Iowa Code § 257.26 (1981). The governing authority of Garrigan High pays the tuition charges to the Algona District for students who attend the shared-time classes but who are not residents of the Algona district. Students who attend Garrigan High pay a tuition fee to that school:

Your question is:

> When Garrigan or any non-public school pays tuition to Algona School District or any public

> school district for non-resident students, and the non-public school student's parent pays taxes to the public school district, may the non-public school deduct from the tuition bill an amount equal to the school tax paid by the parent to the public school district?

The answer to your question is yes, if and only if the nonpublic school deducts the amount of the offsetting tax from the student's tuition to the private school.

The United States Supreme Court, in a long line of cases that interpret the Establishment Clause, has drawn very intricate and specific lines in connection with aid to parochial schools and aid to students or parents. Those cases involve the use of a test which is as follows:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243, 20 L.Ed.2d 1060, 1065, 88 S.Ct. 1923 (1968); finally, the statute must not foster "an excessive government entanglement with religion." Walz, supra, at 674, 25 L.Ed.2d at 704.

Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 29 L.Ed.2d 745, 755 (1971).

The "entanglement" prong of the test is usually at issue when a statute or policy is challenged on the ground that it violates the First Amendment because it provides state aid to a parochial school. See, e.g., Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947); Meek v. Pittenger, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975); Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968).

It is well settled that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education. Wolman v. Walter, 433 U.S. 229, 240, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977). It is also settled that the secular education may be obtained at private schools. Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Moreover, under the Court's decision, the state may, for example, provide transportation to private school students and textbooks on secular subjects. The aid must be to the student or parent and not to the religious organization to avoid "entanglement" in the affairs of a church.

With these principles in mind, we turn to your question and the relevant statutory scheme. Iowa students are entitled to free education in a public school in the district in which they reside. See Iowa Code § 282.6 (1981). If a student attends public school outside his or her home district, the student is to be charged tuition. See Iowa Code § 282.1 (1981). However, the legislature has adopted § 282.2 as a special exception to § 282.1. If a parent or guardian owns property in a district in which the student does not reside but attends school, the amount of property tax paid for school purposes can be deducted from the nonresident student's tuition bill. It is thus a narrow exception. The circumstance you describe falls within the narrow exception of Iowa Code § 282.2.

We assume that Garrigan pays the school district as a matter of bookkeeping convenience but we assume also that the total amount paid by Garrigan is based on a per pupil, per class amount, i.e. the tuition charge can be attributed to each individual student and class in which the student is enrolled. See Iowa Code § 442.4(1) (School Foundation Programs - formula for state aid, including shared-time students).

In our opinion, a taxpayer who wishes to take advantage of § 282.2, must submit the appropriate documents, i.e., tax receipts, to the private school for submission to the school district for an offset. The relevant amount then must be deducted by the private school from the tuition the student is required to pay. Otherwise, the result would be state aid to the school and not an offset for the benefit of the parent or guardian.

In sum, the benefit provided to qualifying taxpayers by § 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.

Respectfully submitted,

Merle W. Fleming

MERLE W. FLEMING
Assistant Attorney General

MWF/jkp

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

Dr. Edward J. Stanek, Director
Office for Planning & Programming
Capitol Hill Church
L O C A L

Dear Dr. Stanek:

You requested our opinion concerning a city's power to regulate subdivision platting outside city limits under Iowa Code Section 409.14 (1981).

Your first question asks what action a city must take to have authority to approve subdivision plats in the two-mile area outside city limits. In cities of twenty-five thousand or more people, landowners must obtain city council approval of subdivision plats in the two-mile area outside city limits under § 409.14, and city councils need take no action to gain jurisdiction thereof. In cities under twenty-five thousand, landowners may be required to obtain council approval of subdivision plats if cities enact an ordinance which specifically adopts Iowa Code § 409.14 (1981).

Chapter 409 requires owners of any parcel of land of any size within a city or two miles of a city subject to § 409.14, who subdivides into three or more parts, to make and record a subdivision plat. Iowa Code § 409.1 (1981). Section 409.14 requires city council approval of subdivision plats in cities of twenty-five thousand or more people, or smaller cities which by ordinance adopt the restrictions of § 409.14, or within two miles of such cities, prior to the time the plat is recorded. Section 409.14 states:

> No county recorder shall hereafter file or record, nor permit to be filed or recorded,

> any plat purporting to lay out or subdivide any tract of land into lots and blocks within any city having a population by the latest federal census of twenty-five thousand or over, or within a city of any size which by ordinance adopts the restrictions of this section or, except as hereinafter provided, within two miles of the limits of such city, unless such plat has been first filed with and approved by the council of such city as provided in section 409.7, after review and recommendation by the city plan commission in cities where such commission exists. . . .

Iowa Code § 409.14 (1981), first unnumbered paragraph. (The exception referred to is for cities which are less than four miles from another city, in which case jurisdiction to approve plats extends to a line equidistant between the two. Iowa Code § 409.14 (1981), second paragraph.)

City council review of rural subdivision plats under § 409.14 is mainly concerned with orderly development and extension of existing street and alley systems, road grades, etc. See Iowa Code § 409.14 (1981), fourth paragraph. Section 409.14 also refers to council approval "as provided in section 409.7," which requires streets, blocks, road grades, and alleys to conform to those existing in the city. See Iowa Code §§ 409.4, 409.5, 409.6, 409.7 (1981). The Iowa Supreme Court has recognized the importance of city council review of subdivisions near city limits, since such areas are often later annexed to the city. See Oakes Construction Co. v. City of Iowa City, 304 N.W.2d 797, 805 (Iowa 1981). See also Note, 54 Iowa L.Rev. 1121, 1122-23 (1969); Tomain, Land-Use Control in Iowa, 27 Drake L.Rev. 254, 300-302 (1977-78).

Section 409.14 plainly requires city council approval of subdivision plats in the two-mile area outside cities of twenty-five thousand or more people; such cities need not pass an ordinance so stating. Therefore your question actually pertains to cities under twenty-five thousand, which must pass an ordinance in order for the restrictions of § 409.14 to apply.

Initially it should be noted that cities of any size have certain powers over subdivisions outside city limits apart from § 409.14. Road plans for rural subdivisions within one mile of the corporate limits of any city must be

approved by the city engineer or city council before the subdivision is laid out and platted. Iowa Code § 306.21 (1981). Conveyances or plats of subdivisions adjacent to any city in which streets and alleys are sought to be dedicated to public use must be approved by the city council. Iowa Code § 558.65 (1981). See Op.Att'yGen. #79-4-21, concerning the relationship between these code provisions and § 409.14 (copy enclosed). A city may by ordinance extend its zoning powers up to two miles beyond city limits except for areas where county zoning exists or where city limits are less than four miles from the limits of another city. Iowa Code § 414.23 (1981). Chapter 409 itself requires city council approval of any plat of any addition to any city or any subdivision within or adjacent to any city of any size. Iowa Code §§ 409.4-409.7 (1981).

Section 409.14 provides cities under twenty-five thousand population an additional enforcement power over the entire two-mile area outside city limits: the county recorder is expressly forbidden from filing or recording plats for subdivisions in that area unless they have been approved by the city council. This provision applies to cities under twenty-five thousand people only if they adopt the restrictions of § 409.14. We think that a city under twenty-five thousand people which wants to have this enforcement power, and wants to apply it to all plats of subdivisions within two miles of city limits, should pass an ordinance which specifically adopts the restrictions of Iowa Code § 409.14 (1981).

Your second question asks if a city which has a subdivision regulation ordinance can grant exceptions or variances, and if so, what standards should be used to determine whether an exception or variance is appropriate. Exceptions are contained in the ordinance itself and allow deviation from the general rule when certain facts and circumstances are found to exist which are specified in the ordinance as sufficient to warrant such deviation from the general rule. See 8 McQuillan Municipal Corporations § 25.160 (3rd ed. 1976); Iowa Code § 414.12(2) (1981). A variance, on the other hand, is authority granted to the owner of property to use it in a manner forbidden by the ordinance where literal enforcement would cause unnecessary hardship. Board of Adjustment of City of Des Moines v. Ruble, 193 N.W.2d 497, 503 (Iowa 1972); 8 McQuillan Municipal Corporations § 25.160. This office has previously issued the opinion that under the Municipal Home Rule Amendment to the Iowa Constitution a city may establish subdivision regulations if they are more

stringent than those imposed by state law, unless a statute expressly provides otherwise. Op.Att'yGen. #80-2-9 (city ordinance which required platting of land upon subdivision into two or more parts was not unconstitutionally inconsistent with Chapter 409 requirement of platting upon subdivision into three or more parts (copy enclosed)). See also Oakes Construction Co. v. City of Iowa City, 304 N.W.2d 797 (upholding city council disapproval of subdivision plat on basis of inadequate access, a ground not specified in § 409.14).

We believe that a city's subdivision ordinance could also contain exceptions, and that the city council could grant variances to the terms of the ordinance in the unusual circumstances where variances are appropriate. Of course, exceptions and variances could be permitted only as provided in the city's subdivision ordinance. The principles of the Home Rule Amendment and statute would govern whether a city can grant an exception or variance to its subdivision ordinance. That is, a city could grant a variance to its own subdivision ordinance where appropriate, but could never allow a variance or exception which would be inconsistent with or less stringent than the subdivision requirements of state law.

Chapter 409 contains no specific provisions concerning variances to subdivision ordinances. However the Code provides for variances to zoning ordinances in cases of unnecessary hardship where such variance is not contrary to the public interest or the spirit of the zoning ordinance. Iowa Code § 414.12(3) (1981). We think it likely that the courts would apply the standards governing zoning ordinances to variances from local subdivision ordinances.

Variances are granted only in exceptional circumstances, and the burden of showing unnecessary hardship is on the person seeking a variance. Ruble, 193 N.W.2d at 502-503; Deardorf v. Board of Adjustment, 254 Iowa 380, 384-385, 389-390, 118 N.W.2d 78, 80, 83 (1962). The Iowa Supreme Court has stated that a party must show the following in order to establish an unnecessary hardship:

> 1) that the land in question cannot yield a reasonable return if used only for a purpose allowed under the ordinance;
>
> 2) the plight of the owner is due to unique circumstances and not to general conditions which may reflect the unreasonableness of the ordinance itself; and

3) the use authorized by the variance will not alter the essential character of the locality.

Board of Adjustment v. Ruble, 193 N.W.2d at 505; Deardorf v. Board of Adjustment, 254 Iowa at 386, 118 N.W.2d at 81; see also 8 McQuillan Municipal Corporations §§ 25.159-25.164 (3rd ed. 1976). Since each variance must be decided on its own facts, it is difficult for us to state when a variance could be allowed to a municipal subdivision ordinance. However we think these principles should aid in the decision whether to grant a variance to a subdivision ordinance.

In summary, a city under twenty-five thousand population which seeks to regulate subdivision platting in the two-mile area outside city limits pursuant to Iowa Code § 409.14 (1981) should pass an ordinance which specifically adopts the restrictions of § 409.14. Cities with local subdivision regulation ordinances may have exceptions or grant variances thereto so long as they are no less stringent than and not otherwise inconsistent with state law. A variance should be granted only in the exceptional case where the one requesting it can prove unnecessary hardship.

Sincerely,

Eliza Ovrom

ELIZA OVROM
Assistant Attorney General

EO:rcp

Enclosures

ELECTIONS: ELECTION BOARD; ELECTIONEERING. Iowa Code Chp. 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)

Mr. Phillip N. Norland
Worth County Attorney
99 7th Street North
Northwood, Iowa 50459

January 25, 1983

Dear Mr. Norland:

You have requested an opinion of the Attorney General concerning issues which arose during the recent general election. Specifically, you inquire:

1. May a member of a candidate's campaign committee serve on an election board?

2. Does a candidate transporting voters to the polling place constitute "electioneering" within the statutory prohibition found in Section 49.107(1) of the Code?

For the purpose of clarity these questions are treated separately in the following discussion.

I.

Your first question focuses on the composition of the election boards. Election boards are created by statute. Pursuant to Section 49.12 of the Code "[t]here shall be appointed in each election precinct an election board which shall ordinarily consist of five precinct election officials." Iowa Code § 49.12 (1981).

The procedures for appointments to the election board are controlled by statute. Members of each precinct election board are appointed by the commissioner of elections from an election board panel. Iowa Code § 49.13(1) (1981). The election board panel for each precinct is drawn up by the commissioner not less than twenty days before each primary election and shall include members of the two political parties whose candidates for president or governor received the largest and next largest number of votes in the precinct in the last general election. Iowa Code §§ 49.15, 49.13(2) (1981). Members of the two political parties included in the election panel may be designated by the county

chairpersons of each of the political parties. Iowa Code § 49.15 (1981). Alternate procedures are available to place names on the election board panel when the county chairpersons fail to designate a sufficient number of names, when no candidates appear on the ballot for either of the qualified political parties, or when either the city council or the school board of qualified cities has advised the commissioner of persons willing to serve without pay. Iowa Code § 49.15 (1981).

Persons are disqualified by statute from membership on an election board only under narrow, specific circumstances. Sections 49.16 provides in part that "[n]o person shall serve on the election board at any election in which he [or she] or any person related to him [or her] within the third degree of consanguinity or affinity is a candidate to be voted upon in that precinct." Iowa Code § 49.16(1) (1981). This disqualification is inapplicable when the candidate is unopposed. Id.

Applying these principles to the specific question which you pose, we find no statutory provision which would disqualify a member of a candidate's campaign committee from membership on an election board based solely on the factor of membership on the campaign committee. Section 49.16(1), of course, would disqualify a member of a candidate's campaign committee from membership on an election board if the member were related to the candidate within the third degree of consanguinity or affinity.

II.

Your second question focuses on the activities prohibited on election day. On any election day Section 49.107, in part, prohibits the following acts, except as specially authorized by law:

> Loitering, congregating, electioneering, posting of signs, treating voters, or soliciting votes, during the receiving of the ballots, either on the premises of any polling place or within three hundred feet of any outside door of any building affording access to any room where the polls are held, or of any outside door of any building affording access to any hallway, corridor, stairway, or other means of reaching the room where the polls are held, except this subsection shall not apply to the posting of signs on private property not a polling place.

Iowa Code 49.107(1) (1981) (emphasis added). The violation of this section constitutes a simple misdemeanor. Iowa Code § 49.108 (1981).

"Electioneering", about which you specifically inquire, is not further defined in Chapter 49. Generally, words which are not defined differently by the legislature or possessed of a peculiar and appropriate meaning in law should be given their ordinary meaning. American Home Products v. Iowa State Board of Tax Review, 302 N.W.2d 140, 143-44 (Iowa 1981). The term "electioneering" is ordinarily defined as taking "an active part in an election campaign" as "to try to sway public opinion." Webster's Thid New International Dictionary at 731 (3rd ed. 1976). Since the statute is penal, however, the language must be construed narrowly. Knight v. Iowa District Court of Story County, 269 N.W.2d 430, 437-38 (Iowa 1978). A narrow construction is required in order to give all persons "a clear and unequivocal warning in language that people would generally understand as to what actions would expose them to liabilities for penalties." Id. at 437-38.

Applying these principles, we do not believe that the bare act of transporting voters to the polling place constitutes "electioneering" within the meaning of § 49.107(1). Transporting voters to a polling place does not necessarily rise to the level of an attempt to sway public opinion. The act of transporting, unaccompanied by more overt campaign activities, may, in fact, be carried out by civic groups for nonpartisan purposes. Under these circumstances we do not believe the statute provides "a clear and unequivocal warning in language that people would generally understand" that transporting voters to the polls would expose a candidate to liability for penalty under § 49.107(1).

In summary, therefore, we conclude that:

1. A member of a candidate's committee is not statutorily prohibited from serving on an election board under Chapter 49.

2. A candidate transporting voters to the polls does not constitute "electioneering" in violation of § 49.107(1).

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP/jkp

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

Mr. Arnold O. Kenyon
Union County Attorney
Union County Courthouse
Creston, Iowa 50801

Dear Mr. Kenyon:

You have requested an opinion of the Attorney General on two questions relating to the provision of medical services at the county hospital. First, you ask:

> Whether the County Hospital organized under Chapters 347 and 348 of the Code of Iowa which receives less than 10% of its revenues from taxation is required to provide free medical care to indigents without reimbursement from the County Poor Fund?

This question was addressed by our office in 1979 Op.Att'yGen. 388, a copy of which is enclosed. That opinion concludes in part that the board of supervisors is responsibile for paying the "reasonable" claims of the county hospital for the care of indigent patients, except to the extent that those patients receive financial assistance under Title XIX. This conclusion was based on a number of statutory provisions which have since been amended or repealed by the County Home Rule Act, 1981 Iowa Acts, Ch. 117. A review of these provisions follows.

First, our 1979 opinion cites Iowa Code § 347.16(2) (1979), which provides:

> Free care and treatment shall be furnished in a county public hospital to any sick or injured person who has legal settlement under § 252.16 in the county maintaining the hospital, and who is indigent. The board of hospital trustees shall determine whether a person is indigent and entitled to free care under this subsection, or may delegate that determination to the overseer of the poor or the office of the department of social services in that county, subject to such guidelines as the board may adopt in conformity with applicable statutes.

This provision remains unchanged in the 1981 Iowa Code, and continues to impose on the county hospital the mandatory duty to provide medical services to the indigent. However, this provision does not specifically address the question of responsibility for the costs incurred for such services.

To determine that responsibility, our 1979 opinion turned to several provisions in Iowa Code Ch. 252 (1979) relating to support of the poor. First, § 252.22 provides in relevant part that:

> All laws relating to the support of the poor as provided by this chapter shall be applicable to care, treatment, and hospitalization provided by county public hospitals.

This section also remains unchanged by the County Home Rule Act. Next, Section 252.27 provided:

> The relief [for the poor] may be either in the form of food, rent, or clothing, fuel and lights, medical attendance, civil legal aid or in money . . . [Emphasis added].

This section was amended by the County Home Rule Act to provide in relevant part that:

> The board of supervisors shall determine the form of the relief . . . . The amount of assistance shall be determined by standards of assistance established by the board of supervisors. . . .

Finally, the 1979 opinion cited § 252.39, which states:

> All claims and bills for the care and support of the poor shall be certified to be correct by the proper trustees and presented to the board of supervisors, and, if they are satisfied that they are reasonable and proper, they shall be paid out of the county treasury.

This section was repealed by the County Home Rule Act, 1981 Iowa Acts, Ch. 117, § 1097.

In sum, our 1979 opinion relies on the above-cited statutory provisions to conclude that the county hospital was to bill the county for costs incurred by the hospital in treating indigent patients who qualified under § 347.16(2) and who were not receiving federal assistance. The county was then to pay those costs from the county poor fund.

We believe the changes in the relevant statutes as a result of the County Home Rule Act, taken in conjunction with the concept of county home rule, confuse the rationale of our 1979 opinion. Further, we believe the current statutes are unclear as to whether the county hospital or the county is responsible for payment of expenses incurred for treatment of indigents at the county hospital. Indeed, after discussion with individuals at the Iowa State Association of Counties, at Broadlawns Polk County Hospital, and in the State Comptroller's Office, it appears that billing practices in county hospitals throughout the state vary widely. Some hospitals pay the expenses of indigents not receiving federal assistance from funds created by the county hospital tax levy. When that fund is exhausted, the hospital then seeks assistance from the county. Other county hospitals bill the counties directly for all medical services incurred by indigents.

It is our opinion that, while § 347.16(2) clearly imposes a mandatory duty to provide treatment to qualified indigent patients at a county hospital, the relevant statutes do not conclusively establish liability for the expenses incurred in providing that treatment. Thus, in the absence of an express legislative mandate, we conclude that the county, pursuant to home rule authority, may decide for itself what billing policy should be followed by the county. Indeed, § 252.27 now requires the board of supervisors to establish standards by which the amount of assistance received by an individual from the county poor fund is to be

determined. As a part of these standards the board could, for example, require the county hospital to bill the county poor fund directly for services rendered to indigent patients, to pay those costs from the county hospital tax levy until that is no longer possible, or to pay those costs from both the county poor fund and the county hospital tax levy in some pre-determined ratio.

Further, it is our opinion that pursuant to home rule authority, a county may also adopt a policy as to whether and under what circumstances the county will provide assistance to an indigent patient at a county hospital who is already receiving some form of federal assistance.

In concluding, we note that any clarification of this statutory confusion should be sought from the legislature.

Your second question asks:

> Whether the County Hospital organized under Chapters 347 and 348 of the Code of Iowa would be allowed to charge different rates to non-Union County residents for services provided than to its residents in light of the fact that those nonresident users are not providing any tax support for the hospital.

Iowa Code § 347.14 provides that the board of hospital trustees may:

> (4) Determine whether or not, and if so upon what terms, it will extend the privileges of the hospital to nonresidents of the county.

Further, § 347.16(3) provides in part as follows:

> Care and treatment may be furnished in a county public hospital to any sick or injured person who has legal settlement outside the county which maintains the hospital, subject to such policies and rules as the board of hospital trustees may adopt. . . . (emphasis added)

These statutory provisions make clear that provision of county hospital medical services to nonresidents of the county is subject to the discretion of the county hospital board of trustees. However, in order to satisfy constitu-

tional requirements we note that the difference in charges to residents and nonresidents must be reasonable and related to the distinctions between the two classes.

In sum, 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.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

Enclosure

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 18, 1983

Mr. David E. Richter
Pottawattamie County Attorney
Pottawattamie County Courthouse
Council Bluffs, Iowa 51501

Dear Mr. Richter:

You have requested an opinion of the Attorney General on the following questions:

> Is it legal to require postage be paid to the Clerk of District Court's Office before mailing out the child support checks?

You state in your request that only postage is charged, not any additional administrative fee, and further, that the checks are held until postage is paid, but after the expiration of a certain period of time the checks are mailed at county expense with a reminder as to the county's postage policy. In a recent telephone conversation, you informed me that this question arises out of those situations where a dissolution decree is entered and the court orders child support to be paid through the clerk of court.

It is our opinion that the county may not charge postage for sending out child support checks. In support of this conclusion we turn first to the provisions of Iowa Code § 331.702(86), which includes among the many duties of the clerk of court the duty to:

> Carry out duties relating to the dissolution of a marriage as provided in [Iowa Code] Chapter 598 [1981].

In particular, § 598.22 provides that:

> All orders or judgments providing for temporary or permanent support payments

> shall direct the payment of such sums to the clerk of the court for the use of the person for whom the payments have been awarded.
>
> * * *
>
> An order or judgment entered by the court for temporary or permanent support or for an assignment shall be filed with the court clerk. Such orders shall have the same force and effect as judgments when entered in the judgment docket and lien index and shall be a record open to the public. The clerk shall disburse the payments received pursuant to such orders or judgments. All moneys received or disbursed under this section shall be entered in a record book kept by the clerk, which shall be open to inspection by the parties to the action and their attorneys. (emphasis added)
>
> * * *

Consequently, § 598.22 requires that all child support payments be paid to the clerk of court rather than paid directly to the recipient. The clerk is then required, as a part of that office's statutory duties, to distribute the payments pursuant to the particular order or judgment. There are no specific statutory provisions which authorize the clerk to charge a fee for the expense incurred by the county in mailing out these payments. By contrast, numerous statutory provisions authorize the assessment of fees and charges for the performance of certain other statutory duties. See, e.g., Iowa Code § 331.705(1).

Accordingly, it is our opinion that the clerk may not assess the postage costs for mailing support checks pursuant to § 598.22. We believe that the salary received by a county office and the money budgeted to that office encompasses performance of that office's statutory duties. When the legislature has included a particular duty among the other statutory duties of a county officer, that officer is not entitled to impose a fee or charge for the cost of performing that duty unless a fee or charge is expressly authorized by the legislature. We note that the county does not have authority in this area pursuant to home rule, as the statutory scheme is so pervasive that state law preempts the area. See Iowa Code § 331.301(1) (1981).

We reached the same conclusion in Op.Att'yGen. #81-5-7(L), a copy of which is enclosed. In that opinion we held that a county may not assess a service charge for processing employee payroll deductions. We cited numerous statutory sections as examples of the various fees county officers were authorized to assess, and concluded that in the absence of such an express authorization, a fee could not be imposed. In addition, we discussed the policy considerations in support of our conclusions and stated in part:

> We are hesitant to sanction a policy which would result in a situation wherein the performance of a public duty turns on whether a fee is or is not paid, unless the body establishing the duty has also authorized the collection of a fee. Permitting a public officer to require the payment of a fee before he or she performs a mandatory function established by a higher authority would be detrimental to the effective carrying out of the higher authority's mandate.

In conclusion, it is our opinion that a county may not assess the cost of postage incurred by the county in mailing out support checks pursuant to Iowa Code § 598.22.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

Enclosure

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 17, 1983

Allen Anderson
Dickinson County Attorney
P.O. Box 257
Spirit Lake, IA 51360

Dear Mr. Anderson:

You have requested an answer to the question:

> Whether a beer & liquor licensee may discount prices based upon drawing marked tabs?

The answer is no. This would constitute gambling and would be forbidden. Iowa Code § 99B.6 (1981) limits the type of gambling which may be engaged in on a premises which has a Class "A", "B", or "C" liquor license or a Class "B" beer license issued under the Iowa Beer & Liquor Control Act, Iowa Code Chapter 123 (1981).

Iowa Code § 99B.6(b) (1981) states that the liquor licensee, his agent or employee shall not participate in any gambling except as a participant on the same basis as every other participant. Obviously, if the bartender is "conducting" the "tab-pulling game" by supervising and collecting or paying off, he or she is not participating as every other participant. Section 99B.6(c) (1981) states that only social games can be engaged in on a premises with a beer or liquor license. Social gambling is defined by § 99B.1(13) as those activities listed in § 99B.12. The "tab pulling" would not qualify as social gambling. Briefly and specifically, the gambling associated with the discount tabs would not be incidental to a bona fide social relationship, § 99B.12(1)(a); the bartender is not necessarily

participating as an individual, § 99B.12(1)(c); it appears a concealed number is used, § 99B.12(1)(d); the operator of the game would not change, 99B.12(1)(i). Section 99B.12(2)(a) in addition expressly provides a "pull-tab" game is not a social game.

An argument could be made that no payment is required to play and thus there is no gambling. We conclude that is not true. The scheme constitutes a lottery under Iowa law. See Iowa Code § 725.12 (1981). Reducing the price is no different than requiring a full payment for the drink to qualify to play the game with the payoff for winning a refund on the price of the drink. It does not change the true nature of the transaction by reducing the price actually paid when the tab is drawn instead of requiring payment and then awarding a prize (refund) when the tab is drawn. In determining whether a transaction is gambling, the courts will look behind the name and style of the game to see what its true character is. See e.g. State v. Wiley, 232 Iowa 443, 452, 3 N.W.2d 620, 625 (1942) (pinball machine actually a gambling device). In addition, the means or nature of the payment is not necessarily controlling if payment to participate is required. State v. Mabrey, 244 Iowa 415, 421-22, 56 N.W.2d 888, 891-92 (1953) (pay for dinner to play bingo).

While the above is not an exhaustive analysis of why the marked tabs would be illegal, it clearly indicates and supports our conclusion that it is. See also 1976 Op. Atty. Gen. 371. It should also provide a caveat to all beer and liquor license holders to handle with the utmost care any kind of game or other transaction which gives any kind of award, which includes any kind of chance, or which in any way looks like it may be gambling.

Sincerely,

THOMAS D. McGRANE
Assistant Attorney General

TDM:djs

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)

Honorable Douglas Smalley
Iowa House of Representatives
State Capitol
Des Moines, IA 50319
L O C A L

January 17, 1983

Dear Representative Smalley:

You have requested an opinion of the Attorney General on the question of whether a podiatrist is authorized, under Iowa law, to amputate a toe.

Iowa Code Section 149.1(2)(1981) defines the scope of practice of podiatry as including the examination, diagnosis, or treatment of ailments of the human foot, medically or surgically. The only statutory limitation imposed on surgery of the foot by podiatrists is contained in Iowa Code Section 149.5 which states, in pertinent part, as follows:

> A license to practice podiatry shall not authorize the licensee to amputate the human foot or perform any surgery on the human body at or above the ankle . . . .

Based on the foregoing, it is our opinion that a licensed podiatrist is authorized to amputate a toe. This conclusion is reinforced by the legislative history of section 149.5. Formerly, this provision stated that, "A license to practice podiatry shall not authorize the licensee to amputate the human foot or toe. . . ." (emphasis added) Iowa Code Section 2546 (1935). Elimination of the words "or toe" by amendment in 1937, evinces a legislative intent to permit podiatrists to perform such amputations. 1937 Iowa Acts, Chapter 104, Section 6.

Very truly yours,

Susan B. Brammer

SUSAN B. BRAMMER
Assistant Attorney General

SBB/mel

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 10, 1983

The Honorable Donald D. Avenson
State Representative
State House
L O C A L

Dear Representative Avenson:

You have requested the opinion of this office concerning the assessment of tangible property. Specifically, you asked the following:

> If a person rents a building and installs in it automatic car wash equipment (which is removable), should the equipment be assessed as real or personal property?

In answer to your question, equipment, machinery or improvements attached to buildings or structures are taxed as real property unless they are the kind of property ordinarily removed when the owner of the property moves to another location. Iowa Code §427A.1(3) (1981), states as follows:

> Notwithstanding the definition of "attached" in subsection 2, property is not "attached" if it is a kind of property which would ordinarily be removed when the owner of the property moves to another location. In making this determination the assessing authority shall not take into account the intent of the particular owner.

This section was construed in Cowles Commun. v. Bd. of Rev. of Polk County, 266 N.W.2d 626 (1978). The Iowa Supreme Court determined that §427A.1(3) requires property to be assessed as personal property if it is of the kind of property ordinarily removed when the owner moves to another location. Id. 266 N.W.2d at 635. The Court went on to hold that an 1880 foot high television tower was the kind of property ordinarily removed and should be taxed as personal property.

The question of appropriate assessment is thus determined by the nature of the kind of property, not the particular location where attached nor the intent of the owner. The determination of whether the property is of the kind of property ordinarily removed is a factual determination delegated to the assessor pursuant to Iowa Code §441.17 (1981).[1] If it is determined by the assessor that the tangible property is not the kind of property ordinarily removed when the owner moves then notwithstanding the fact it is on rented property it should be taxed as real property.

Therefore, it is the opinion of this office that pursuant to 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.

Yours truly,

Mark R. Schuling

Mark R. Schuling
Assistant Attorney General

WP5

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[1] The assessor would be required to make an investigation of the industry to gather the necessary data needed to provide a factual basis for the determination of the appropriate property classification.

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)

February 18, 1983

Honorable William H. Harbor
State Representative
State Capitol
L O C A L

Dear Representative Harbor:

You have requested an opinion of the Attorney General on several questions concerning sanitary districts and the interpretation of Iowa Code Ch. 358 (1981). We shall address each question in turn.

Several of your questions involve interpretation of Iowa Code § 358.21 (1981). That section provides in relevant part:

> Any sanitary district organized hereunder may borrow money for its corporate purposes, but shall not become indebted in any manner or for any purpose to an amount in the aggregate exceeding five percent on the value of the taxable property within such district, to be ascertained by the last state and county tax lists previous to the incurring of such indebtedness. Indebtedness within this constitutional limit shall not include the indebtedness of any other municipal corporation located wholly or partly within the boundaries of such sanitary district.

> Subject only to this debt limitation, any such sanitary district organized hereunder shall have and it is hereby vested with all of the same powers to issue bonds, including both general obligation and revenue bonds, which cities now or may hereafter have under the laws of this state . . . .
>
> * * *
>
> The proceeds of any bond issue made under the provisions of this section shall be used only for [purposes relating to treatment and disposal of sewage]. Proceeds from such bond issue may also be used for the payment of special assessment deficiencies. Said bonds shall be payable in not more than forty annual installments and with interest at a rate not exceeding that permitted by chapter 74A, and shall be made payable at such place and be of such form as the board of trustees shall by resolution designate. Any sanitary district issuing bonds as authorized in this section is hereby granted authority to pledge the future avails of a tax levy to the payment of the principal and interest of such bonds after the same come due, and the power to impose and certify said levy is hereby granted to the trustees of sanitary districts organized under the provisions of this chapter. (emphasis added)

We note as an initial matter that § 358.21 is a reiteration of an identical constitutional limitation imposed on the indebtedness incurred by "a county or other political or municipal corporation." Iowa Const., Art. XI, § 3. This constitutional provision applies to sanitary districts as well, as § 358.11 provides that a sanitary district is "a body corporate and politic . . ." The Iowa Supreme Court has consistently held that the purpose of this constitutional provision is to prevent taxes of a political subdivision from becoming overly burdensome as a result of various obligations. See, e.g., Richards v. City of Muscatine, 237 N.W.2d 48 (Iowa 1975). We turn now to your specific questions.

I.

Your first question asks:

> What types of indebtedness (general obligation bonds, revenue bonds, special assessments, etc.) are being spoken to in 358.21?

Several statutory provisions in Ch. 358 authorize a sanitary district to incur certain types of indebtedness. Section 358.21 authorizes a district "to issue bonds, including both general obligation and revenue bonds," in the same manner as cities are authorized. Section 358.22 authorizes the district to impose special assessments.

The statute states that a sanitary district "shall not become indebted in any manner or for any purpose" in excess of the statutory amount. (emphasis added) While there are no cases interpreting the indebtedness limitation of § 358.21, Article XI, § 3 contains language almost identical to that of § 358.21 and has been construed by the Iowa Supreme Court in a number of cases. The Court has consistently held that this constitutional restriction on indebtedness includes not only bonded debt but all forms of indebtedness. See, e.g., City of Council Bluffs v. Stewart, 51 Iowa 385, 1 N.W. 628 (1879). However, to constitute a debt within the meaning of this limitation, there must be an obligation which the municipality must meet with its funds or property, and it must be a pecuniary liability or a charge against the municipality's general credit. Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 179 N.W.2d 449, 458 (Iowa 1970); Interstate Power Co. v. Incorporated Town of McGregor, 230 Iowa 42, 296 N.W. 770 (1941).

Therefore, certain methods of financing municipal projects do not constitute indebtedness within the meaning of Article XI, § 3. For example, revenue bond issues that are to be paid off entirely from the operating revenues of a municipality do not constitute debt and therefore do not fall within constitutional and statutory limitations on indebtedness, so long as the general taxing powers or credits of the city are not pledged in any way. Goreham, supra, 179 N.W.2d at 461. In the present case, § 358.21 provides that sanitary districts may issue bonds in the same manner as cities are authorized. Iowa Code Ch. 384 (1981) governs city finance. In particular, § 384.82(1) governs issuance of revenue bonds, but expressly provides that revenue bonds are "payable solely and only out of the net

revenues of the . . . project." Consequently, revenue bonds issued by sanitary districts are payable only from the revenue of the district and therefore do not constitute debt within the meaning of § 358.21.

This latter example is intended only to be illustrative. We cannot, in this limited discussion of issues falling within the complex area of municipal indebtedness and bonding, enumerate every type of financing arrangement which does or does not fall within the purview of constitutional and statutory limitations on indebtedness. Such a determination would necessarily require consideration of various factors, including the terms and specific language of a particular arrangement. This determination could only be made on a case-by-case basis, and because of its heavy reliance on factual considerations could not properly be resolved by an Attorney General's opinion.

II.

Your second question asks:

> Is the five percent (5%) limitation an annual aggregate or is it the total amount of indebtedness over the period of time necessary to retire same?

We construe this question as asking whether the statutory five percent limit applies to the indebtedness incurred in each separate year, or to the total indebtedness incurred over the number of years the district has been in existence. Again, we believe the language of § 358.21 is clear: a sanitary district is not to become indebted "in any manner or for any purpose to an amount in the aggregate exceeding five percent on the value of the taxable property within such district." (emphasis added) The legislature has not provided a definition of "aggregate," and therefore we refer to its common meaning. Webster's New World Dictionary defines "aggregate" as: "gathered into a whole or mass; total . . . a total or whole . . . to amount to, total." See also Chapin v. Wilcox, 114 Cal. 498, 46 P. 457 (1896) ("aggregate" is a sum, mass, or assemblage of particulars; a total or gross amount; a plurality of units, whose total amount it represents); Mefford v. Wilson Concrete Co., 163 Neb. 137, 77 N.W.2d 895 (1956). Consequently, it is our opinion that the § 358.21 indebtedness limitation applies to all debts incurred by a sanitary district since its inception, and does not apply solely to the debts incurred by the district in a particular year.

III.

In your third question you ask:

> Does the five percent (5%) limitation apply to the levy only or to the levy plus interest?

To clarify your question, we assume that you are addressing the five percent limitation on indebtedness found in § 358.21, as § 358.18 provides that a sanitary district levy shall not exceed fifty-four cents per thousand dollars of the adjusted taxable valuation of the property within the district.

It is our opinion that the § 358.21 debt limitation does not apply to the amount of interest the district pays on the debt it incurs. We believe that "indebtedness" in § 358.21 refers solely to the principal amount of the debt incurred, and therefore does not include the interest to be paid as a part of retiring that debt. This conclusion is consistent with court decisions addressing this same question. Wright v. Stapp-Zoe Consolidated School District No. 1, 191 Okla. 289, 123 P.2d 281 (1942) (unaccrued interest not considered part of indebtedness when determining whether bond issue created debt in excess of that authorized by constitution); Ashland v. Culbertson, 103 Ky. 161, 44 S.W. 441 (1898) (constitutional limitation on indebtedness includes only the amount on face of the bonds and does not include the interest that will accrue).

IV.

Your fourth question asks:

> If the taxable property within the sanitary district is not of sufficient value to reach the amount necessary to finance a project, would the county board of supervisors be able to sell general obligation bonds, using the taxable value of the whole county as the tax base with said bonds to be retired by a tax levied on only those properties within the sanitary district?

It is our opinion that the county board of supervisors is not authorized to sell general obligation bonds under the circumstances you describe.

The statutory provisions of Ch. 358 relating to sanitary districts are lengthy and detailed, and we believe they provide the exclusive means for establishing, financing, and operating a Ch. 358 sanitary district. Indeed, such a district constitutes "a body corporate and politic" by virtue of § 358.11, and thus is an autonomous governmental body. Because of this, and because Ch. 358 expressly authorizes a sanitary district to issue bonds and levy taxes as needed, it is our opinion that absent statutory authority to the contrary, the county board of supervisors may not assume responsibilities delegated solely to a Ch. 358 district. Therefore, the supervisors may not issue bonds using the entire county as the tax base, those bonds to be retired by a tax levied only on the district.

Furthermore, we have serious concerns about the authority of the supervisors to obligate the entire county for debts to be incurred by a district within the county, and we can find no authority which would support such action.

Finally, we believe a contrary result would effectively circumvent the § 358.21 indebtedness limitation, a result clearly not intended by the legislature. As we stated above, strong policy considerations support this statutory and constitutional indebtedness limitation: property subject to a Ch. 358 or other levy relating to sewage treatment and disposal is subject to numerous other levies as well, and this limitation is designed to protect that property from an excessive tax burden. See Richards v. City of Muscatine, supra.

V.

Finally, you ask:

> Can the sewer district trustees enter into a 28E agreement with the board of supervisors for the purpose of issuing general obligation bonds or any other type of bonds for the construction of a sanitary sewer district?

It is our opinion that, while a Ch. 28E agreement could not be used to circumvent the constitutional and statutory indebtedness limitation on indebtedness of a Ch. 358 sanitary district, such an agreement would be permissible.

Iowa Code § 28E.3 (1981) provides that:

> Any power or powers, privileges or authority exercised or capable of exercise by a public

> agency of this state may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privileges and authority . . .

A sanitary district created pursuant to Ch. 358 is authorized in § 358.21 to issue bonds, including general obligation and revenue bonds, for the purpose of treating and disposing of sewage and industrial wastes. A county board of supervisors is authorized by Iowa Code §§ 331.441.2 (b)(5) and 331.443 (general obligation bonds) and §§ 331.461 (1)(b) and 331.463 (1981) (revenue bonds) to issue general obligation and revenue bonds for the works and facilities necessary for the collection, treatment, and disposal of sewage and industrial waste of the county. In the case of revenue bonds, the statute includes works and facilities:

> . . . within or without the limits of the county, and including works and facilities to be jointly used by the county and other political subdivisions.

Section 331.461(1)(b) (1981).

We conclude that both the county and Ch. 358 sanitary districts are authorized to issue bonds. Therefore, the requirement of § 28E.3, i.e., that a 28E agreement to perform a particular function be entered into only by those public agencies who are independently authorized to perform that function, is satisfied. Therefore, it is our opinion that a Ch. 358 sanitary district may enter into an agreement with a county board of supervisors to issue bonds to finance construction of sewage treatment and disposal facilities.[1] Of course, any bonds issued by the district would be retired by taxes levied in the district, while bonds issued by the county would be retired by taxes levied on a county-wide basis.

In conclusion, it is our opinion that the indebtedness limitation of § 358.21 applies to all types of indebtedness and 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

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[1] Section 358.16 recognizes the possibility of a similar type of joint undertaking by expressly authorizing a sanitary district to contract with a city for the operation of local municipal sewage facilities as part of the functioning of the district.

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.

Sincerely,

Theresa O'Connell Weeg (ad.)

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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)

Senator Calvin O. Hultman
701 Joy Street
Red Oak, Iowa 51566

February 18, 1983

Dear Senator Hultman:

You have asked for our opinion on a series of questions pertaining to use of monies in the schoolhouse fund which were raised by levies made pursuant to Iowa Code § 297.5 (1981). The questions are as follows:

1. May the Red Oak Community School District use funds in its schoolhouse fund raised by prior levies and/or, future levies pursuant to Section 297.5 Code of Iowa for the following purposes:

a. Improving a site already owned by the District to be used as a football field, including grading, tiling, irrigating, seeding and moving bleachers?

b. Improving a site already owned by the District to be used as a track, including grading and laying the track?

c. Improving a site already owned to be used as a softball field, including grading and installing lights?

d. Improving a site owned by the City of Red Oak but leased to the District by renovating athletic facilities thereon including grading, tiling, adjusting the track to meters, installing lighting, seeding and remodeling the field house?

2. Does the term "schoolhouse" contained in the last unnumbered paragraph of Section 297.5 include athletic facilities, such as field houses,

football fields and tracks, such that the term "major building repairs" includes repairs and improvements to athletic facilities?

Your questions require us to examine with care the language of Iowa Code § 297.5 (1981) and an amendment thereto. Prior to amendment, the relevant language of § 297.5 was as follows:

> The directors . . . may, . . . certify an amount not exceeding twenty-seven cents per thousand dollars of assessed value . . ., and the tax so levied shall be placed in the schoolhouse fund to be used for the purchase and improvement of sites or for major building repairs. Any funds expended by a school district for new construction of school buildings or school administration buildings must first be approved by the voters of the district.
>
> For the purpose of this section, "improvement of sites" includes: Grading, landscaping, seeding and planting of shrubs and trees; constructing new sidewalks, roadways, retaining walls, sewers and storm drains, and installing hydrants; original surfacing and soil treatment of athletic fields and tennis courts; furnishing and installing for the first time, flagpoles, gateways, fences and underground storage tanks which are not parts of building service systems; demolition work; and special assessments against the school district for capital improvements such as streets, curbs, and drains.
>
> . . .
>
> For purposes of this section, "major building repairs" includes reconstruction, repair, improvement or remodeling of an existing schoolhouse and additions to an existing schoolhouse and expenditures for energy conservation. (Emphasis supplied.)

The legislature amended the section by inserting the following language after the first paragraph set out above:

> Notwithstanding section 291.13, unencumbered funds collected from the levy authorized in this section prior to July 1, 1981, may also be expended for the purposes defined in this section.

1981 Iowa Acts ch. 92, § 1.

When construing a statute that regulates Iowa school districts we must do so in the light of Dillon's rule: school districts are limited to the exercise of those powers expressly granted or necessarily implied in their governing statutes. See McFarland v. Board of Education, 277 N.W.2d 901, 906 (Iowa 1979); Barnett v. Durant Community School District v. Parker, 249 N.W.2d 626, 627 (Iowa 1977), Silver Lake Consolidated School District v. Parker, 238 Iowa 984, 990, 29 N.W.2d 214, 217 (1947). Moreover, because Iowa Code § 297.5 as amended authorizes specific lists of uses of funds acquired by § 297.5 levies, we must apply a principle of statutory construction known by the Latin phrase "expressio unius est exclusio alterius." That principle may be stated another way; express mention in a statute of a thing or things implies the exclusion of others. Wilson Food Corp. v. Cherry, 315 N.W.2d 756, 757 (Iowa 1982); Iowa Farmer's Purchasing Ass'n. Inc. v. Huff, 260 N.W.2d 824, 827 (Iowa 1977); In re Wilson's Estate, 202 N.W.2d 41, 44 (Iowa 1972). With those statutory construction principles in mind, we turn to your questions.

Questions 1a, 1b, and 1c

In our opinion, the statutory language of § 297.5 as amended clearly encompasses all of the improvements listed in your questions 1a, 1b and 1c except "moving bleachers" in 1a and "installing lights" in 1c. The words "original surfacing . . . of athletic fields and tennis courts" surely includes a football field, a softball field and a track.

Neither "moving bleachers" nor "installing lights" is included in the list in § 297.5. This may appear to be an unnecessarily narrow construction but we are sensitive to the fact that when the legislature defines a term "for the purpose of this section," see § 297.5, a narrow construction is required to sustain the intent of the legislature. We recognize that the word "include" in a statute is ordinarily a word of enlargement and not of limitation, Lucke v. Lucke, 300 N.W.2d 231, 234 (N.D. 1980), but where "includes" is used in connection with the definition of a term for the purpose of a particular section, as here, it is a word of limitation. Surowitz v. City of Pontiac, 374 Mich. 597, 132 N.W.2d 628, 632 (Mich. 1965). It seems to us that although moving bleachers is not authorized by the definitions in § 297.5, it does fall under ordinary maintenance. Therefore, costs for that activity could be met from the school district general fund.

On the other hand, installation of lights does not fall under the "improvement of sites" or "major building repairs" as those terms are defined for "the purpose of" § 297.5. And "installing lights" on a newly created softball field would

surely not be ordinary maintenance. If the omission of installation of lights from the definition of "improvement of sites" in this statute was unintentional or inadvertent, the legislature may decide to add it to the list of specific items in the definitions of § 297.5. This construction is in keeping with a declaratory ruling, relating to § 297.5, issued by the Superintendent of Public Instruction. We are mindful of the deference due on administrative agency's interpretation of a statute. Davenport Community School District v. Iowa Civil Rights Commission, 277 N.W.2d 907, 910 (Iowa 1979). Superintendent Benton expressed the view that the word "includes" in § 297.5 was "one of limitation, rather than enlargement." 1 D.P.I. Dec.Rul.31 (1977).

Question 1d

The issues presented for our opinion in question 1d are very different from those discussed above. In our opinion, the district does not have power to use § 297.5 funds to improve sites that are leased and not owned by it.

The powers of a school district to lease property for school purposes is limited. Voters may authorize a schoolhouse tax "for rental of facilities pursuant to chapter 28E," Iowa Code § 278.1(7) (1981).[1] When the voters have authorized such a tax, a district board is authorized by Iowa Code § 279.26 (1981) to enter into rental or lease agreements "consistent with the purposes" for which the tax was approved. The Iowa Supreme Court has held in two cases that the limited power to "rent a room and employ a teacher" found in Iowa Code § 297.12 may not be extended and that other Code sections do not enlarge the authority given a district board under that section. See Porter v. Iowa State Board of Public Instruction, 259 Iowa 571, 536-577, 144 N.W.2d 920, 923 (1966); Cray v. Howard-Winneshiek Com. School Dist., 260 Iowa 465, 150 N.W.2d 84 (1967). We note that the language of Iowa Code § 297.12 (1981) has not been changed since those cases

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[1] We express no view as to whether improvements could be made to facilities leased by a school district pursuant to ch. 28E and authorized by the voters according to Iowa Code § 278.1(7) (1981). Chapter 300 also authorizes a school district to levy a tax to establish and maintain public recreation places and playgrounds "to carry on public educational and recreational activities," Iowa Code § 300.1 (1981) in school facilities and upon grounds and buildings under the ownership and management of cities. The tax to support this activity must be approved by a majority of the votes cast on a proposal for such a levy. See Iowa Code § 300.3 (1981).

were decided. Cf. Iowa Code § 297.12 (1962). Nothing in Iowa Code § 297.5, at issue here, gives rise to an inference that a school district holds power to improve or repair leased sites.[2]

Question 2

In our opinion the term "major building repairs" in § 297.5 pertains to buildings only and does not authorize "repairs" to "athletic fields or tennis courts." By its terms, § 297.5 grants power to use such funds for "original" surfacing of athletic fields which leads us to conclude that the legislature did not intend such funds to be used for "repair" of such surfaces. On the other hand, such funds could be used to repair a gymnasium, i.e., a building. This view is not in conflict with an earlier opinion, 1980 Op.Att'yGen. 515. That opinion pertained to funds raised by a bond issue pursuant to Iowa Code § 278.1(7) and not to use of funds raised pursuant to § 297.5.

One other matter merits our discussion. You state that certain citizens of the district have agreed to donate a portion of the materials and services that are necessary to make improvements to the athletic facilities. The board of directors of a school district is authorized to receive gifts and utilize gifts for schoolhouse or general purposes. See Iowa Code § 279.42 (1981). In our opinion, the language "funds through gifts, devises and bequests" includes gifts of service and materials as well as money. The school board retains power to decide what work shall be done. See, e.g., Iowa Code §§ 279.8; 279.28; and 297.1. In our opinion, the Red Oak school board has power to accept gifts of labor and materials. See also Iowa Code § 565.6 (1981) (gifts to governmental bodies).

In sum, funds raised by § 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 "improvements of sites" and "major building repairs" as defined in § 297.5, do not apply to moving bleachers or installing lights on the softball field.

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[2] Iowa Code § 297.22 (1981) as amended by 1981 Iowa Acts ch. 93, entitled Disposal of School Property, authorizes school districts to sell, lease or otherwise dispose of property that is no longer needed for school purposes but that statute has no bearing on the issues presented here.

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.

Sincerely,

Merle W. Fleming

MERLE W. FLEMING
Assistant Attorney General

MWF/jkp

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)

Administrative Rules Review Committee
c/o Joseph Royce
State Capitol
L O C A L

February 18, 1983

Dear Sir:

On behalf of the Administrative Rules Review Committee, you have requested our opinion on the following question:

> Does art. VII, § 1 of the Iowa Constitution prohibit the State from making advance payments to Medicaid recipients, to cover transportation expenses incurred for the purpose of obtaining medical treatment under the Medicaid program.

As you correctly point out, the cost of transportation is a covered expense under the Medicaid program. Title 42 C.F.R. 431.53, in implementing 42 U.S.C. § 1396a, provides that a state plan must:

> a. Specify that the Medicaid agency will assure necessary transportation for recipients to and from providers:
>
> b. Describe the methods that will be used to meet this requirement.

The Legislature has determined that the State shall participate in the Medicaid program, [Iowa Code Chapter 249A (1983)] and has filed such a state plan. The "Medicaid agency" in Iowa, the

Department of Social Services, under the provisions of 770 I.A.C. 78.13(9), will not provide transportation payments in advance, but only reimburse expenses incurred. Your request for an opinion addresses the issue of a constitutional prohibition and we find none. The provision of transportation payments in advance is within the administrative discretion of the Medicaid agency. For reasons which need not be addressed within the context of this opinion, the agency has elected in the exercise of that discretion, to provide for reimbursement only. Although in our opinion art. VII, § 1 of the Iowa Constitution does not prohibit payment of advance travel expenses, neither is there any constitutional or statutory provision which requires it. A similar conclusion was reached with respect to advance payment of state employee travel expenses in Op.Att'yGen. 79-7-18.

Article VII, § 1, provides in relevant part as follows:

> The credit of the State shall not in any manner, be given or loaned to, or in aid of, any individual...and the State shall never assume, or become responsible for, the debts or liabilities of any individual...

The Iowa Supreme Court interpreted § 1 of art. VII in Grout v. Kendall, 195 Iowa 467, 472-73, 192 N.W. 529, 531 (1923), in the following way:

> It was to remove the delusion of suretyship, with its snare of temptation, that this section of the Constitution was adopted. It withheld from the constituted authorities of the State all power or function of suretyship. It forbade the incurring of obligations by the indirect method of secondary liability. This is the field and full scope of the section. It does not purport to deal with the creation of a primary indebtedness for any purpose whatsoever. (Emphasis added).

The essence of the surety concept is a pledge of the State's credit, an undertaking to pay in the event that the principal fails. (Webster's Third New International Dictionary, 1971) As Grout v. Kendall, 195 Iowa 467, 472-73, 192 N.W. 529, 531 (1923),

and other Iowa Supreme Court cases on art. VII, § 1, suggests, the following four point analysis is applicable:

1. Is the Department, as the governmental body of the State, using its own money? See Sampson v. City of Cedar Falls, 231 N.W.2d 609, 613 (Iowa 1975).

2. Is the governmental body acting as a surety for the debt of another? See Grubb v. Iowa Housing Finance, 255 N.W.2d 89, 98 (Iowa 1977); Edge v. Brice, 253 Iowa 710, 113 N.W.2d 755, 758 (1962); Grout v. Kendall, supra.

3. Is the governmental body's obligation a primary one? Richards v. City of Muscatine, 237 N.W.2d 48, 62 (Iowa 1975); Graham v. Worthington, 259 Iowa 845, 146 N.W.2d 626, 639-41 (1966); Edge v. Brice, supra; Grubb v. Iowa House Finance, supra.

4. Is the expenditure or loan for a public purpose? Edge v. Brice, 253 Iowa 710, 113 N.W.2d 755, 758 (1962).

With respect to advance Medicaid transportion expenses, the governmental body, as the Medicaid agency, which authorizes the travel, is obligated to pay the recipient's transportation costs. (42 C.F.R. § 431.53.) Therefore, the Department is using its own credit and spending its own money.

The Department would not be acting as a surety for the debt of another if it in the exercise of its discretion elected to make allowances to advance transportation costs. First, with advance travel payments, there generally is no pre-existing debt of another. The recipient receiving the advance transportation payment is not a debtor. In fact, that recipient is a potential creditor of the Medicaid agency providing the benefits. Secondly, to the extent that there is a debt, the Department, as the Medicaid agency authorizing the travel, has the primary obligation of paying the travel expenses. As stated, the essence of a surety relationship is that the surety need not pay anything if the person with the primary liability satisfies the debt. In the travel expense situation, the governmental body is not relieved of liability when and after the recipient pays their own transportation expenses. 42 C.F.R. § 431.53 requires reimbursement of travel expenses as a condition of eligibility for the federal program.

The primary obligation for paying for transportation costs connected with Medicaid benefits falls on the Medicaid agency authorizing the benefits. Thus, by electing to pay those

transportation costs in advance, or electing to reimburse those costs subsequent to payment by the recipient, the Department is doing no more than discharging its primary obligation to pay the expenses.

As you suggest in your request, the Department has taken the position that electing to pay transportation costs in advance would fail to satisfy the requirement that the expense be for a public purpose. It should first be noted that even if advance transportation costs are characterized as loans, they are not prohibited by art. VII, § 1, provided that the expense is for a public purpose. See Grubb v. Iowa Housing Finance, 255 N.W.2d 89, 98 (Iowa 1977); 1938 Op.Att'yGen. 80. As stated in Grubb, supra, at 93:

> It has long been 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.

That the expenditure or even loan, may benefit certain individuals or classes more than others, is not determinative alone of whether the law serves a public purpose. (See Richards v. City of Muscatine, 237 N.W.2d 48, 60 (1975).) In granting to the governmental body that flexibility and expansive scope required to meet complex social and economic conditions, the Supreme Court has been reluctant to find an "absence of public purpose except where such absence is so clear as to be perceptible by every mind at first blush". See Dickinson v. Porter, 35 N.W.2d 66 80 (1948). Should the Department as the Medicaid agency in the exercise of its discretion elect to make advance transportation cost payments, a challenge to such a discretionary decision would require a showing not on the policy, wisdom, advisability or justice of the decision, but a demonstration beyond a reasonable doubt that the constitutional provision invoked has been violated.

Every reasonable basis supporting the public purpose justification must be indulged. It is certainly not beyond a reasonable doubt that such a decision would be perceived by every mind at first blush to be without a public purpose. (See City of Waterloo v. Selden, 251 N.W.2d 506, 508 (Iowa 1977). It is certainly "fairly debatable" that it is within the scope of public purpose to facilitate and expedite the receipt of Medicaid benefits to recipients who might not otherwise have the financial

reserves necessary to meet transportation expenses without advance of those expenses.

As compared to reimbursement of eligible expenses already incurred, advance payment could result in a prohibited expenditure for private purposes in "aid of an individual" if the money were misappropriated. Advance payment, despite this risk, would nonetheless meet the public purpose requirement if the agency determines that the need for advance payment in a particular class of cases far outweighs the risk.

The exercise of administrative discretion by the Medicaid agency, the Department of Social Services, should it elect to pay in advance the transportation costs of Medicaid recipients is not prohibited by art. VII, § 1 of the Iowa Constitution.

Sincerely,

Gordon E. Allen
Special Assistant
Attorney General

GEA/jaa

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 11, 1983

The Honorable Norman J. Goodwin
State Senator
State Capitol
L O C A L

Dear Senator Goodwin:

You have requested an Attorney General's opinion concerning whether a member of an airport commission can be removed from the Commission by a mayor. Specifically, you pose the following questions:

1. Do the removal powers contained in Code Section 372.15 apply to Airport Commission members as appointed under Code Section 330.20 since the Commission is an autonomous entity under Code Section 320.21 or is the sole authority for removal under Chapter 66?

2. If the appointing entity is vested with the removal powers under Code Section 372.15, are such powers exercisable by the City Council, present appointing authority under current Code Section 330.20, or by the Mayor, the appointing authority under the Code Section in force in 1944?

At the outset, we feel compelled to state the appropriate purposes of an Attorney General's opinion. While it is appropriate for this office to express an opinion on legal issues, it is improper for us to engage in judicial fact-finding in the context of an opinion. Our opinion, therefore, is limited to the posed questions of law.

I.

Iowa Code § 372.15 (1981), provides:

> Except as otherwise provided by state or city law, all persons appointed to city office may be removed by the officer or body making the appointment, but every such removal shall be by written order. The order shall give the reasons, be filed in the office of the city clerk, and a copy shall be sent by certified mail to the person removed who, upon request filed with the clerk within thirty days of the date of mailing the copy, shall be granted a public hearing before the council on all issues connected with the removal. The hearing shall be held within thirty days of the date the request is filed, unless the person removed requests a later date.

The term "city office" is not defined in the City Code of Iowa. However, the term "officer" is defined in such a way as to imply that it means the same as one holding a "city office." Iowa Code § 362.2(8) (1981) defines an "officer" as "a natural person elected or appointed to a fixed term and exercising some portion of the power of the city." As to the first element, airport commissioners are appointed to six year terms. See Iowa Code § 330.20 (1981). That an airport commissioner exercises a power of the city is established by City of Cedar Rapids v. Schade, 257 N.W.2d 500 (Iowa 1977), which held that a city airport commission holds all of the powers expressly granted to a city in Chapter 330 plus all of the city's home rule airport powers. Thus, we conclude that the office of airport commissioner, charged with the management and control of a city airport, is a city office.

The control of a city airport commission by state law excepts it from the definition of a city "administrative agency" in Iowa Code § 362.2(23) (1981). See 1980 Op.Att'yGen. 487. No similar exception, however, is contained in the definition of a city "officer" in Iowa Code § 362.2(8) (1981).

Our conclusion that the office of city airport commissioner is a city office is supported by a city's continued involvement once an airport commission is established. First, an airport commission is established, and may be abolished, by majority vote of the qualified electors of a city. See Iowa Code § 330.17 (1981), as amended by Acts, 1981 Session, 69th G.A., Ch. 117, § 1054. Second, a city places the management and control of its airport in an airport commission, once established. Id. Next, members of an airport commission are appointed by the governing

body of a city. See Iowa Code § 330.20 (1981). Fourth, each commissioner is required to execute and furnish a bond in an amount fixed by the governing body, filed with the city clerk, and paid from the general fund. Id. Fifth, a city may budget funds for airport purpose. See Iowa Code § 330.21 (1981), as amended by Acts, 1982 Session, 69th G.A., Ch. 1104, § 10 and Acts, 1981 Session, 69th G.A., Ch. 117, § 1057. In addition, all funds derived from taxation or otherwise for airport purposes are to be deposited with the city clerk to the credit of the airport commission. Id. Seventh, an airport commission, following the close of each municipal fiscal year, is required to file an audit with the city clerk. See Iowa Code § 330.22 (1981). Finally, the governing body of a city, to the extent that an airport commission would have insufficient funds or other resources to defend itself, would have that duty under Iowa Code § 613A.8. See 1978 Op.Att'yGen. 539. Accordingly, it is our judgment that a member of an airport commission is subject to removal under Iowa Code § 372.15 (1981), upon proper compliance with the requirements of that statute.

It is unusual at the local, state, or federal levels of government to have appointees who serve on quasi-independent boards or commissions for fixed terms subject to removal by the appointing authorities prior to the expiration of the term. It is particularly unusual when management or control of an enterprise such as an airport is granted to the board or commission. For if the appointees are subject to removal, their independent management and control can as a practical matter, in some instances, be impaired by the appointing authority. We would, therefore, suggest that the legislature review the consequences produced by Iowa Code § 372.15 and 362.2(8) and make any changes it considers necessary or appropriate.

II.

The applicability of Iowa Code § 372.15 (1981) to members of an airport commission raises the second issue as to whether the power to remove is vested with the city council or the mayor. A resolution of that question of law can be gained from an examination of a trilogy of Iowa Code sections.

Specifically, Iowa Code § 372.15 (1981) grants the appointing authority the power to remove an officer. Members of an airport commission, according to Iowa Code § 330.20 (1981),[1] are appointed by the governing body of a city or county. A

[1] Prior to implementation of municipal home rule, Acts, 1972 Session, 64th G.A., Ch. 1088, § 275 (effective July 1, 1975), the appointing authority was vested in the mayor. See Iowa Code § 330.20 (1975).

council, as defined in Iowa Code § 362.2(3) (1981), is the governing body of a city. Accordingly, the city council is vested with the authority to remove a member of an airport commission under Iowa Code § 372.15 (1981).

In summary, 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.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/jkp

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)

State Representative William H. Harbor
House of Representatives
State Capitol
L O C A L

February 11, 1983

Dear Representative Harbor:

The question you have presented for our consideration is as follows:

> 1. What is the definition of the twelve-month period cited in Iowa Code sections 542.3(4)(a) and 543.6(4), 1981, as amended by House File 841, 69th General Assembly?

Iowa Code sections 542.3(4)(a) and 543.6(4) do not specifically cite a twelve-month period, as your question indicates. However, Iowa Code sections 542.3(4)(b) and 543.6(4)(b) do refer to inspections during "each twelve-month period". This opinion will thus be based upon the references in those two code sections.

In our opinion, under the amended statute, the inspection periods for both warehouse and grain dealer licenses are based on the fiscal year. The bill, House File 841, 69th General Assembly, effective July 1, 1981, amended both the grain dealer and warehouse law in some respects. The period for the license year for both warehousemen and grain dealers remained the same, i.e., beginning on July 1, and ending on June 30, of the following year. Because the licenses for both the grain dealer and the warehouseman are issued on a fiscal year basis, and renewed thereafter on a fiscal year basis, it would seem that references to "each twelve-month period" in provisions concerning these licenses would also be on a fiscal year basis. Iowa Code sections 542.5 and 543.37.

William H. Harbor
State Representative

The Commerce Commission is authorized to inspect the business premises and books, accounts, records and papers of every state licensed grain dealer, as well as every state licensed warehouseman. Iowa Code sections 542.9 and 543.2. The Commission is required to inspect Class-1 warehouses and Class-1 grain dealers, who file unqualified audits, once each twelve-month license period beginning July 1. The Commission is also required to inspect Class-1 warehouses and Class-1 grain dealers who submit an unaudited financial statement twice each twelve-month license period beginning July 1. Iowa Code sections 542.3(4)(b) and 543.6(4)(b). If, during the inspection process, the Commerce Commission inspectors find that the warehouseman or grain dealer has not met the minimal standards or provisions outlined by law, the Commission has the authority to suspend or revoke the licenses of the warehouseman and grain dealer, or take other appropriate action. Iowa Code sections 542.10 and 543.10.

Therefore, it is our opinion that the required inspections by the Commerce Commission for each twelve-month period are to be done on a fiscal year basis.

Respectfully submitted,

Iris J. Post

Iris J. Post
Assistant Attorney General

IJP:mj
cc: Kevin S. Vinchattle
Research Analyst

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)

Dr. Michael V. Reagen, Ph.D.
Commissioner
Iowa Department of Social Services
Fifth Floor
Hoover State Office Building
L O C A L

February 11, 1983

Dear Dr. Reagen:

You have requested an opinion of the Attorney General, in which you present the question:

> Can a Department of Social Services' employee, upon his request, receive leave without pay for the time during which the employee serves in the Iowa Legislature?

Because we find no administrative rule, statute or constitutional provision prohibiting or requiring your approval of the requested leave, we are of the opinion that it is within your administrative discretion consistent with applicable Merit rules.

Your question specifically involves an interpretation of the rules of the Merit Department, created by chapter 19A, which department is charged with the responsibility to promulgate rules, including those rules governing leaves of absence, with or without pay. (Iowa Code § 19A.9(18) (1981).) That rulemaking authority is granted within the framework of specific legislative directives.

> No person holding a position in the classified service shall during working hours or when performing his duties engage in any

> political activity that will impair his efficiency during working hours or cause him to be tardy or absent from his work. The provisions of this section do not preclude any employee from holding any office for which no pay is received or any office for which only a token pay is received...
>
> Any...employee...who shall become a candidate for any partisan elective office for remuneration shall, commencing thirty days prior to the date of the primary or general election and continuing until such person is eliminated as a candidate, automatically receive leave of absence without pay...

Iowa Code § 19A.18 (1981).

It is assumed for purposes of this opinion that your request concerns an employee of the department who holds a classified position according to Merit rules. It is apparent that the legislature enacted these restrictions to prevent political considerations from infecting, however subtly, the integrity and efficiency of the offices involved, and to insure that full value is received for the expenditure of public funds. Recognizing that involvement in a political campaign for partisan office may require a personal, emotional and physical dedication that could seriously detract from attention to duties, the legislature requires an employee to perform no official duties during a primary or general election campaign. Pursuant to their rule-making authority, the Merit Department has created a leave of absence without pay provision and a provision for election leave. (I.A.C. 570--14.13.) Leave without pay (I.A.C. 570--14.6) is available to your employee upon your written approval and may be granted for a period of up to two years for any reason deemed satisfactory to you. Your employee would, upon the return from the leave, have the right to be returned to a vacant position in his class or if none is available, to a vacant position in a class in the same pay grade.

The problem you present is not without prior exposure. In previous opinions, the Attorney General has opined that simultaneous service as a legislator and an assistant chief of police of a municipality is permissible, (Op.Att'yGen. 76-11-23) and as a salaried employee of a private corporation (Op.Att'yGen. 76-6-3). Those opinions and the Op.Att'yGen. 76-9-31 considered the art. III, § 22 provision of the Constitution of Iowa no

impediment to the specific examples of simultaneous service under consideration. Art. III, § 22 states:

> No person holding any lucrative office under the United States, or this State or any other power, shall be eligible to hold a seat in the general assembly;

As the latter opinion explained, if there is pay or compensation attached to the office, then it is "lucrative" within the meaning of that prohibition. However, the employee whose specific situation which is presently under consideration by you does not hold an "office" as that term is understood within the meaning of the prohibition. (Op.Att'yGen. 76-9-31.) Such an office must be created by legislative direction, not by the commissioner of the Department of Social Services. The constitutional prohibition is thus inapplicable.

The election leave provisions of I.A.C. 570--14.13 subsequent to the election of the employee are likewise inapplicable. The merit rule at I.A.C. 570--16.1(8) cited by you in your request provides in part:

> Classified employees...are prohibited from:
>
> (8) being a candidate from any paid partisan elective office while on active state employment duty or on paid leave within 30 days prior to a primary or general election. This does not prohibit an employee from being a candidate for or holding any office which is not paid or for which only token pay is received or from being a candidate for or holding any paid or non-paid political party office;

Admittedly, as you can discern from your own reading of the above provisions, none of the constitutional, statutory or regulatory prohibitions specifically direct that you may not grant leave without pay to your requesting employee. Your employee while on leave without pay does not hold an office (art. III, § 22) nor, so long as election leave is properly granted, does he become a "candidate for paid partisan elective office while on active duty". (I.A.C. 570--14.13 and 16.1(8).)

The question you pose is an interpretation of merit rules which is in the initial instance a matter charged to, and within the direct responsibility of, the Merit Commission. The question of law presented is the limit on the power of the Merit Department to regulate the conduct of Merit employees, and the limit upon your discretion as the Appointing Authority to regulate your employees within your discretion. We find no provision prohibiting leave without pay status for legislators, nor for that matter do we find any provision mandating that such leave without pay status be granted upon request by legislator-employee. The controlling provision is therefore I.A.C. 570--14.6 which describes your discretionary decision to grant leave without pay for a period of up to, two years for any reason deemed satisfactory to you.

Respectfully,

Gordon E. Allen
Special Assistant
Attorney General

GEA/jaa

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 7, 1983

Mr. W. Edward Anstey
Appanoose County Attorney
Centerville, IA 52544

Dear Mr. Anstey:

You have requested an opinion of the Attorney General regarding the continued handling of guardianships and conservatorships by the county attorney pursuant to §222.18, Code of Iowa (1981). You have raised two specific questions:

1. In the event the proceedings under §222.18 result in the appointment of a private individual who is not the Director of a county health care facility as the fiduciary of a person who is mentally retarded, is there any continued duty on the part of a county attorney to oversee the qualifications of said fiduciary and the filing of any mandatory reports?

2. What, if any, is the statutory mandate imposing these duties on the county attorney?

The statutory mandate imposing duties on the county attorney in the appointment of a guardian for persons who are mentally

retarded appears several times in the Code. See §222.18 and 69 Iowa Acts, ch. 117, §756(43). Section 222.18 provides in pertinent part:

> The county attorney shall, if requested, appear on behalf of any petitioner for the appointment of a guardian or commitment of a person alleged to be mentally retarded under this chapter, and on behalf of all public officials and superintendents in all matters pertaining to the duties imposed upon them by this chapter.

Additionally, 69 Iowa Acts, ch. 117, §756(43) provides:

> The county attorney shall:
>
> 43. Carry out duties relating to the appointment of a guardian or commitment of a mentally retarded person as provided in Section 222.18.

We reasoned in a prior opinion that the responsibility of the county attorney under these sections is a mandatory duty. See Op.Att'yGen. #82-1-4(L). However, we have never expressed an opinion as to the extent of the responsibility under §222.18 and 69 Iowa Acts, ch. 117, §756(43).

We are of the opinion that the responsibility of the county attorney extends only to appearing on behalf of the petitioner for the appointment of a guardian. There is no further responsibility.

It is generally presumed that statutory words are used in their ordinary and usual sense with the meaning commonly attributed to them. See American Home Products Corp. v. Iowa State Board of Tax Review, 302 NW2d 140 (Iowa 1981). Where language of the statute is clear and plain, there is no room for construction. We must look at what the legislature said rather than what it should or might have said. See First National Bank of Ottumwa v. Bair, 252 NW2d 723 (Iowa 1977). Two terms in §222.18 lend support to our conclusion that it was the intent of the legislature to limit the duties of the county attorney in this circumstance. First, the statute mandates the county attorney to appear "on behalf of the petitioner." Once appointment is made, the petitioner becomes the guardian. If a continuing responsibility were intended, the statute would direct the county attorney to appear on behalf of the guardian. Second, the statute clearly limits the appearance to the appointment proceedings, no more.

In further support of our opinion, we contrast the language in §135C.24(5) and 69 Iowa Acts, ch. 117, §756(27) with that in §222.18 and 69 Iowa Acts, ch. 117, §756(43). Section 135C.24(5) provides:

> The provisions of this section notwithstanding, upon the verified petition of the county board of supervisors the district court may appoint the administrator of a county care facility as conservator or guardian, or both, of a resident of such county care facility, in accordance with the provisions of chapter 633. Such administrator shall serve as conservator or guardian, or both, without fee. The county attorney shall serve as attorney for the administrator in such conservatorship or guardianship, or both, without fee. The administrator may establish either separate or common bank accounts for cash funds of such resident wards.

69 Iowa Acts, ch. 117, §756(27) states "[t]he county attorney shall serve as attorney for the county health care facility administrator in matters relating to the administrator's service as a conservator or guardian for a resident of the health care facility as provided in Section 135C.24."

Both §135C.24(5) and Ch. 117, §756(27) provide that the county attorney shall serve as attorney for the county health care facility administrator in matters relating to the administrator's service as conservator or guardian. These sections clearly connote a continuing responsibility on the part of the county attorney. If the legislature had intended the responsibility under §222.18 to be a continuing one, they would have utilized similar language. We believe it was the intent of the legislature to limit the responsibility to appearing on behalf of the petitioner in the appointment proceedings.

Sincerely,

Diane Munns

Diane C. Munns
Assistant Attorney General

jlf

STATUTES: DELEGATION OF RULEMAKING AUTHORITY. Chp. 19A; § 19A.9(2). 1981 Session, 69 G.A. Chp. 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 4, 1983

Honorable Laverne Schroeder
State Representative
State Capitol
L O C A L

Dear Representative Schroeder:

You have requested an opinion of the Attorney General concerning the impact of House File 875, which was passed in 1981, on the rules of the Merit Employment Commission. You point out that subsection one of section 19 of this act provides for an eight percent increase of the salary levels for the various grades and steps within the merit system pay plan in fiscal year 1981 and in fiscal year 1982. You further point out that subsection four of section 19 provides an increase for the specific class of professional and managerial employees of eight percent of the total salaries budgeted for the fiscal year in 1981 and in 1982. The percentage increase for each individual, however, shall be determined by the appointing authority and may vary but in no event shall exceed the eight percent ceiling. 1981 Session, 69 G.A., Chp. 9, § 19.

Applying these provisions since House File 875 became effective in July, 1981, the Merit Employment Commission has eliminated the use of salary "steps" for pay grades in the professional and managerial class. The establishment of salary steps for all pay grades had been provided in rules which were in existence at the time House File 875 became effective. See, e.g., 570 I.A.C. § 4.3 (1981). The Commission, however, has construed House File 875 to supersede these rules with respect to professional and managerial employees. Since House File 875 became effective, the Commission has been working on a major revision of its rules based, in part, on this issue. These revised rules are currently on file but have been delayed by the Administrative Rules Review Committee pending our opinion.

You ask our opinion on two specific questions which are related:

1. Does 1981 Acts Chapter Nine Section Nineteen authorize the Merit Department to establish more than one type of pay plan, some with steps within grades, another establishing only grades?

2. Does the Merit Department's administrative decision to eliminate steps for professional and managerial employees override currently effective department rules that specifically establish steps for each pay grade?

In our view House File 875 authorizes the Commission to eliminate steps within grades for professional and managerial employees. The statutory mandate of House File 875, moreover, supersedes existing rules which were premised on the administration of a pay plan for professional and managerial employees structured by salary steps.

In order to respond to your inquiries, it is necessary to consider the pertinent principles governing the relationship between statutes and rules as well as the relevant statutory provisions. The pertinent principles governing the relationship between statutes and rules are well settled. Administrative rules are essentially sublegislation subordinate to the laws enacted by the legislature. B. Schwartz, Administrative Law, 148 (1976); see Histerote Homes Inc. v. Riedmann, 277 N.W.2d 911, 915 (Iowa 1979). An agency, therefore, cannot validly enact rules which contravene statutory provisions. Id. at 915. Since administrative rules are subordinate to statutory provisions, moreover, subsequent legislation may supersede otherwise validly enacted administrative rules. See, generally, Id. at 914-15.

With these principles in mind, it is necessary to review the statutory provisions which were in effect prior to the enactment of House File 875. The authority of the Commission to promulgate the rules which were in effect at the time House File 875 was passed derives from Chapter 19A. Section 9 mandates rulemaking on numerous subjects including provision "[f]or a pay plan within the purview of an appropriation made by the general assembly and not otherwise provided by law for all employees in the merit system." Iowa Code § 19A.9(2) (1981). This section further provides that "[e]ach employee shall be paid at one of the rates set forth in the pay plan for the class of position in which employed and, unless otherwise designated by the commission, shall begin employment at the first step of the established range for the employee's class." Id.

Fulfilling this statutory mandate, the Commission promulgated rules establishing a pay plan premised on a salary structure of classes which are subdivided into pay grades which, in turn, are subdivided into salary steps. See 570 I.A.C. 4.3 (1981). The salary structure assigned in the pay plan according to class, grade, and step are not promulgated in rule form. Rather, the rules authorize preparation of a pay plan reflecting the salary structure according to class, grade, and step to be adopted by the Commission following a public hearing and approval by the Executive Council. See 570 I.A.C. § 4.1 (1981). Other rules governing the administration of the pay plan, however, are integrated into and dependent upon the salary structure. See, e.g., 570 I.A.C. § 4.5(2) (1981) ("A merit pay increase is a periodic increase in pay from one step to the next higher step within the pay grade for a class."); 570 I.A.C. § 4.5(4) (1981) ("A classified employee who is promoted shall have his/her pay increased to the minimum step of the pay grade for the higher class of his/her rate of pay before promotion falls below that minimum step.").

We have no doubt that promulgation of rules which provide for a salary structure based on steps was within the scope of the Commission's rulemaking authority delegated under section 19A.9(2). Generally, a rule should be considered valid when a rational agency could conclude that the rule is included within the agency's delegated authority. Histerote Homes, Inc. v. Riedmann, 277 N.W.2d at 913. Section 19A.9(2) specifically delegated rulemaking authority for creation of a "pay plan." Iowa Code § 19A.9(2) (1981). A rational agency could conclude, particularly in light of specific references to step, range and class in section 19A.9(2), that rules providing for a structure of salary steps were within the agency's delegated authority as a reasonable means of creating a pay plan.

Subsequent to the promulgation of these rules, the legislature enacted House File 875. The specific provisions about which you inquire provide:

> 1. The merit system pay plan and executive council exempt pay plan provided for in section 19A.9, subsection 2, as they exist for the fiscal years ending June 30, 1981, and June 30, 1982, shall be increased for employees who are not included in a collective bargaining agreement made final under chapter 20 by eight percent for the fiscal year beginning July 1, 1981, effective with the pay period beginning July 3, 1981, and by eight percent for the fiscal year beginning July 1, 1982, effective with the pay period beginning July 2, 1982. The merit employment commission shall revise the merit system pay plan and

> the governor shall revise the executive council pay plan as provided under section 19A.9, subsection 2, by increasing the salary levels for the various grades and steps within the respective plans by eight percent.
>
> * * * *
>
> 4. The appointing authority shall determine the percentage increase for each professional and managerial employee's salary provided for under this section and may increase the salaries of the professional and managerial employees by different percentages, but the total percentage increase of all salaries of the professional and managerial employees under the appointing authority's jurisdiction for the fiscal year beginning July 1, 1981, shall be eight percent of those salaries as they exist on July 2, 1981, and for the fiscal year beginning July 1, 1982, shall be eight percent of those salaries as they exist on July 1, 1982. As used in this section, "professional and managerial employee" means a professional employee as defined in section 20.3, subsection 11 or a representative of a public employer or supervisory employee as defined in section 20.4, subsection 2.

These sections, as previously noted, generally provide for an eight percent increase for the various grades and steps in the merit system pay plan but specifically provide for a lump sum eight percent increase for professional and managerial employees with the increase for each employee to be determined by the appointing authority.

In order to determine the effect of these provisions on otherwise valid, existing rules, it is first necessary to construe the provisions themselves. In our view, subsections one and four are in conflict insofar as subsection one mandates an eight percent increase for the various steps and grades within the merit system pay plan and subsection four mandates a lump sum eight percent increase for professional and managerial employees. If subsection one were given effect with respect to all grades and steps, including those grades and steps governing professional and managerial employees, the result would be unreasonable. Each step on the salary structure for professional and managerial employees would be increased by eight percent while the actual increase granted each professional and managerial employee would be determined by the appointing authority. This process would result in the retention of a salary step structure upon which any professional or managerial

employee who received an increase other than eight percent would not fit. Under these circumstances, we believe the statutory provisions of subsections one and four are in conflict.

In order to resolve the conflict between these subsections, we rely on principles of statutory construction. When a general statute is in conflict with a specific statute, the specific statute prevails. Peters v. Iowa Employment Security Commission, 248 N.W.2d 92, 95-96 (Iowa 1976). Subsection one is a general provision applicable to "the merit system pay plan." 1981 Session, 69 G.A. Chp. 9 § 19(1). Subsection four is a specific provision applicable to "professional and managerial employees" within the merit system pay plan. 1981 Session, 69 G.A. Chp. 9 § 19(4). Applying the principle that the specific statute prevails over the general, we conclude that subsection four prevails over subsection one. Accordingly, professional and managerial employees are subject to a lump sum increase of eight percent but the salary structure for professional and managerial employees is not subject to an increase of eight percent for each salary step.

Having construed the statutory provisions, we must now determine the impact of House File 875 on Commission rules in existence at the time of the bill's effective date. In our view continued application of rules for professional and managerial employees which are integrated into and dependent upon a salary step structure are in conflict with the application of House File 875 for the same reasons which underlie the conflict between subsections one and four of House File 875. It is unreasonable to administer a pay plan by rules premised on "steps" for professional and managerial employees when any professional or managerial employee who received an increase other than eight percent would not fit into the step structure. In order to resolve this conflict between existing rules and newly enacted statutory provisions, we rely on principles governing the relationship between rules and statutues. Administrative rules cannot contravene statutory provisions. See Histerote Homes, Inc. v. Riedmann, 277 N.W.2d at 915. Accordingly, we conclude that the statutory provisions of House File 875 must supercede existing rules which conflict. The determination whether any particular rule is in conflict must be made on a case-by-case basis.

In summary, therefore, based on the foregoing analysis, we advise that House File 875 authorizes the Commission to eliminate steps within grades for professional and managerial employees. The statutory mandate of House File 875, moreover, supersedes

existing rules which were premised on the administration of a pay plan for professional and managerial employees structured by salary steps.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP/jkp

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

Mr. Michael P. Short
Lee County Attorney
609 Blondeau Street
Keokuk, IA 52632

Dear Mr. Short:

You have requested the opinion of this office concerning the use of a permanent real estate tax index number system. Specifically, you asked the following:

> May the treasurer, auditor or assessor use a permanent real estate tax number in lieu of the legal description of the real estate in giving a legally required notice to a person in whose name property is taxed, or to members of the general public?

In answer to your question, the treasurer, auditor or assessor may use the permanent real estate transfer tax number in lieu of the legal description for all real estate tax administration purposes.[1] Iowa Code §441.29 (1981), provides in relevant part:

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[1]The opinion assumes that a permanent real estate tax number system has been adopted by the county pursuant to Iowa Code §441.29 (1981).

> The auditor of any county with the approval of the board of supervisors may establish a permanent real estate index number system with related tax maps for all real estate tax administration purposes, including the assessment, levy and collection of such taxes. Wherever in real property tax administration the legal description of tax parcels is required, such permanent number system may be adopted in addition thereto or in lieu thereof. If established, the permanent real estate index number system shall describe real estate by township, section, quarter section, block series and parcel; and the auditor shall prepare and maintain permanent real estate index number tax maps, which shall carry such numbers and reflect the legal description of each parcel of real estate and delineate it graphically; and the auditor shall prepare and maintain cross indexes of the numbers assigned under said system, with legal description of the real estate to which such numbers relate. Indexes and tax maps established as provided herein shall be open to public inspection. (Emphasis added).

Therefore, by statute the permanent real estate index number system may be adopted in addition to or in lieu of the legal descriptions for all real estate tax administration purposes.

This brings us to the crux of your question: May the permanent real estate tax index number be used in lieu of the legal description in giving notice to a person in whose name the property is taxed, or to members of the general public? Section 441.29 contains its own language detailing the permissable usage of permanent real estate tax index numbers. Permanent real estate tax index numbers may be used for all real estate tax administration purposes, including the assessment, levy and collection of such taxes.

In order to make a proper determination of the extent of this permissable usage of permanent real estate tax index numbers, it is necessary to examine §441.29 for the language used and the purposes for which it was enacted. Northern Natural Gas Co. v. Forst, 205 N.W.2d 692, 695 (Iowa 1973). "A statute must be read as a whole and given its plain and obvious meaning, a sensible and logical construction." Telegraph Herald, Inc. v. City of Dubuque, 297 N.W.2d 529, 532 (Iowa 1980). "General words in a statute which are followed by specific words take their meaning from the specific ones." Hamilton v. City of Urbandale, 291 N.W.2d 15, 18 (Iowa 1980).

Section 441.29 must be interpreted to allow permanent real estate tax numbers to be used in tax administration for purposes relating to the assessment, levy and collection of taxes, and for all other purposes similar to the assessment, levy and collection of taxes which logically can be construed to constitute tax administration. Provided this above qualification is met, the usage of the tax numbers extends to situations where members of the public are involved.[2]

Therefore, it is the opinion of this office that pursuant to Iowa Code §441.29 (1981), the treasurer, auditor and assessor may use a permanent real estate tax number in lieu of the legal description of the real estate for tax administration purposes involving members of the public.

Yours truly,

Mark R. Schuling

Mark R. Schuling
Assistant Attorney General

WP2

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[2]The opinion request evidenced a concern that the number system may be limited in use to interagency communications and affairs. Interpreting §441.29 for the purpose for which it was enacted requires a construction that allows the number system to be used for all tax administration, including tax administration involving members of the public.

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

Jim P. Robbins
County Attorney
Boone County Courthouse
Boone, Iowa 50036

Dear Mr. Robbins:

You have requested an opinion from this office concerning whether cash bond posted by a third party is subject to garnishment by the State in order to pay court costs. It is our opinion that under the present Iowa Criminal Code, cash bond deposited by a third party cannot be garnished by the State in order to pay court costs.

As you noted, State v. Owen, 122 Iowa 403, 84 N.W. 529 (1900), treated a cash deposit as defendant's property. Subsequent cases however, recognized the superior right of a third-party cash-bond depositor to the fund as against defendant's garnishing creditors. State v. Schultz, 245 N.W.2d 316, 319 (Iowa 1976); Simmons v. Beeson, 201 Iowa 144, 206 N.W. 667, 668 (1907); Wright & Taylor v. Dougherty, 138 Iowa 195, 115 N.W. 905, 909 (1908). In the case of Wright & Taylor, the Court, notwithstanding its recognition of the third-party depositor's superior right to the fund as against defendant's creditors also noted the State's right to deduct court costs from that fund. This was only because the statute then specifically provided for deduction of costs from this fund, and, therefore, the depositor was deemed to have agreed to such a deduction. Wright & Taylor, 138 Iowa at 196, 115 N.W. at 909.

The current Iowa Criminal Code, however, eliminates the provision authorizing the deduction of court costs from a cash bond deposit. Iowa Code Chapter 811 (1981). In the absence of such a statutory provision the State has no right to the deposit for the satisfaction of court costs. See 1980 Op. Atty. Gen. at 121-123; 8 C.J.S. Bail § 53 (1962). Consequently, the depositor cannot be held to have agreed to such a deduction. Once the sole statutory purpose of assuring the appearance of the defendant at trial has been satisfied, the equitable estate is in the depositor.

"It is well settled that a levy of attachment is of force only to the extent of the real interest of the debtor in the property seized either under levy or garnishment; if the equitable estate is in another, it will prevail." Wright & Taylor, 138 Iowa at 196, 115 N.W. at 909. A lien does not displace prior equities or rights. Briley v. Madrid Imp. Co., 255 Iowa 388, 122 N.W.2d 824 (1963).

Because the equitable estate is in the depositor and the State has no statutory interest in the deposit with respect to deduction of court costs, the State cannot create such an interest through garnishment. In other words, absent express statutory authority, we conclude that the State cannot be distinguished from other creditors and is subject to the holding of Wright & Taylor. Thus, in answer to your question, a cash bail deposit by a third party is not subject to garnishment by the State.

Sincerely,

Mary Jane Blink

MARY JANE BLINK
Assistant Attorney General

MJB:djs

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)

March 29, 1983

Mr. Douglas R. Smalley
1603 48th Street
Des Moines, Iowa 50310

Dear Mr. Smalley:

In your former capacity as state representative, you had requested an opinion of the Attorney General on the following question:

> Does the County Compensation Board have the authority to authorize a salary decrease for members of the County Board of Supervisors?

Iowa Code §§ 331.905 to 331.907 (1983) contain the statutory provisions which create county compensation boards and govern their functions. Sections 331.905 and 331.906 include requirements and procedures for selecting members of a compensation board, and § 331.907 sets forth the board's specific duties. In particular, § 331.907(1) provides as follows:

> The annual compensation of the auditor, treasurer, recorder, clerk, sheriff, county attorney, and supervisors shall be determined as provided in this section. The county compensation board annually shall review the compensation paid to comparable officers in other counties of this state, other states, private enterprise, and the federal government. The county compensation board shall prepare a recommended compensation schedule for the elective county officers. Following completion of the compensation schedule, the county compensation board shall publish the compensation schedule in a newspaper having general circulation throughout the county. The publication

> shall also include a public notice of the date and location of a hearing to be held by the county compensation board not less than one week nor more than three weeks from the date of notice. Upon completion of the public hearing, the county compensation board shall prepare a final compensation schedule recommendation.

This section sets forth the only requirements the compensation board must follow in reaching its final compensation schedule recommendation: i.e., the board must review salaries paid for comparable offices in other counties and levels of government, must publish notice of its initial recommendations, and must hold a public hearing on this recommendation. We have previously held that § 331.907(1) does not limit the compensation board to consideration of comparable salaries or of information received from the public at the hearing, and that in addition the board may consider any other factors which it believes are relevant to the determination of appropriate salaries for the designated county officers. Op.Att'yGen. #82-2-12(L).

Apart from the factors the compensation board must consider pursuant to § 331.907(1) in reaching its final compensation recommendation, the legislature has not limited the compensation board's authority to raise or lower existing salaries as the board deems necessary or appropriate. It is our opinion that in the absence of any such guidelines, a compensation board is free to set a particular county officer's salary at any amount the board deems appropriate. Therefore, a compensation board may authorize a salary decrease for members of the board of supervisors. We believe that this result is consistent with the intent of §§ 331.905 to 331.907 that county officers' salaries be set by a representative group of county residents and officers in accordance with minimal statutory guidelines, but further, in accordance with any other relevant factors, and ultimately in accordance with the Board's best judgment.

We note that upon receiving the final compensation recommendation from the county compensation board, the county board of supervisors is then authorized to determine the final compensation schedule. Section 331.907(2). However, the supervisors' options upon receiving this recommendation are limited to the following: the supervisors may either accept the compensation board's recommendation in its entirety, or may reduce the recommendation by an equal

percentage for each county officer. Section 331.907(2); 1980 Op.Att'yGen. 701; 1978 Op.Att'yGen. 111. The supervisors may not increase the recommendation, nor may they totally reject that recommendation. Id.

In conclusion, it is our opinion that the county compensation board has the authority to authorize a salary decrease for members of the county board of supervisors.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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)

Honorable David Osterberg
State Representative
State Capitol
L O C A L

Dear Representative Osterberg:

You have requested an opinion of the Attorney General on several questions relating to establishment of agricultural areas in Cedar County, pursuant to Iowa Code Ch. 93A (1983), the new land preservation and use act. Your questions are as follows:

> 1. If the legal description of the area or the map are found to be incorrect, can they be corrected after filing but before approval of the area by the county board of supervisors?
>
> 2. Can land be withdrawn from the area after filing but before approval without constituting a new proposal?
>
> 3. Can the county board of supervisors reject the area on grounds that there are mistakes in the proposal?
>
> 4. If it is the intent that each separate petition be a part of the whole area and not an area itself, must the board consider all petitions as part of one proposal?

> 5. Must mortgage holders sign before land is legally added to the area?
>
> 6. Does the requirement that land in the agricultural area be nearly as adjacent as possible, preclude inclusion of land which is not strictly adjacent in the agricultural area?

Our office recently issued an opinion which dealt with numerous questions relating to the creation of agricultural areas in Cedar County. Op.Att'yGen. #83-2-5. That opinion obviously did not resolve many of the questions remaining with regard to creation of agricultural areas pursuant to Ch. 93A. However, our office is not able to answer many of the questions you pose.

First, questions one, two, and four concern issues that were not addressed by the legislature in Ch. 93A. Given the absence of statutory guidance, it is our view that the county board of supervisors has the authority pursuant to home rule to resolve these questions in the first instance and to determine what is reasonable in each instance. While we could reach an opinion as to what we believe the answers to these questions should be, this opinion would reflect our personal judgment and not statutory construction. Given the policy of home rule, we believe that judgment is not ours, but must instead be exercised by the county.

However, there are three questions that do not involve resolution of factual issues but instead involve questions of law and statutory interpretation, and therefore are the proper subject of an Attorney General's opinion. The first question is:

> Can the county board of supervisors reject [a proposal for an agricultural] area on grounds that there are mistakes in the proposal?

Section 93A.7(2) provides that upon receiving a proposal for an agricultural area which meets statutory requirements, 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.

Thus, § 93A.7(2) requires the supervisors to adopt a proposal for an agricultural area with two exceptions. First, the supervisors are authorized to make any modifications to the proposal that are deemed appropriate. Such modifications could include correction of mistakes in the proposal, but again, the discretion in making these modifications rests with the supervisors. Second, as made clear by the express language of this provision and as we held in Op. Att'yGen. #83-2-5, § 93A.7(2) authorizes the supervisors to reject a proposal for an agricultural area, but only if that proposal is inconsistent with the express purposes of Ch. 93A, as set forth in § 93A.1. We therefore do not believe that the supervisors may reject a proposal for an agricultural area for the sole reason that technical mistakes which could be modified can be found in the proposal.

However, we note that § 93A.7(1) requires a proposal for an agricultural area to meet statutory requirements, including those contained in § 93A.6. For example, § 93A.6 requires that a description of the proposed area be included in the proposal. If the proposal does not meet these statutory requirements, by, for example, mistakenly describing the proposed area, we believe the supervisors are authorized pursuant to § 93A.6 to return the proposal to the landowners for correction before they meet to consider that proposal. If the mistakes were sufficient to nullify the notice, it would of course be appropriate to require notice to be reissued. The nature of the mistake will be relevant to the reasonableness of the supervisors' actions.

The second question which we may answer is as follows:

> Must mortgage holders sign before land is legally added to [an agricultural] area?

Section 93A.6 provides in relevant part:

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

In Op.Att'yGen. #83-2-5, we concluded that because both the contract seller and contract buyer of land are legal owners of that land, though each has a different interest in the land, the consent of both is required in order for that land to be included in an agricultural area.[1] However, a mortgage

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[1] In Op.Att'yGen. #83-2-5, we also held that the consent of a spouse of an owner must be obtained before a proposal for an agricultural area is adopted. However, the rationale for this conclusion is based on the unique legal provisions relating to spouses, which are irrelevant to the question of legal ownership raised in this case.

holder is in no way considered an owner of the land subject to the mortgage under the rationale set forth in Op.Att'yGen. #83-2-5. While the mortgage holder clearly has an interest in that land, that interest is not such as to constitute legal or equitable ownership of that land. Because § 93A.6 only requires consent to an agricultural area by the owner, the consent of a mortgage holder need not be obtained in order to include land in an agricultural area.

Finally, the third question is:

> Does the requirement that land in the agricultural area be nearly as adjacent as possible, preclude inclusion of land which is not strictly adjacent in the agricultural area?

Section 93A.6 provides in part that the territory of land included in a proposal for an agricultural area "shall be as compact and as nearly adjacent as feasible." This statutory language clearly does not require that land be strictly adjacent, but nearly adjacent as feasible. Therefore, it is our opinion that § 93A.6 does not preclude inclusion of land in an agricultural area which is not strictly adjacent. However, the factual determination of whether land meets the § 93A.6 requirement that it be "as nearly adjacent as feasible" is left to the discretion of the board of supervisors.

In conclusion, it is our opinion that: (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.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

ENVIRONMENTAL QUALITY/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 Chapter 455B. (Ovrom to Ballou, Executive Director, Department of Environmental Quality, 3/23/83) #83-3-19 (L)

Mr. Stephen W. Ballou
Executive Director
Department of Environmental Quality
Wallace State Office Building
L O C A L

Dear Mr. Ballou:

You have requested an opinion concerning Iowa Code § 455B.420 (1983) [formerly 455B.139], which states that Department of Environmental Quality rules adopted under the hazardous waste statute (§§ 455B.411 to 455B.421) "shall be consistent with and shall not exceed the requirements of" the federal Resource Conservation and Recovery Act (RCRA) and rules and regulations promulgated pursuant thereto. You asked whether DEQ can establish hazardous waste rules more stringent than comparable federal Environmental Protection Agency rules when the federal agency rules authorize states to be more stringent; in other words, would this "exceed the requirements of" federal rules in violation of § 455B.420? For the reasons stated below, we do not think that § 455B.420 allows DEQ to set substantive requirements stricter than those in federal regulations merely because there is language in some of the federal regulations authorizing states to impose more restrictive requirements. However we think that rules promulgated pursuant to other Code provisions concerning water pollutants and solid waste would apply to hazardous wastes, which are a subset of those wastes. The consistency requirement in § 455B.420 applies only to rules adopted under §§ 455B.411 to 455B.421.

Several federal regulations adopted pursuant to RCRA state that the states may impose more stringent requirements. See, e.g., 40 C.F.R. 123.7(b) (underground injection of hazardous wastes); 40 C.F.R. 122.7(k)(6) (notification of spills).

Therefore one could argue that DEQ would "not exceed the requirements" therein by enacting stricter regulations. We do not agree with that interpretation. The RCRA statute itself provides that states may impose requirements more stringent than those imposed by federal regulations. 42 U.S.C. 6929. This statement is reiterated in various federal regulations promulgated pursuant to RCRA. The Iowa legislature, when it enacted a hazardous waste bill pursuant to RCRA, surely was aware of these provisions; in fact, § 455B.420 makes it look as if the legislature specifically intended that DEQ not impose requirements more stringent than those imposed under RCRA and federal regulations when it adopts regulations pursuant to §§ 455B.411 to 455B.421. We do not think that the Iowa legislature intended the language in § 455B.420 to authorize DEQ to adopt regulations stricter than federal regulations merely because federal regulations reiterate the statutory language that states may impose more stringent requirements.

We have written several opinions concerning the "consistency" requirements of § 455B.420 [formerly 455B.139]. We have said that the section shows a legislative intent that DEQ rules be no more stringent than federal rules, although it does not require DEQ to adopt rules identical to federal rules. Op.Att'yGen. #82-6-5(L). Rather, it appears the legislature intended DEQ to establish a hazardous waste program consistent with but no more restrictive than the federal program. Id. We have also said that § 455B.139 [now 455B.420] cannot require DEQ to incorporate federal regulations adopted after enactment of the state statute, since it would be an unconstitutional delegation of power to the federal government and would violate the notice and comment requirements for rulemaking under Iowa law. Id. We have said that the section does not require DEQ to adopt a rule which is consistent with and does not exceed the requirements of a federal regulation when such rule would be in direct conflict with another provision of Chapter 455B. (Letter from Ovrom to Anderson, February 3, 1983, copy attached). We would add to this that § 455B.420 applies only to "[r]ules adopted by the commission under sections 455B.411 to 455B.421," and not to rules adopted under other sections.

You asked three specific questions which are answered below:

1. Injection of hazardous waste into wells.

Federal regulations authorize but do not require states with no Underground Injection Control program to issue permits for injection of hazardous waste into wells. 40 C.F.R. 122.30. DEQ rule 400 I.A.C. 17.9 prohibits the disposal of any pollutant other than heat into wells within Iowa. We are asked whether Iowa Code § 455B.420 (1983) requires DEQ to provide by rule for permits for the injection of hazardous waste into wells.

Section 455B.420 applies only to "rules adopted by the commission under sections 455B.411 to 455B.421." Its effect is to limit the authority of the commission which has been delegated by those Code sections. However, the rule in question was not promulgated pursuant to that delegated authority but was instead adopted to implement the water quality statutes, §§ 455B.171 et seq. (1983). Iowa Code § 455B.186 (1983) states:

> A pollutant shall not be disposed of by dumping, depositing or discharging such pollutant into any water of the state except that this section shall not be construed to prohibit the discharge of adequately treated sewage, industrial waste, or other waste pursuant to a permit issued by the executive director. . . .

"Pollutant" is defined as "sewage, industrial waste or other waste." Iowa Code § 455B.171(13) (1983). "Hazardous wastes" are wastes which cause death or serious illness or pose substantial danger to human health or the environment. Iowa Code § 455B.411(2) (1983). Therefore hazardous wastes are included within the definition of pollutants which cannot be placed in any water of the state without a permit.

Assuming that the rule, 400 I.A.C. 17.9, is within the authority delegated to DEQ under the water quality statutes, it is necessary to determine whether § 455B.420 overrides this authority as it relates to hazardous waste. If there is conflict between the statutes, the later and more specific provision would control. Llewellyn v. Iowa State Commerce Commission, 200 N.W.2d 881, 884 (1972). However, this principle applies only where conflict exists. Nothing in the hazardous waste management statutes, § 455B.411 et seq.,

indicates that hazardous wastes are exempt from other environmental statutes administered by DEQ. Section 455B.420, as noted above, merely prohibits the commission from adopting rules "under sections 455B.411 to 455B.421" which exceed the requirements of RCRA and federal regulations. If DEQ attempted to utilize other authorities to adopt a rule applicable only to hazardous waste, this might well be an unlawful attempt to avoid the legislative limitations on its hazardous waste authority. However, 400 I.A.C. 17.9 is applicable to all pollutants. We can find no indication of legislative intent in § 455B.411 et seq. to permit water pollution by hazardous wastes where disposal of less toxic wastes is prohibited by other laws.

2. Solid waste disposal rules.

Your second question asks whether DEQ can apply its solid waste disposal rules to hazardous waste disposal, if such rules "exceed the requirements" of federal hazardous waste disposal regulations. Your letter states that hazardous waste is a subset of solid waste, as defined in Iowa Code § 455B.301 (1983). You also state DEQ's solid waste disposal rules are in some cases more stringent than federal hazardous waste disposal regulations. See 400 I.A.C. Ch. 28; 40 C.F.R. 264, 40 C.F.R. 127.B(8), 40 C.F.R. 122.29.

DEQ's solid waste disposal rules were enacted pursuant to Iowa Code § 455B.304, which authorizes DEQ to establish rules for treatment and disposal of solid waste. That section was enacted in 1971. 1972 Iowa Acts, ch. 1119. The requirement that rules be consistent with and no more restrictive than RCRA and federal regulations applies only to rules adopted pursuant to §§ 455B.411 to 455B.421. Iowa Code § 455B.420 (1983). Therefore, the requirement does not invalidate solid waste rules adopted under § 455B.304 which also apply to hazardous wastes. Of course if the agency attempted to adopt a rule under 455B.304 which applied only to hazardous wastes and which were inconsistent with and more stringent than RCRA and federal regulations adopted pursuant thereto, the rule could be in violation of § 455B.420.

3. Reporting hazardous conditions.

Your third question concerns the time within which permittees must report situations which endanger health or the environment. Iowa law requires any person manufacturing, storing, handling, transporting, or disposing of a hazardous substance to notify DEQ or the local police department of a "hazardous condition" within six hours after onset or dis-

covery of the condition. Iowa Code § 455B.386 (1983). A hazardous condition is a spill or release of a hazardous substance which endangers public health or safety. Iowa Code § 455B.381(2) (1983). Federal regulations require permittees to report "any noncompliance which may endanger health or the environment" within 24 hours of the time the permittee becomes aware of the situation. 40 C.F.R. 122.7(k)(6).

You asked whether DEQ can require reporting noncompliance which endangers the health or the environment within six hours or whether it must allow 24 hours in order to be consistent with and not exceed the requirements of federal regulations. In a recent letter to DEQ we said that § 455B.139 [now 455B.420] does not require DEQ to adopt a rule consistent with and not exceeding the requirements of a federal regulation when it would be in direct conflict with an Iowa statute. Insofar as the federal reporting rule and the Iowa reporting statute are different, the Iowa statute would control and reporting would be required within six hours. It appears that the Iowa statute could cover a broader range of people and of substances than does the federal regulation, which applies only to permittees and hazardous wastes. See Iowa Code § 455B.386 (1983); 40 C.F.R. 122.7(k)(6). It is also possible that a "hazardous condition" as defined in Iowa law could cover different situations than the "noncompliance which may endanger health or the environment" in the federal regulations. However, the legislature clearly intended that persons subject to § 455B.386 report hazardous conditions within six hours. We do not think the general language in § 455B.420 concerning hazardous waste management rules adopted pursuant to §§ 455B.411 to 455B.421 was meant to modify the six hour reporting requirement in § 455B.386.

Sincerely,

ELIZA OVROM
Assistant Attorney General

EO:rcp

COUNTIES: Sheriff -- Fees; mileage expense. Iowa Code Section 331.655 (1983). There is no provision in Iowa Code Section 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)

Robert E. Lee
Humboldt County Attorney
Humboldt County Courthouse
Humboldt, IA 50548

Dear Mr. Lee:

You have requested the opinion of the attorney general on the question of whether a sheriff is authorized under Iowa law to collect fees or mileage expense for notices returned unserved after a diligent search. Iowa Code section 331.655 sets out the fees, mileage and expenses collectible by a sheriff. It provides in pertinent part:

> 1. The sheriff shall collect the following fees:
>
> a. For serving a notice and returning it, for the first person served, six dollars, and each additional person, six dollars except the fee for serving additional persons in the same household shall be three dollars for each additional service. (Emphasis supplied)
>
> . . .
>
> j. Mileage at the rate specified in section 79.9 in all cases required by law, going and returning. Mileage fees do apply where provision is made for expenses, and both mileage and expenses shall not be allowed for the same services and for the same trip. If the sheriff transports one or more persons by auto to a state institution or any other destination required by law or if one or more legal papers are served on the same trip, the sheriff is entitled to one mileage, the mileage cost of which shall be prorated to the persons transported or papers served. However, in serving original notices in civil cases and in serving and returning a subpoena, the sheriff shall be allowed mileage in each action where the original notice or subpoena is served, with a minimum mileage of one dollar for each service. The sheriff may refuse to serve original notices in civil cases until the fees and estimated mileage for service have been paid. (Emphasis supplied)

It is our opinion that a notice returned unserved after a diligent search does not constitute "serving" a notice or "returning" it, and thus fees and mileage may not be collected. Our conclusion is based on several considerations. Payment of the six dollar fee in subsection 1(a) is clearly contingent upon "serving a notice and returning it." No statute or other provision of The Code provides that an attempt to serve a notice is equivalent to serving a notice. In fact, Rule 56, Iowa Rules of Civil Procedure states that "Original notices are served by delivering a copy to the proper person." (Emphasis supplied). Thus, it seems clear that serving and returning a notice in 1(a) means completed service and not just an attempt.

The question of mileage expense under subsection 1(j) presents a more difficult problem. Subsection 1(j) instructs that a sheriff shall collect for mileage "in all cases required by law, going and returning." This language suggests that the sheriff is required by law to attempt to serve notices and that his consequent mileage expense should be repaid. This interpretation, however, conflicts with the plain meaning of later language in subsection 1(j). The third sentence of the subsection requires that in certain instances mileage be prorated "to the person transported or papers served." (Emphasis supplied) The fourth sentence allows mileage in each action "where the original notice or subpoena is served". (Emphasis supplied) The language in these two sentences clearly contemplates the payment of mileage expense only when service is successful. While the language of subsection 1(j) is somewhat ambiguous, we believe that it should be interpreted consistently with subsection 1(a), and that mileage expense should not be allowed for unsuccessful attempts to serve notice.

The above conclusions are reinforced by comparing the notice fee provision in subsection 1(a) above, to its companion warrant fee provision at Iowa Code section 331.655(1)(b) which states as follows:

> 1. The sheriff shall collect the following fees:
>
> b. For each warrant served, six dollars, and the repayment of necessary expenses incurred in executing the warrant, as sworn to by the sheriff, or if service of the warrant cannot be made, the repayment of all necessary expenses actually incurred by the sheriff while attempting in good faith to serve the warrant. (Emphasis supplied)

This warrant fee provision indicates that the General Assembly knew how to provide for payments of expenses incident to unsuccessful attempts to serve process. The absence of similar language for the notice fee provision suggests that the General Assembly did not intend that either fee or mileage expense be paid for unsuccessful attempts to serve notices.

Sincerely,

William T Nassif

WILLIAM T. NASSIF
Assistant Attorney General

WTN/mel

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)

Ms. J. L. Greenley
Hamilton County Attorney
817 1/2 Des Moines Street
Webster City, Iowa 50595

Dear Ms. Greenley:

You have requested an opinion of the Attorney General concerning interpretation of Iowa Code Ch. 71 (1983), the Iowa nepotism statute. You describe the facts from which your request arises as follows:

> In May, 1982, the County Recorder advised the Board of Supervisors of a need for extra help in her office due to the illness and necessary absence of a regular employee. The Recorder discussed with the Board the possibility of employing her daughter on a temporary basis. On May 11, 1982, during a regularly scheduled Board session, the hiring of the daughter in the Recorder's office was approved on the "part-time as needed" basis. The daughter received approximately $300.00 for her work in the Recorder's office through June 30, 1982.
>
> The daughter continued her employment in the Recorder's office during her school vacation periods in July, August and December,

> 1982. Payment for her work during these periods would exceed $600.00. All claims submitted through the Board of Supervisors for services of the daughter, have been approved, with the exception of the latest claim which has brought about the controversy. Also, in July, 1982, the Board gave its oral approval of the continuation of the Recorder's daughter as an employee in the County Courthouse.

From these facts, you posit several questions, which we shall address in turn, but first we review the relevant statutory provisions.

Chapter 71 is the statutory provision here in question, and states as follows:

> 71.1 Employments prohibited. It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of the state or by virtue of the ordinance of any city in the state, to appoint as deputy, clerk, or helper in said office or position to be paid from the public funds, any person related by consanguinity or affinity, within the third degree, to the person elected, appointed, or making said appointment, unless such appointment shall first be approved by the officer, board, council, or commission whose duty it is to approve the bond of the principal; provided this provision shall not apply in cases where such person appointed receives compensation at the rate of six hundred dollars per year or less, nor shall it apply to persons teaching in public schools, nor shall it apply to the employment of clerks of members of the general assembly.
>
> 71.2 Payment prohibited. No person so unlawfully appointed or employed shall be paid or receive any compensation from the public money and such appointment shall be null and void and any person or persons so paying the same or any part thereof, together with his bondsmen, shall be liable for any and all moneys so paid.

Chapter 71 thus limits the power of an elected official to appoint a person related within the third degree to positions as deputy or clerk in that official's office. Such appointments are permitted only in the following instances:

> First: Where the appointment is approved by the officer or board who is responsible for approving the elected official's bond.
>
> Second: Where the appointee receives annual compensation in the amount of six hundred dollars or less.
>
> Third: Where public school teachers are involved.
>
> Fourth: Where clerks of members of the general assembly are involved.

Satisfaction of any one of these requirements is sufficient.

I.

Given this background information, we turn now to your first question, in which you ask:

> In Section 71.1, The Code, does the language "$600.00 per year" refer to a calendar year as suggested by Section 4.1(11), The Code, or a fiscal year?

Section 71.1 allows a public officer to appoint a relation if the appointee "receives compensation at the rate of six hundred dollars per year or less." The statute does not designate whether the term "year" refers to a calendar year or a fiscal year. In the absence of a specific definition of this term in Ch. 71, we look to other statutory provisions which may be helpful. Iowa Code Chapter 4 (1983) governs the construction of statutes. Section 4.1 expressly provides that several rules contained therein are to be followed in construing statutes, unless a specific statute otherwise provides. As you note in your question, § 4.1(11) provides that the word "year" is "equivalent to the expression 'year of our Lord,'" but this definition does not assist us in answering your question. However, § 4.1(35) later provides that "the word 'year' means twelve consecutive months." Because Ch. 71 does not define the term "year" as it is used in § 71.1, the definition of that

term in § 4.1(35) governs. Therefore, it is our opinion that for the purposes of § 71.1, the term "year" means twelve consecutive months from the date an appointee assumes his or her position. In other words, a public officer's appointment of a relative as deputy, clerk, or assistant to that officer does not require further approval if that appointee does not receive compensation exceeding six hundred dollars for the twelve consecutive months from the date the appointee begins work.

II.

Your second question asks:

> If the Board of Supervisors has approved such employment, is there a limitation on the amount the employee can be paid from public funds, or, must the Board limit the compensation at the time the employment is approved?

There is no express statutory limitation on the amount an employee may be paid from public funds once the supervisors have approved an appointment pursuant to § 71.1. Further, the Iowa Supreme Court has held that an appointment as a deputy to a county officer pursuant to the statutory language of § 71.1, if approved by the supervisors, is in the nature of any other appointment by a county officer. Kellogg v. Story County et al, 218 Iowa 224, 253 N.W. 915 (1934). Prior opinions of this office have reached this same conclusion. 1934 Op.Att'yGen. 445; 1932 Op.Att'yGen. 175.

In our 1934 opinion we stated that approval of an appointment pursuant to the nepotism statute made the appointment legal, and that "the appointment, being legal when made, stands as any other appointment," i.e., at the discretion of the appointing officer. 1934 Op.Att'yGen. 445. We concluded that a contrary result "would be saying that the Board [of supervisors] practically had the authority to fire a deputy officer at any time it saw fit." Id. This result was clearly not intended by the legislature under past and current provisions of the Iowa Code, which previously allowed and continue to allow county officers to appoint their deputies, assistants, and clerks, who then serve at the discretion of the appointing officer. See Iowa Code § 331.903(1) and (2) (1983).

Finally, in our 1932 opinion we held that where the legislature has not fixed a term of office of a deputy, clerk, or other assistant appointed by a county officer and approved by the supervisors pursuant to the nepotism statute, and the appointment is not made or approved for a definite term, then the term of office for that appointee is at the will of the appointing officer, as proved by statute in cases of regular appointments. 1932 Op.Att'yGen. 175.

Thus, as applied in the present case, these previous opinions support our conclusion that an appointee approved by the supervisors pursuant to § 71.1 may hold office for as long as the appointing officer wishes, unless the legislature has statutorily limited the term of a particular office or unless the supervisors expressly limit the appointee's term of office or the amount of compensation that appointee may receive when they approve the § 71.1 appointment. Therefore, in the absence of such an express limitation it follows that there is no limit on the amount such an appointee may be paid from public funds, so long as the provisions of § 331.904 relating to salaries of deputies, assistants, and clerks are followed.

We do not by these general conclusions intend to resolve the question of whether the appointee in the present case improperly received public funds. The facts you present in your opinion request are insufficient to even determine the nature of the recorder's daughter's appointment. You state that the supervisors approved the appointment on a "temporary as needed" basis, but do not state whether the "as needed" determination was to be left to the discretion of the supervisors or the recorder. In any event, such a factual determination is not the proper subject of an Attorney General's opinion, and should be decided at the county level.

III.

Your third question asks:

> If such employment is unlawful, which of the County Officers would be responsible for the amounts already paid from public funds?

Your opinion request has not actually asked us to determine whether the employment in the present case was prohibited by Ch. 71; and indeed, as stated above, we would be unable to determine from the facts presented to us whether

a violation of Ch. 71 has occurred. However, for the sole purpose of answering your third question, we will assume that the employment in question was unlawful.

Section 71.2 was set forth in its entirety above, and expressly provides that in the event public money is paid to a person unlawfully appointed or employed as a result of the general prohibition of § 71.1, any person who pays that money is liable for any amount paid, together with that person's bondsman. Again, there are no facts before us that state which county officer or officers in the present case are responsible for paying public monies to the recorder's daughter, and therefore we are unable to state which specific persons could be liable under § 71.2.

IV.

Finally, your fourth question asks:

> What constitutes "approval" of an employee by the Board -- must the employment approval be noted in the Board minutes or is the mere allowance of a payroll claim sufficient?

Chapter 71 does not define what actions are necessary to constitute "approval" of an appointment pursuant to § 71.1. In the absence of statutory requirements, it is our opinion that any affirmative action taken by the supervisors that may reasonably be construed as approval of an appointment is sufficient to satisfy the approval requirement of § 71.1. This conclusion is consistent with a prior opinion by the Iowa Supreme Court. In Kellogg v. Story County, et al, supra, 253 N.W. at 916, the Court held that where: 1) a county superintendent orally appointed his wife as his deputy, 2) she duly qualified for the appointment, 3) the supervisors approved her bond, 4) the bond included a statement that the appointed term was for three years, and 5) the wife had discharged her duties for two years without objection, there was sufficient evidence to establish that the supervisors had approved the appointment pursuant to the nepotism statute, even though the supervisors had never passed a resolution authorizing the appointment.

Thus, in response to your particular question, there is no requirement that approval of a § 71.1 appointment be noted in the supervisors' minutes, though that is one way that such approval could be established. Further, allowance of a payroll claim may be sufficient to constitute approval, but only if the supervisors were aware of the facts causing

the provisions of Ch. 71 to be relevant at the time a payroll claim was allowed. In other words, the act of the supervisors in approving a routine payroll claim would not necessarily constitute approval of an appointment pursuant to § 71.1, but if the supervisors were aware of the entire situation, approval of a payroll claim may be sufficient to constitute approval of the appointment as well. Resolution of this particular question is factual in nature and must therefore be resolved on a case-by-case basis.

In conclusion, it is our opinion that: (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.

Sincerely,

Theresa O'Connell Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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(4) 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)

Mr. Thomas E. Noonan
Benton County Attorney
Third Floor, Courthouse
Vinton, Iowa 52349

Dear Mr. Noonan:

You have requested an opinion of the Attorney General concerning interpretation of Iowa Code § 331.752 (1981). In your opinion request you state the facts from which this request arises. On November 23, 1982, the Benton County board of supervisors passed a resolution pursuant to § 331.752 providing that the office of county attorney be a full-time position. The resolution was dated to be effective January 22, 1983, and further stated that the annual salary of the county attorney was to be $31,000.00. On December 8, 1982, the Benton County compensation board met and recommended that the salary of the full-time county attorney for the 1983-1984 fiscal year be $28,000.00. A question exists as to which salary should be paid. You ask:

> 1. Does [§ 331.752(4)] remove a salary recommendation for the full time County Attorney from the jurisdiction of the Benton County Compensation Board until they make recommendations for fiscal year 1984-85? . . .
>
> 2. When does the County Compensation Board have the authority to prepare and adopt a compensation recommendation for the full-time Benton County Attorney pursuant to [§§ 331.905-331.907]? Is it December, 1982, or December, 1983?

It is our opinion that when a resolution to change the status of the county attorney is adopted pursuant to § 331.752, § 331.752(4) 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).

Section 331.752 provides as follows:

> 1. The board may provide that the county attorney is a full-time or part-time county officer in the manner provided in this section. A full-time county attorney shall refrain from the private practice of law.
>
> 2. The board may provide, by resolution, that the county attorney shall be a full-time county officer. The resolution shall include an effective date which shall not be less than sixty days from the date of adoption. However, if the county attorney or county attorney-elect objects to the full-time status, the effective date of the change to a full-time status shall be delayed until January 1 of the year following the next general election at which a county attorney is elected. The board shall not adopt a resolution changing the status of the county attorney between March 1 and the date of the general election of the year in which the county attorney is regularly elected as provided in section 39.17.
>
> 3. The board may change the status of a full-time county attorney to a part-time county attorney by following the same procedures as provided in subsection 2. If the incumbent county attorney objects to the change in status, the change shall be delayed until January 1 following the next election of a county attorney.
>
> 4. The resolution changing the status of a county attorney shall state initial annual salary to be paid to the county attorney when the full-time or part-time status is effective. The annual salary specified in the resolution shall remain effective until changed as provided in section 331.907. The annual salary of a full-time county attorney

> shall be an amount which is between forty-five percent and one hundred percent of the annual salary received by a district court judge. (emphasis added)

Section 331.752 clearly requires that the resolution changing the status of the county attorney be effective not less than sixty days from the date adopted. Furthermore, the resolution must state the initial annual salary to be received by the county attorney in his or her new status. The supervisors are the body required by § 331.752(2) to adopt a change-in-status resolution, and therefore are the body required by § 331.752(4) to set the initial salary. Section 331.752(4) then provides that this salary is to remain in effect until the county compensation board next meets and submits its salary recommendations pursuant to § 331.907.

Section 331.907(1) provides in relevant part that the compensation board is to annually review the salaries of elective county officers and prepare a recommended salary schedule, which is to be published in the county. A public hearing is to be held, following which the board is to prepare a final salary recommendation. Section 331.907(2) requires in part that this recommendation be submitted to the board of supervisors "annually during the month of December." The supervisors are then authorized to accept the recommendations in their entirety or reduce them by an equal percentage. § 331.907(2). The final compensation schedule thus adopted by the supervisors becomes effective the following July 1st. Id.

As applied to the facts of the present case, § 331.752 requires that the county attorney receive the annual salary specified by the Benton County board of supervisors in its change-of-status resolution. While the resolution was initially passed before the compensation board submitted its salary recommendations, § 331.752(2) dictated that this resolution was not effective until after those recommendations were submitted. Consequently, the salary specified in the resolution will remain effective until the compensation board meets and submits its salary recommendations in December of 1983. Those recommendations, as adopted by the supervisors, would become effective on July 1st of 1984. See § 331.907(2).

This result is consistent with the conclusion we reached in 1980 Op.Att'yGen. 26. This prior opinion involved a factual situation similar to that in the present case, and as in this case, we concluded that the board of supervisors are to initially set the county attorney's salary after a

change-in-status resolution is adopted, but thereafter the county compensation board has jurisdiction to set the county attorney's salary. However, this prior opinion involved interpretation of statutory language that differs significantly from the current language of § 331.752.

Section 331.752(4) replaced Iowa Code § 332.62(2) (1981), which provided:

> The resolution changing the status of the county attorney shall state the annual salary to be paid to the full-time county attorney. Notwithstanding section 340A.6 of the Code [now § 331.907(2)] the board of supervisors shall adopt an annual salary for the county attorney which is between forty-five and one hundred percent of the annual salary received by a district court judge. (emphasis added)

One question in our 1980 opinion involved interpretation of the language emphasized above, and asked "whether the supervisors retain the authority to set the [county attorney's] salary to the exclusion of the compensation board" after the initial salary specified in the resolution has expired. After a lengthy discussion of legislative history and principles of statutory interpretation, we concluded that:

> Although the applicable sections are void of any provision affecting this type of situation, we believe that the salary set by the supervisors should control until such time following the change in status that the compensation board again makes its recommendations to the supervisors . . . . (emphasis added)

1980 Op.Att'yGen. 26, 29.

The legislature has since filled this void. Section 332.62(2) was amended by 1981 Iowa Acts, ch. 117, § 751, and is now found in § 331.752, which we previously set forth in its entirety. This new section clarifies the confusion that existed in our prior opinion, as § 331.752(4) now expressly provides that a change-in-status resolution shall state the county attorney's initial salary, but this salary is to remain in effect only until changed by the compensation board in the normal course of its duties, as set forth in in § 331.907.

Thus, to answer your original questions: 1) Iowa Code § 331.752(4) (1981) does remove the original salary recommendation for the full-time county attorney from the jurisdiction of the Benton County compensation board until they make recommendations for the 1984-1985 fiscal year, and 2) the compensation board will not have authority to adopt a compensation recommendation for the full-time county attorney until December of 1983.

Sincerely,

Theresa D. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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 section 903.1(3) and also has no effect on the jurisdictional limit established by Iowa Constitution article I, section 11. (Foritano to Horn, Judicial Magistrate, 3/21/83) #83-3-14 (L)

Ida M. Horn
Judicial Magistrate
Courthouse
Fairfield, IA 52556

Dear Judge Horn:

You have requested the opinion of this office regarding the new criminal penalty surcharge, 1982 Iowa Acts, Chapter 1258, sections 1 and 2. Your request raises two important questions, one statutory and one constitutional, regarding the relationship between the surcharge and the imposition of fines on certain criminal defendants. The first question is whether the surcharge affects the maximum dollar amount that a court may fine pursuant to Iowa Code section 903.1(3) (1981). The second question is whether the surcharge increases the maximum fine that a magistrate may impose to more than one hundred dollars, thereby exceeding the jurisdictional limit of Iowa Constitution article I, section 11 (1857).

An answer to both questions lies in the determination of whether the surcharge is part of the "fine" imposed on criminal defendants and thus is criminal in nature. This determination is important because the limitations of section 903.1(3) and Iowa Constitution article I, section 11 apply only to criminal fines. It is the opinion of this office that the surcharge does not constitute part of the fine, rather it is an "additional penalty" that is civil in nature. Thus, the surcharge should affect neither the maximum dollar amount that can be fined nor the jurisdictional limit established by the Iowa Constitution.

This conclusion is derived from an application of the well settled rules of statutory construction. The polestar of statutory interpretation is legislative intent. State v. Conner, 292 N.W.2d 682, 684 (Iowa 1980). "We must look to what the legislature said, rather that what it should or might have said." In the Interest of Clay, 246 N.W.2d 263, 265 (Iowa 1976). Further, courts may properly consider the evil sought to be remedied and the purposes or objectives of the enactment. State v. Williams, 315 N.W.2d 45, 49 (Iowa 1982).

Chapter 1258, section 2 provides:

> Sec. 2. NEW SECTION. TEN PERCENT SURCHARGE. When a court imposes a fine or forfeiture for a violation of a state law, or of a city or county ordinance except an ordinance regulating the parking of motor vehicles, the court shall assess an additional penalty in the form of a surcharge equal to ten percent of the fine or forfeiture imposed. In the event of multiple offenses, the surcharge shall be based upon the total amount of fines or forfeitures imposed for all offenses. When a fine or forfeiture is suspended in whole or in part, the surcharge shall be reduced in proportion to the amount suspended. This section applies only with respect to criminal actions commenced on or after July 1, 1982.

(Emphasis added.)

Whether a particular statutorily-defined penalty is civil or criminal is a matter of statutory construction. United States v. Ward, 448 U.S. 242, 248, 65 L.Ed.2d 742, 749, 100 S.Ct. 2636, 2641 (1980). The analysis has two steps. The first is to determine if the legislature has indicated either expressly or impliedly a preference for one label or the other. The second step comes into play when the legislature has indicated an intent to establish a civil penalty. If so, then a determination must be made as to whether the "statutory scheme was so punitive either in purpose or effect as to negate that intention." Id.

As to the first inquiry, the language of the statute indicates that the legislature intended to draw a distinction between the terms "fine" and "penalty." Generally, a fine is only imposed as punishment for criminal behavior. See Iowa Code § 909.1 (1981); 3 C. Sands, Statutes and Statutory Construction § 66.11 (4th ed. 1973). A penalty, on the other hand, appears to

be a much broader concept that encompasses civil liability as well as the criminal fine. See Clinton Community School Dist. v. Anderson, 322 N.W.2d 73, 75 (Iowa 1982). This distinction between "fine" and "penalty" is crucial because both the Iowa Constitution article I, section 11 and the section 903.1(3) limitations apply only to fines, i.e., penalties that are criminal in nature. Because a "penalty" can be civil or criminal, further analysis is necessary.

In Kennedy v. Mendoza - Martinez, 372 U.S. 144, 167-68, 9 L.Ed.2d 644, 660-61, 83 S.Ct. 554, 566-68 (1963), the Supreme Court listed factors that may be considered when determing whether a statute is penal or regulatory in character. Those factors include: whether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment; whether it comes into play only on a finding of scienter; whether its operation will promote the traditional aims of punishment, that is, retribution and deterrence; whether the behavior to which it applies is already a crime; whether an alternative purpose to which it may rationally be connected is assignable for it; and whether it appears excessive in relation to the alternative purpose assigned. Id.

Initially, it must be noted that Chapter 1258 was enacted subsequent to the enactment of both the Iowa Constitution and section 903.1(3), and further that Chapter 1258 appears as a new and distinct statutory provision. "The legislature is presumed to know the existing state of the law at the time of the enactment of the new statute." State v. Rauhauser, 272 N.W.2d 432, 434 (Iowa 1978). Moreover, a subsequent statute is generally presumed to have no altering or repealing effect on the existing law unless the legislative intent is clearly expressed. Rauhauser, 272 N.W.2d at 435. Chapter 1258 contains no language that repeals, amends or in any way alters the existing law, section 903.1(3) and Iowa Constitution article I, section 11. Had the legislature intended the surcharge to be a criminal fine, they could easily have done so explicitly. However, because there is no enunciated change, the new statute must be read in pari materia with its predecessors. That is, the statutes in question and Iowa Constitution article I, section 11 must be construed in such a manner as to be internally consistent. See Rauhauser, 272 N.W.2d at 435; 2A C. Sands, Statutes and Statutory Construction § 51.01 (4th ed. 1973).

The statutory language indicates that the surcharge is calculated and assessed only after the imposition of the criminal fine. ("When a court imposes a fine. . .the court shall assess an additional penalty. . . .") Moreover, the legislature described the surcharge as "an additional penalty"--one that must be added to the criminal fine. This language evidences an intent to establish the surcharge as a separate and distinct entity.

The underlying basis for Chapter 1258 also supports our opinion that the surcharge is civil rather than criminal in nature. The surcharge is an additional fee, somewhat like a tax, that is to provide revenue for specific government programs relating to criminal justice; it is not imposed for punishment or deterrent purposes. Chapter 1258 was enacted "to provide a program for compensating and assisting innocent victims who suffer bodily injury or death as a consequence, and for encouraging greater public cooperation in the successful apprehension and prosecution of criminal offenders." Ch. 1258, § 4. The funding for the program is to come from the surcharge. Section 1 states that the surcharge "shall be used for the maintenance and improvement of criminal justice programs, law enforcement efforts, victim reparation. . . ."

The Supreme Court of Arizona was faced with a virtually identicial problem in Frazier v. Terrill, 175 P.2d 438, 439 (Ariz. 1946). The statute in question provided that persons found guilty of certain game law violations "shall be punished by a fine of not less than one hundred dollars nor more than three hundred dollars". . ."and in addition thereto, is liable to an additional penalty of fifty dollars. . . ." Id. (Emphasis added.) The issue was whether the fifty dollar additional penalty increased the maximum penalty beyond that which the justice court was authorized to impose, thereby depriving the court of jurisdiction. The Arizona Supreme Court found that the terms "fine" and "penalty" were not synonymous. The Court held that the additional penalty did not affect the justice court's jurisdiction. Id. Cf. State ex rel Larson v. Farley, 471 P.2d 731, 735 (Ariz. 1970).

In conclusion, it is the opinion of this office that the surcharge is not a form of criminal punishment, rather the ten percent additional penalty is civil in nature. Thus, the surcharge should have no effect on either the maximum that a court can fine under section 903.1(3) or the jurisdictional limit of Iowa Constitution article I, section 11.

Sincerely,

Steven M. Foritano

STEVEN M. FORITANO
Assistant Attorney General

SMF:djs

MUNICIPALITIES: Police and Fire Retirement Systems. Ordinary Death Benefits. Iowa Code §§ 411.1(10), 411.2, 411.6(8), and 411.6(8)(a) through (e) (1983); 1978 Iowa Acts, Chapter 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)

The Honorable Ronald K. Noah
Floyd County Attorney
Courthouse
Charles City, Iowa 50616

Dear Mr. Noah:

We are in receipt of your request for an opinion of the Attorney General regarding Iowa Code Chapter 411 retirement systems for police officers and fire fighters. First, you ask whether 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 common-law marriage. The second question, predicated upon an affirmative response to the previous question, presents a conflict of laws issue. Specifically, you ask whether a surviving spouse who satisfies the requisite elements of an Iowa common-law marriage, but resides in a jurisdiction which does not recognize common-law marriages, is entitled to continue to receive the ordinary death benefit pension.

I.

Your first question concerns only continuing eligibility for pension benefits as compared to lump sum payments. Iowa Code § 411.6(8) (1983) provides in case of ordinary (nonemployment-related) death benefits, a lump sum payment is to be paid to the designated beneficiary. See Iowa Code § 411.6(8)(b) (1983). Absent the nomination of a beneficiary, certain statutory beneficiaries can opt for a monthly pension in lieu of the lump sum payment to the estate. Id. A statutory beneficiary can exercise that option even though nominated as a beneficiary. Id.

The statutory beneficiaries are established in a chain of succession. Priority to the pension is initially vested in the surviving spouse. See Iowa Code § 411.6(8)(c) (1983). The guardian of the member's child or children succeeds to the

benefits if there is no spouse, or if the spouse dies or remarries. See Iowa Code § 411.6(8)(d) (1983). Finally, the member's dependent father or mother are to receive the death benefits in the absence of a surviving spouse or child. See Iowa Code § 411.6(8)(e) (1983).

Once a surviving spouse opts for a pension, the spouse continues to receive the pension until the occurrence of either of two events. First, the pension ceases upon the death of the spouse. See Iowa Code § 411.6(8)(d) (1983). Alternatively, the pension continues as long as the spouse "remains unmarried." Iowa Code § 411.6(8)(c) (1983). Thus, a surviving spouse loses eligibility for pension benefits upon death or remarriage.

A previous opinion of our office construed the term "remains unmarried" as applied to a subsequent marriage ending in divorce. See Op.Att'yGen. #80-12-5(L). The issue we address is whether a common-law marriage would constitute remarriage.

Iowa has long recognized common-law marriage. See Hoese v. Hoese, 205 Iowa 313, 217 N.W.2d 860 (1928). The elements of common-law marriage are set forth in In Re Marriage of Winegard, 278 N.W.2d 505 (Iowa 1979). The three elements requisite to a common-law marriage are: (1) present intent and agreement to be married, (2) continuous cohabitation, and (3) public declaration that the parties are husband and wife. Id. The burden of proof to establish a common-law marriage lies on the party asserting the existence of such a marriage. Id. Finally, if a common-law marriage is found to exist, the consequence is that the individuals are indeed married and assume the legal responsibilities of marriage such as support of a spouse. Id.

Thus, we would conclude that a surviving spouse who enters into a valid common-law marriage does not "remain unmarried" as required for continuing eligibility unless there is legislative intent to the contrary. To construe the legislative intent we read the statute as a whole in light of the legislative purpose. See State v. Whetstine, 315 N.W.2d 758 (Iowa 1982).

In 1978, the legislature amended the definition of "surviving spouse" in Iowa Code § 411.1(10) (1983) to require that marriage to the decedent member be either "solemnized" prior to retirement or that the marriage be of at least two years duration if "solemnized" after retirement. 1978 Iowa Acts, Chapter 1060, § 42. Previously the definition provided that the marriage to the decedent member, instead of being "solemnized," had to be "consummated." We do not find this provision helpful in construing whether a common-law marriage precludes a surviving spouse from remaining "unmarried" as required by Iowa Code

§ 411.6(8)(c) (1983) because it is concerned with initial eligibility rather than continued eligibility for pension benefits. The legislature did not similarly amend § 411.6(8)(c) to require that a marriage by solemnized to constitute a remarriage. While the legislature has expressly required that eligibility to be a surviving spouse depends upon solemnization of the marriage, it did not so amend the provision for termination upon remarriage.

We also believe that the legislative purpose in terminating benefits upon remarriage applies equally to a valid common-law marriage as to a solemnized marriage. In Iowa, laws creating pension rights are liberally construed to promote the legislative purpose and object. See Carstensen v. Board of Trustees, Etc., 253 N.W.2d 560, 564 (Iowa 1977). The Iowa Supreme Court, in In Re Todd's Estate, 243 Iowa 930, 54 N.W.2d 521 (1952), indicated that pensions, in general, are granted to provide for the care and support of pensioners in order to prevent them from becoming public charges. Thus, a pension is generally intended to provide necessary support.

Under Iowa Code § 411.6(8)(c) (1983), a surviving spouse loses eligibility for pension benefits upon death or remarriage. It is apparent that either event would extinguish the pensioner's need for support. Accordingly, the restriction on the duration of a surviving spouse's eligibility for pension benefits supports the view that the legislative purpose of that pension is the provision of support.

We would further note that only a limited group, surviving spouses, children, and dependent parents, are given the option of selecting a pension of one-fourth of the decedent's last annual compensation annually rather than a single lump sum death benefit of one-half of the last year of compensation. Thus, the pension provisions in question here specify a relationship required in order to receive pension benefits. This distinguishes this from Lynch v. Bogenrief, 237 N.W.2d 793, 798 (Iowa 1976), holding that a fireman's divorced spouse could obtain a lump sum death benefit (not a pension) where named by the decedent as the beneficiary.

Because a valid common-law marriage has the same legal consequences, including legal obligations for support, as does a solemnized marriage, we believe that a person entering into a valid common-law marriage does not "remain unmarried."

This consequence follows only if there is indeed a valid common-law marriage. If this has been determined by judicial decree in an action binding on both participants in the common-law marriage, then the pension board could, in our opinion, validly terminate the pension. Where this has not occurred, it would be difficult to establish the elements for a common-law

marriage, as for instance the point at which cohabitation becomes sufficiently continuous so as to constitute a common-law marriage. If the other partner to the alleged common-law marriage were not a party to the proceeding, the danger would exist that the pension would be terminated and yet the purported spouse would have no legal duty to provide support. While a valid common-law marriage would terminate eligibility for the pension, establishment of its existence may involve legal difficulty.

II.

The second issue presented concerns what law of common-law marriage governs the eligibility for continued pension benefits when the surviving spouse satisfies the requisite elements of an Iowa common-law marriage, but resides in a jurisdiction which does not recognize such marriages. Iowa adheres to the traditional conflict of laws rule that the validity of a marriage is determined by the law of the state in which it is contracted. See Boehm v. Rohlfs, 224 Iowa 226, 230, 276 N.W. 105, 108 (1937).

It should be noted that the Iowa Supreme Court has suggested that it may abandon the traditional conflict of laws rule for the "significant contracts" approach "persuasively advocated" by the Restatement (Second) of Conflicts authors. In Re Marriage of Reed, 226 N.W.2d 795, 796 (Iowa 1975). The validity of a marriage, under the Restatement approach, would be determined by the law of the state with the "most significant relationship" to the spouses. Restatement (Second) Conflict of Laws, Chapter 11, § 283 (1971). The Restatement approach, however, is unlikely to upset the governing law because the only contact with the State of Iowa will be the situs of the pension reserve. A surviving spouse's legal entitlement to support in a common-law marriage is the functional basis for termination of pension benefits upon remarriage. Because the legal obligation for support would be dependent upon the state with the most contacts with the couple and not the state where the pension fund is located, 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.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/jkp

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)

Honorable Clay Spear
State Representative
State Capitol
L O C A L

Dear Representative Spear:

You have requested an opinion of the Attorney General as to whether there is a conflict of interest when the spouse of a city assessor serves as a member of the school board. It is our opinion that no conflict of interest exists in this situation.

The common law doctrine of conflict of interest is generally applicable when a person holding public office could gain a private advantage, financial or otherwise, from such service. Op.Att'yGen. #81-8-26. The determination of whether a conflict of interest exists in a given situation involves an analysis of the particular facts of the case and the actions taken by the office holder. Id. There are situations in which a certain type of conflict of interest is prohibited by statute. See, e.g., Iowa Code Ch. 68B (1981) and Iowa Code § 331.342 (1981). However, we can find no statute addressing the question of conflict of interest given the facts of the present case.[1]

However, this office has on numerous occasions addressed the question of whether a conflict of interest exists because of a spousal or other familial relationship. 1980 Op.Att'yGen.

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[1] One statutory provision that is remotely relevant is Iowa Code Ch. 71 (1981), the nepotism statute. However, its provision only prohibits a public officer from directly employing a relative, unless that appointment is approved by the entity which is required to approve the bond of that public officer. Again, this provision is inapplicable in the present case because neither spouse employed the other, but both were independently elected or appointed to their positions.

300; 1974 Op.Att'yGen. 127; 1972 Op.Att'yGen. 338; and 1966 Op.Att'yGen. 38. We have consistently held that a mere familial relationship is alone insufficient to constitute a conflict of interest, and that in order to find a conflict the facts must show "an actual financial or other beneficial interest or conduct which [is] outrageous or unjustly favorable to the family member . . ." 1980 Op.Att'yGen. 300.

In the present case, the mere fact that one spouse is a member of the school board while the other spouse is the city assessor is insufficient to create a conflict of interest. Indeed, a contrary finding would discourage married persons or persons in other familial relationships from public service when another family member already is a public officeholder, a policy which we do not seek to promote. We rely on the above-cited opinions in support of this conclusion; in particular, we refer you to the lengthy discussion of relevant cases in our 1980 opinion.

However, as a cautionary note, we believe that while there is no inherent conflict when spouses hold the two public offices in question, there may be situations in which the duties of the two offices overlap or conflict with each other or with the personal interests of the officeholders in question, and given the particular facts involved, a conflict of interest may arise. If this occurs, the persons faced with the conflict should not participate in any decision-making concerning matters related to the conflict.

One example of a conflict of interest arises out of the provisions of Iowa Code § 441.2 (1983) which states that the members of a school board, among others, are to sit as members of a city conference board. These school board members constitute one voting unit for purposes of city conference board business. Section 441.6 provides that one of a conference board's duties is to appoint an assessor. Because a school board member votes on that appointment and because a school board member whose spouse is an applicant for the position has an interest in that spouse assuming the position, it is our opinion that a conflict of interest exists when a school board member participates in the decision of a city conference board to appoint that member's spouse as city assessor. To avoid a conflict of interest, the spouse who is a school board member should simply not participate in that appointment decision.

Similar conflict of interest problems could arise when the conference board makes decisions concerning the assessor's salary, § 441.16, removal of the assessor, § 441.9, or in other situations where the assessor's position is directly

affected. We do not believe it necessary to speculate further as to the numerous hypothetical situations in which a conflict of interest problem may arise, but believe it sufficient to simply alert you to the possibility that in certain situations the school board member here in question should not participate in city conference board or other decision-making which directly concerns the assessor's position.

In conclusion, it is our opinion that 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.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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 1/2 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 11, 1983

Mr. Richard F. Drake
State Senator
State Capitol
L O C A L

Dear Senator Drake:

The following answers are provided in response to your request for an Attorney General opinion of January 17, 1983. The request seeks guidance concerning the discretion available to the Iowa General Assembly in adopting maximum trailer lengths to comply with The Surface Transportation Assistance Act of 1982, P.L. 97-424. We would note that this opinion calls for interpretation of federal and not state law. Because the federal administering agency is not bound by opinions of this Office as would be an Iowa administrative agency, we perceive the function of this opinion to provide advice to the legislature concerning the likely interpretation of federal law and the alternatives available to the Legislature.

(1) What lengths may the State of Iowa regulate under the terms of the Congressional Act as far as semitrailer lengths and

tractor lengths, and in what situations may the state regulate them?

Certain provisions in section 411 clearly apply only on the Interstate and Defense highways and designated Federal-aid Primary System highways. The minimum lengths of 48 feet for single trailers and 28 feet for "doubles" trailers apply only on those highways under the express language of section 411(a). The provision prohibiting States from barring "doubles" also is expressly limited to the Interstate and Defense highways and designated Federal-aid Primary highways under section 411(c). The difficult question is whether the provisions in section 411(b) barring States from imposing overall length limitations on truck combination is also limited to the described Federal-aid highways.

Section 411(b) states:

> (b) Length limitations established, maintained, or enforced by the States under subsection (a) of this section shall apply solely to the semitrailer or trailer or trailers and not to a truck tractor. No State shall establish, maintain, or enforce any regulation of commerce which imposes an overall length limitation on commercial motor vehicles operating in truck-tractor semitrailer or truck tractor semitrailer, trailer combinations. No State shall establish, maintain, or enforce any regulation of commerce which has the effect of prohibiting the use of trailers or semitrailers of such dimensions as those that were in actual and lawful use in such State on December 1, 1982. No State shall establish, maintain, or enforce any regulation of commerce which has the effect of prohibiting the use of existing trailers or semitrailers, of up to twenty-eight and one-half feet in length, in a truck tractor-semitrailer-trailer combination if those trailers or semitrailers were actually and lawfully operating on December 1, 1982, within a sixty-five foot overall length limit in any State.

(Emphasis added.)

The last three sentences of subsection 411(b)[1] do not contain any express limitation to the Federal-aid highways but instead refer to "any regulation of commerce." The issue thus arises whether Congress preempted all State regulation of overall length limitations on truck combinations on any highway or was merely adopting further length limitation on the Federal-aid highways described elsewhere in section 411.

Arguments for reading subsection 411(b) as limited to the federally assisted highways include the title of section 411, "Length Limitations on Federally Assisted Highways." The provision is contained in an appropriations act and other provisions of the Act are limited to described federally assisted highways.

On the other hand, there is evidence that subsection 411(b) could be construed as prohibiting any State regulation of overall length of single or double truck trailer combinations. The underlined sentence quoted above does refer to "any regulation of commerce" and is not expressly limited to described Federal-aid highways as are subsections 411(a) and (c). Additionally, subsection 411(e) mandates the Secretary to designate the "qualifying Federal-aid Primary highways subject to subsections (a) and (c) . . ." This provision for designation of the applicable highways suggests that the provisions of subsection (b) are not limited to the designated Federal-aid highways.

There is some evidence that Congress may have enacted section 411(b) as a preemption of commerce regulation rather than as a condition of an appropriation. Section 411 governing length limitations differs from the provisions regarding weight limitations contained in section 133 of the Surface Transportation Assistance Act of 1982. The weight provision is in Title I to be cited as the "Highway Improvement Act of 1982." The weight limitation is enforced by cutting off federal funds under the Federal-aid Highway Act of 1956 if the heavier trucks are not permitted on Interstate and Defense highways within the State. The Congressional requirement that States permit trucks up to 102" wide is also tied to apportionment of funds and is expressly limited to specified Federal-aid highways. Department of Transportation and Related Agencies Apportionment Act of 1983, P.L. 97-369, sec. 321.

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[1] Only the first sentence of section 411(b) is expressly limited to the described Federal-aid highways. This sentence incorporates subsection 411(a) and states that those length limitations in subsection (a) apply only to the trailer and not to the truck tractor.

Although the House bill, H.R. 6211, originally included length, weight, and width requirements in one section and tied all three categories to federal highway funding, the statutes as passed divided the three categories and treated length limitations differently. The length limitations are now contained in Title IV, Part B, entitled "Commercial Motor Vehicle Length Limitation." The length limitations are not enforced by loss of federal funding but by civil action by the federal government for injunctive relief. Sec. 413, P.L. 97-424. See also 48 Fed.Reg. 5211.

The House bill, H.R. 6211, specifically limited the applicability of the prohibition against overall length limitations to the Interstates and Defense Highways. Section 138 of H.R. 6211 amended 23 U.S.C. § 127(b) to prohibit apportionment of funds to States which impose trailer lengths of less than 48 feet for singles and 28 feet for doubles on Interstate and Defense Highways. The next subsection of the House bill amended 23 U.S.C. § 127(c) in almost identical language to section 411(b) of the Act as passed except that the second sentence included the additional language underlined below:

> No State shall establish, maintain, or enforce any regulation of commerce which imposes an overall length limitation on motor vehicles operating in truck-tractor semitrailer or truck tractor semitrailer, trailer combinations authorized in subsection (b) of this section.

Thus, under the House bill, this sentence clearly applied only on described Federal-aid highways. The Senate amendment is the origin of section 411(b) as enacted. Senate Amendment No. 4998, amending H.R. 6211, sec. 422(b). The Conference Report contains a brief description of the House bill and Senate amendment. The language describing this aspect of the Senate amendment is not illuminating. It states only, "Assures that State regulation may not apply to truck tractors or the overall length of singles and doubles." Cong.Rec., Dec. 21, 1982, H 10817. This language does not refer solely to the interstate and Federal-aid highway system as does other language in the Conference Report. On the other hand, it lumps regulation of truck tractor length and overall length together when the only specific prohibition of length limitations on truck tractors applies only on those roads described in section 411(a). § 411(b), first sentence.

The Conference Report contains no discussion of the differences between the House and Senate versions or between the House version and the Conference version adopting the Senate amendment. We have found no floor debate discussing this difference.

The Federal Highway Administrator issued a Notice of Policy Statement on February 1, 1983, 48 Fed.Reg. 5210 (Feb. 3, 1983). That Policy Statement construes the overall length limitation as applicable only to the limited category of Federal-aid highways. It states:

> In addition, Section 411 prohibits all States from imposing overall length limitations on the operation of tractor - semitrailers and tractor-semi-trailer-trailer combinations on the Interstate System and the designated portions of the Federal-aid Primary System."

48 Fed.Reg. 5210-5211.

The Federal Highway Administrator also noted that enforcement of section 411 is by injunctive action rather by withholding of Federal-aid funds. 48 Fed.Reg. 5211.

Less formal advice from the Federal Highway Administration also indicates that the second sentence of section 411(b) should be limited to the Interstate, etc. The staff of the federal agency provided to the American Association of State Highway and Transportation Officials, Answers to Member Department Questions on the Surface Transportation Act of 1982, p. 16, question 114, as follows:

> Section 411(b)
>
> 114. It is not clear whether the restriction in the second sentence ("no state may establish . . . any regulation which imposes an overall length limitation . . .") applies to all streets and highways or simply those highways on which a federally mandated length is set under 411(a), i.e., Interstates and designated primaries.
>
> [Answer] Statute applies only to those highways on which a federally mandated length has been established.

We cannot accurately predict whether the Federal Highway Administration or a court might ultimately construe this sentence in section 411(b) as barring any overall length limitations on single or double combinations in commerce, even on secondary roads. We believe the leislature should be aware of this potential legal argument but should also consider whether this construction would produce absurd consequences. This Office is not privy to relevant legislative facts concerning the impact of this

construction on highway safety and operational requirements. We also believe that the State is entitled to rely on the Federal Highway Administration construction of this section.

On the portions of the highway system consisting of the "Interstate" and those primary highways designated by the Secretary of the United States Department of Transportation, Sections 411(a) and (b) of the Surface Transportation Assistance Act of 1982 leave no doubt that only trailer lengths can be regulated. The forty-eight foot length is established in the case of semi-trailer unit and twenty-eight foot length in a "double combination." The situation which presents the greatest difficulty is reflected in your questions two through five. That problem is, what was a legal trailer length in Iowa for either a semi or double on December 1, 1982? This problem occurs because of the language in § 411(b):

> . . . No State shall establish, maintain, or enforce any regulation of commerce which has the effect of prohibiting the use of trailers or semitrailers of such dimensions as those that were in actual and lawful use in such State on December 1, 1982. No State shall establish, maintain, or enforce any regulation of commerce which has the effect of prohibiting the use of existing trailers or semitrailers, of up to twenty-eight and one-half feet in length, in a truck tractor-semitrailer-trailer combination if those trailers or semitrailers were actually and lawfully operating on December 1, 1982, within a sixty-five foot overall length limit in any State.

In essence, the Surface Transportation Assistance Act of 1982, provides that trailers "of such dimensions as those that were in actual and lawful use" on December 1, 1982, cannot be excluded on the interstate or the designated primary highway systems.

(2) What was the maximum lawful length of semitrailers on Iowa highways on December 1, 1982?

Helpful to answering this question is a reiteration of the Iowa length limits in effect December 1, 1982. See generally, Iowa Code section 321.457, (1981). Basically, Iowa's statute as in most other states did not specifically regulate trailer length whether pulled by a truck tractor alone (semi) or as part of a "double bottom" combination. The only restriction which spoke directly to a semitrailer length was Iowa Code § 321.457(8) (1981), as amended by 1982 Iowa Acts Chapter 1056, Section 3 (69 G.A.) which was effective July 1, 1982 and is as follows:

> 8. A semitrailer shall not have a distance between the kingpin and the center of the rearmost axle of a semitrailer in excess of forty feet, except a semitrailer used principally for hauling livestock, a semitrailer used exclusively for the purposes of hauling self-propelled industrial and construction equipment, or a semitrailer used exclusively for the purposes described in subsection 5 of this section. A semitrailer which is a 1980 or older model having a distance between the kingpin and center of the rearmost axle of more than forty feet may be operated on the highways of this state if a special overlength permit is obtained from the department for the vehicle. The special overlength permit shall be valid until such time as the semitrailer is inoperable.

Subsection 5 refers to auto transports, or trucks transporting pickup trucks and so forth. Another exception is the so-called "border city" contained in Iowa Code § 421.457(7) (1981).

The problem created by sections 411(a) and (b) for Iowa result from Iowa's having a statute that to some extent regulates trailer length but in a manner different from that under the new Federal Act. By abolishing Iowa's overall length maximum and requiring that States not adopt regulations which prohibit the use of trailers of such dimensions as those in lawful and actual use on December 1, 1982, there exists a very difficult question as to what action the legislature may take.

One approach would be to simply determine the longest trailer which could meet all of Iowa's requirements on December 1, 1982, and use that length as the new maximum. It is a matter of some debate as to what was the maximum overall length of a trailer which met the statutory requirements and was in actual use on December 1, 1982. Some indicate that trailers up to fifty-three feet could be hauled as a semi, others put the maximum at forty-eight feet for a semi. Semi trailer length was a function of the maximum allowable length of the overall truck combination and the forty feet maximum length from kingpin to rear axle where appropriate. There exists no empirical study to show with clarity the maximum "legal" length in feet of a trailer on December 1, 1982. This is a fact which cannot be resolved by this office in an Attorney General's opinion, but could be the subject of legislative inquiry.

An alternative approach would be for the legislature to adopt a 48-foot maximum for singles and additionally permit trailers up to the legislatively found maximum length possible under the old law (48'-53') if those trailers also met the

requirements of section 321.457(h). In other words, the legislature could use 48 feet as one maximum and define the precise dimensions which would be "grandfathered in." Whether this would be practical or reasonable would be for the legislature to determine.

(3) What was the maximum lawful length of trailers on Iowa highways on December 1, 1982?

The same discussion regarding question 2 is relevant. However, based on the testimony in Kassel v. Consolidated Freightways, 450 U.S. 662 (1981), the maximum legal limit for a trailer pulled in a double combination by Consolidated Freightways was apparently twenty-eight and one-half feet. Of course, such were subject to an overall length limitation of 65 feet on the Interstates and other designated roads by virtue of the decision in that case.

(4) Does Section 411 allow the State to set as a maximum forty-eight feet for semitrailer units in truck tractor-semitrailer combinations ["singles"], or is some other maximum mandated by this Act?

Yes, Iowa may set forty-eight feet as the maximum trailer length for a semitrailer. However, the limitations of section 411(b) must also be considered. The State is precluded by section 411(b) from prohibiting the use of trailers "of such dimensions as those that were in actual and lawful use" in Iowa on December 1, 1982. This phrase creates the uncertainty in determining what length limitations are permitted by federal law.

There are two arguable constructions of this phrase. One is that it only "grandfathers" existing trailers operating in Iowa as of December 1, 1982. The other is that States must permit any trailers which would have been lawful on December 1, 1982.

The argument for reading the section as a "grandfathering" provision exempting only existing vehicles is supported by the language "lawful and actual use on December 1, 1982." Additionally, this appears to be the present view of the Federal Highway Administration as shown in the following exchange from the January 18, 1983, American Association of State Highway and Transportation Officials (AASHTO) Answers to Member Department Questions on the Surface Transportation Act of 1982, p. 17, question 115:

> Section 411(b)
> 115. Can a State limit trailer lengths to forty-eight feet (semitrailer) and twenty-eight feet (trailers in a double-bottom combination) minimums

> as specified in the federal legislation while grandfathering in longer length trailers that existed prior to December 1, 1982, and still be in compliance with Section 411(b)?
>
> Yes, the States will be able to exercise this option if they so desire.

However, the federal agency has not issued rules or formal interpretation of this phrase. Additionally, we have no evidence that these answers were approved by the Administrator or by the Office of General Counsel. This federal interpretation may not therefore be binding.

The more cautious approach is to construe the sentence in question as prohibiting States from adopting more stringent length limitations than those in effect on December 1, 1982. This is supported by the language "trailers of such dimensions as those that were in actual and lawful use. . ." An additional argument for this construction is the comparison in form with the next sentence in § 411(b) concerning "the use of existing trailers . . . of up to [28 1/2] feet in length . . . if those trailers . . . were actually and lawfully operating on December 1, 1982 . . ." This sentence clearly protects only existing "double-bottom" trailers actually in use. The difference in language causes us to believe that a court might find that Iowa could not adopt more restrictive limitations on existing and future trailers than that provided by the law in effect on December 1, 1982.

(5) Does Section 411 allow the State to set a maximum twenty-eight feet for semitrailer units in truck tractor-semitrailer-trailer combinations ["doubles"], or is some other maximum mandated by this Act?

The Federal Act provides differing treatment for double combinations than for other trailers. The applicable sentence states:

> No State shall establish, maintain, or enforce any regulation of commerce which has the effect of prohibiting the use of existing trailers or semitrailers, of up to twenty-eight and one-half feet in length, in a truck tractor-semitrailer-trailer combination if those trailers or semitrailers were actually and lawfully operating on December 1, 1982, within a sixty-five foot overall length limit in any State.

Iowa did not have trailer length requirement for trailers in a double combination but instead regulated the overall length of the tractor-trailer combination. By Federal District Court order of August 16, 1979, 65-foot twin-trailer operations have been allowed on the interstate system. These have been additionally permitted on routes designated by the Iowa Department of Transportation. Thus we believe that the quoted sentence in section 411(b) applies and that Iowa can simply "grandfather" existing trailers of up to 28 1/2 feet in double combinations and set the maximum length at 28 feet for all other trailers in double combinations on designated Federal-aid highways.

Iowa did not have a 65-foot overall length limitation on other roads so this sentence could not be construed to apply to roads other than the Interstate and designated highways.

In conclusion, we believe that the legislature can take the following approaches on the designated Federal-aid highways: (1) set a new maximum limit for trailers and trailers in double combinations which uses the length of the longest trailer or "double trailers" lawfully operating in Iowa on December 1, 1982; or (2) adopt 48 feet for single trailers and 28 feet for "doubles" but permit any single trailers which would have met the requirements of Iowa Code § 321.457(8) (1983) in combination with the maximum overall length combination and "grandfather" existing "doubles" of up to 28 1/2 feet. The legislature could also choose to rely on the January 18, 1983, communication to AASHTO which indicated that a State could adopt limits of 48 feet and 28 feet and "grandfather in" only actually existing single trailers. This approach provides the most flexibility to the State, but this approach is least likely to survive judicial challenge.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

Lester A. Paff Emo

LESTER A. PAFF
Assistant Attorney General

EMO/LAP/jkp

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

The Honorable Charles C. Neighbor
Jasper County Attorney
301 Courthouse Building
Newton, Iowa 50308

Dear Mr. Neighbor:

We are in receipt of your request for an opinion of the Attorney General regarding beer brand advertising signs. Specifically, our office has been asked:

1. Does [the 1975 amendment to Iowa Code § 123.51(3) (1983)] mean that even signs advertising a brand name or the price of beer can be used if they are inside said fence or similar enclosure?

2. What type of fence would be satisfactory, i.e. height, type of construction, etc.?

3. What is meant by similar enclosure?

4. What is meant by partially surrounds a licensed premises?

Iowa Code § 123.51(3) (1983) provides:

> No signs or other matter advertising any brand of beer shall be erected or placed upon the outside of any premises occupied by a licensee or permittee authorized to sell beer at retail. This subsection shall not prohibit the use of signs or other matter inside a fence or similar enclosure which wholly or partially surrounds the licensed premises.

Thus, a general prohibition against beer brand advertising signs or other matter advertising any brand of beer is provided for in the opening sentence of that subsection. An exception to that prohibition, added by 1975 Iowa Acts, Chapter 117, § 1, is found in the second sentence. Beer brand advertisements are permitted if placed inside a fence or similar enclosure which at least partially surrounds a licensed premise.

A response to the questions which have been presented requires an examination of the legislative intent and the legislative history of Iowa Code § 123.51(3) (1983). Our interpretation of that subsection follows.

The polestar of statutory construction is legislative intent. See State v. Whetstine, 315 N.W.2d 758 (Iowa 1982). The apparent legislative intent of Iowa Code § 123.51(3) (1983) is to restrict the visibility of beer brand advertisements from the public way.

The legislative history of Iowa Code § 123.51(3) (1983) is also relevant. That subsection, in response to an opinion of the Attorney General, was amended in 1975. See 1975 Iowa Acts, Chapter 117, § 1. The opinion, 1974 Op.Att'yGen. 383, had advised that the erection of signs advertising beer anywhere on the grounds of a ball park licensed to sell beer violated Iowa Code § 123.51(3) (1973). Common practice in baseball stadiums, of course, is to advertise inside the outfield fence. The apparent intent and effect of the 1975 amendment was to legalize the advertisement of beer brands on the inside of a ball park fence.

It is our interpretation that Iowa Code § 123.51(3) (1983) does not prohibit the erection or placement of a sign or other matter advertising any brand of beer on the inside of 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. That interpretation is consistent with the legislative intent and the legislative history of that subsection. In other words, we believe that the fence exception to the prohibition of advertising on the outside of licensed premises is most logically construed to permit advertising which is enclosed by the fence and thus not plainly visible from outside.

An interpretation permitting a beer brand advertisement to be visible from the public way simply through the erection or placement of a fence or similar enclosure would produce an absurd result. In statutory construction, interpretations which produce strained, impractical, or absurd results are to be avoided. See Ida County Courier and the Remainder v. Attorney General, 316 N.W.2d 846 (Iowa 1982).

The effect of our interpretation, in essence, is to extend the permissible area for a beer brand advertisement beyond the inside of a licensed premise to include the inner side of a fence or similar enclosure which at least partially surrounds a licensed premise. At the same time, our interpretation does not subject individuals who have not entered a licensed premise to signs or other matter advertising any brand of beer.

We now address the individual questions which you have presented. In response to your first inquiry, 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 on the inside of 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.

Your second and third questions, which concern the types of partitions which extend the permissible area for a beer brand advertisement, are combined. It is our opinion, consistent with the foregoing discussion, that 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 or beer beyond the inside of a licensed premise.

Finally, in response to your last question, a fence or similar enclosure, inside of which a beer brand advertising sign is erected or placed, need not entirely surround a licensed premise. For instance, a patio bar which is enclosed in the rear of a licensed premise, would not be prohibited from erecting or placing a beer brand advertising sign inside the partition. The partition, however, must not permit the advertisement of the beer brand to be plainly visible from the public way.

In summary, 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.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/jkp

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

John G. Martens
Emmet County Attorney
703 First Avenue South
Estherville, Iowa 51334

Dear Mr. Martens:

You have requested an opinion of the Attorney General concerning the law of extortion. You report that certain law enforcement authorities in Emmet County have extended promises not to charge certain suspects with criminal offenses provided that they give officers information about related or unrelated criminal activities. You further advise that in response to one incident, where an officer of the Estherville Police Department told a juvenile that she would not be charged with possession of beer as a minor if she would give a written statement and testify in court as to an unrelated matter, the City Attorney for Estherville informed the Estherville Police Department that such conduct constitutes extortion under Iowa Code section 711.4 (1981). You question whether the City Attorney is correct. It is our opinion that such conduct does not constitute extortion.

Crime is usually a clandestine activity. Most often, those possessing knowledge of criminal activity are themselves in trouble with the law and are unlikely to volunteer information except in exchange for favorable treatment. Police officers have considerable, albeit not final, discretion to determine who is, and who is not, charged with a criminal offense. Plea negotiations are an accepted practice in this state and, on occasion, depend on a defendant's testifying in another criminal case. Your question carries with it serious implications for what many consider to be legitimate law enforcement activities.

Iowa Code section 711.4 (1981) provides:

> A person commits extortion if the person does any of the following with the purpose of obtaining for oneself or another anything of value, tangible or intangible, including labor or services:
>
> 1. Threatens to inflict physical injury on some person, or to commit any public offense.
> 2. Threatens to accuse another of a public offense.
> 3. Threatens to expose any person to hatred, contempt, or ridicule.
> 4. Threatens to harm the credit or business or professional reputation of any person.
> 5. Threatens to take or withhold action as a public officer or employee, or to cause some public official or employee to take or withhold action.
> 6. Threatens to testify or provide information or to withhold testimony or information with respect to another's legal claim or defense.
> 7. Threatens to wrongfully injure the property of another.
>
> It is a defense to a charge of extortion that the person making a threat other than a threat to commit a public offense, reasonably believed that he or she had a right to make such threats in order to recover property, or to receive compensation for property or services, or to recover a debt to which the person has a good faith claim.
>
> Extortion is a class "D" felony.

The first question is whether information about criminal activity or testimony in a criminal case is something of value. We believe this is a close question. The terms used in section 711.4 are similar to the definition of property provided in Iowa Code section 702.14 (1981). This definition has been described as the "broadest possible definition". 4 J. Yeager & R. Carlson, Iowa Practice § 41 (1979). In Iowa Code sections 714.3 and 714.4 the value of property is defined as "its normal market or exchange value within the community" and when there is no market value the value of property is considered to be its actual

value. State v. Savage, 288 N.W.2d 502, 506 (Iowa 1980). These authorities would suggest that value, though intended to be broadly defined, refers to monetary value as measured by any reasonable standard. Nevertheless, it is not unheard of that persons possessing information concerning criminal activity have been paid for their services. Thus, we are unwilling to conclude that no reasonable juror could find that information concerning criminal activity is something of value.

The second question is whether the conduct described above constitutes a threat. A threat has been defined to be a "menace of such a nature as to unsettle the mind of the person on whom it is intended to operate, and to take away from his acts that free voluntary action which alone constitutes consent." 31 Am. Jur. 2d Extortion, Blackmail, Etc. § 10, at 907 (1967). It has also been defined as "an expression of intention to hurt, destroy, punish, etc., as in retaliation or intimidation . . . ." Webster's New World Dictionary 1482 (2d college ed. 1974).

In some instances there may be a distinction between a threat and a promise. For example, it could be argued that there is a substantive difference between "I promise not to charge you with crime 'X' if you give me information on crime 'Y', and "If you do not give me information on crime 'Y', I will charge you with crime 'X'." The first statement does not necessarily convey the message that if the person does not give information on crime "Y", charge "X" will be filed. It leaves that option open. The second sentence, however, leaves no option open, that is, it specifically conveys the message that the only way to avoid being charged with crime "X" is to give information on crime "Y". This is a fine distinction. It is unnecessary to reach the question of whether the legislature intended such a distinction under section 711.4 because we resolve the issue raised in your question on another ground.

The third question is whether the conduct at issue falls within the defenses set forth in the final paragraph of section 711.4. The purpose of these defenses has been described as follows:

> The exception written into § 711.4 recognizes the fact that some of the listed threats, if made in good faith and without malicious intent, should be at most a civil matter. The threats in subsections 1 and 7 will always be threats to commit a public offense, and the exception will not apply. Those in subsections 3 and 4 are clearly permissible if the necessary reasonable

> belief is present. One must use care in making the threats described in subsections 2, 5, and 6, even if the other conditions of the exception are present.

4 J. Yeager & R. Carlson, Iowa Practice § 256, at 70 (1979).

A "debt" may be defined as "something owed by one person to another or others, an obligation or liability to pay or return something, or the condition of owing." Webster's New World Dictionary 364 (2d college ed. 1974). It is our opinion that a person who has information concerning criminal activity has an obligation to come forward with that information and, if necessary, to testify as a witness. The exchange of a promise not to charge an offense that could be charged or prosecuted is no more than an effort to recover a debt that is due the public.

We have no doubt that in the factual situation you described that an officer could have a reasonable good faith belief "that he or she had a right to make such threats . . . ."[1] Public policy requires that no unnecessary barriers be imposed on the State's option to bargain for truthful testimony. State v. DeWitt, 286 N.W.2d 379, 386 (Iowa 1979), cert. denied, 449 U.S. 844 (1980). There is nothing inherently wrong with police negotiating with those suspected of criminal activity for the purpose of obtaining evidence that they otherwise might not obtain.[2] Negotiations for information concerning criminal activity in exchange for immunity from prosecution is not done for the personal gain of the officers, but for the furtherance and protection of the public's interest in effective law enforcement. Public rights are exchanged for public benefits, as often occurs in plea negotiating or in granting immunity in exchange for testimony. See Gray v. City of Galesburg, 71 Mich. App. 161, 247 N.W.2d 338, 341 (1976).

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[1]This is not to say that such promises could never be considered in bad faith or unreasonable. Some instances may present a question of fact. Specifically, we express no opinion on "threats" made on the basis of an offense the officer knows could not be charged, or instances where the officer's conduct allows criminal acts to continue.

[2]We express no opinion as to the enforceability of agreements not to file criminal charges in exchange for information. But see Cunningham v. Novak, 322 N.W.2d 60 (Iowa 1982). Nor do we express any opinion as to the desirability of such agreements. We do strongly suggest, however, that law enforcement officials should consult with the local prosecuting authority before making such an agreement.

Iowa Code section 711.4 replaced Iowa Code section 720.1 (1977). Iowa code section 720.1 (1977) provided, in relevant part:

> If any person, either verbally or by any written or printed communication, maliciously threaten to accuse another of a crime or offense. . . .

(Emphasis added.) The conduct at issue here would not have been criminal under section 720.1 as it is not malicious, that is, not done "with an evil disposition, a wrong and unlawful motive or purpose; that state of mind which activates conduct injurious to others without lawful reason, cause, or excuse." State v. Dunn, 199 N.W.2d 104, 107 (Iowa 1972). Absent a clear and unmistakable manifestation of legislative intent to the contrary, provisions in the criminal code are not read as altering prior law. Emery v. Fenton, 266 N.W.2d 6, 10 (Iowa 1978). Section 711.4 does not expressly include an element of maliciousness. However, in view of the defenses expressed in section 711.4, it appears that the design of the legislature was to shift the focus from maliciousness as an element to defenses that would negate maliciousness if established. The legislative scheme employed in section 711.4 is reasonable because in most instances the threats covered under section 711.4 would be inherently malicious. Nevertheless, this scheme suggests that to the extent possible the defenses set forth in section 711.4 should be interpreted broadly enough to exclude conduct that would not have been prohibited under the prior law.

In summary, we find no evidence that the legislature intended to change the prior law, and prohibit, under section 711.4, promises to exchange favorable charging treatment for information concerning criminal activity. Thus, it is our opinion that such conduct is excepted from section 711.4 so long as the officer has a reasonable good faith belief of the "right to make such threats" to recover information concerning criminal activity or to obtain the testimony of informant witnesses.

Sincerely,

Richard L. Cleland

RICHARD L. CLELAND
Assistant Attorney General

Marcia Mason

MARCIA MASON
Assistant Attorney General

RLC/MM:djs

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 8, 1983

The Honorable Mary Jane Odell
Secretary of State
State Capitol
L O C A L

Dear Secretary Odell:

You wrote on January 14, 1983 requesting that this office issue an opinion on the proper way to interpret language in Iowa Code Section 548.2 (1981), which deals with registration and protection of trademarks. Your question involves subsection 1 of Section 548.2 which states in full as follows:

> 1. A mark shall not be registered if it:
> a. Consists of or comprises immoral, deceptive, or scandalous matter, or
> b. Consists of or comprises matter which may disparage, bring into contempt or disrepute, or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or
> c. Consists of or comprises the flag, or coat of arms, or other insignia of the United States, or of any state or municipality, or of any foreign nation, or any simulation thereof, or
> d. Consists of, or comprises the name, signature, or portrait of any living individual, except with his written consent, or
> e. Is merely descriptive or misdescriptive, or primarily geographically descriptive as applied to the goods or services of the applicant, or

> f. Is primarily a surname; except nothing in this paragraph shall prevent the registration of a mark used in this state by the applicant, which has become distinctive of the applicant's goods or services. The secretary of state may accept as evidence that the mark has become distinctive proof of continuous use as a mark by the applicant in this state or elsewhere for the five years preceding the date of the filing of the application for registration, or
>
> g. Resembles a mark registered in this state or a mark or trade name previously used in this state by another and not abandoned, so as to be likely, when applied to the goods or services of the applicant, to cause confusion, mistake, or deception of purchasers.

You asked specifically the following:

> . . . whether the following phrase in section 548.2(1)(f) 'except nothing in this paragraph shall prevent the registration of a mark used in this state by the applicant, which has become distinctive of the applicant's goods or services.' is to be applied to subsections (1)(a) through (1)(f) or is merely to be applied to subsection (1)(f).

You also pointed out that if the exception is applied to parts (1)(a) through (1)(f), all marks in those categories may be registered if the Secretary of State determines that the mark has become distinctive of the applicant's goods or services, while if the exception applies only to part (1)(f) the test whether the mark has become distinctive of the applicant's goods or services would apply only to a mark that is primarily a surname. We believe that the latter interpretation is correct.

If a statute is susceptible to two constructions, it is proper to consider legislative history in searching for the intent of the Legislature. Builders Land Co. v. Martens, 122 N.W.2d 189, 255 Iowa 231 (1963). Chapter 548 was patterned after the Model State Trademark Bill which was prepared in 1949 by the United States Trademark Association and which provides in part as follows:

SECTION 2. REGISTRABILITY.

A [trademark] mark by which the goods or services of any applicant for registration may be distinguished from the goods or services of others shall not be registered if it

(a) consists of or comprises immoral, deceptive or scandalous matter; or

(b) consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or

(c) consists of or comprises the flag or coat of arms or other insignia of the United States, or of any state or municipality, or of any foreign nation, or any simulation thereof; or

(d) consists of or comprises the name, signature or portrait of any living individual, except with his written consent; or

(e) consists of a mark which, (1) when applied to the goods or services of the applicants, is merely descriptive or deceptively misdescriptive of them, or (2) when applied to the goods or services of the applicant is primarily geographically descriptive or deceptively misdescriptive of them, or (3) is primarily merely a surname provided, however, that nothing in this section (e) shall prevent the registration of a mark used in this state by the applicant which has become distinctive of the applicant's goods or services. The secretary of state may accept as evidence that the mark has become distinctive, as applied to the applicant's goods or services, proof of continuous use thereof as a mark by the applicant in this state or elsewhere for the five years next preceding the date of the filing of the application for registration; or

(f) consists of or comprises a [trademark] mark which so resembles a [trademark] mark or trade name previously used in this state by another and not abandoned, as to be likely, when applied to the goods or services of the applicant, to cause confusion or mistake or to deceive. [Emphasis supplied.]

See Gilson, Trademark Protection and Practice, Vol. 2, § 601.03 (1982).

Parts (a) through (d) of § 548.2 are almost identical to parts 2(a) through 2(d) of the Model Act. However, the Iowa Legislature deviated from the Model Act by making two parts, (e) and (f), from the Model Act's part (e). In doing so, the Legislature clearly changed the scope of the exception clause from the narrow exception in part (e) of the Model Act. We must determine whether the Legislature intended to broaden or further narrow the scope of the exception clause.

The Bill Drafting Guide which was issued for use in preparing bills introduced during the Sixty-Third General Assembly directed that divisions of Code sections be cited in a certain manner in the body of the bill:

. . . . Divisions of Code sections are cited as follows:

Name	Example
Section	136.3
Subsection	2
Paragraph	a
Subparagraph	(3)

Bill Drafting Guide, 63rd G.A., pp. 16-18.

It is reasonable to assume that the Legislature was aware of the drafting guidelines when structuring § 548.2 and that it knew that § 548.2(1)(f) would, according to the guidelines, be cited as "Section 548, Subsection 2, paragraph f." Therefore, when it stated "except nothing in this paragraph" the Legislature must have been referring to the lettered part in which the clause was located, thereby further narrowing the exception clause. If the Legislature had intended to broaden the applicability of the exception clause when altering the Model Act, it could have said "except nothing in this section" or "except nothing in this subsection."

A broader reading of the exception clause could require the Secretary of State to register marks that were in derogation of public policy. For example, if the clause were construed to apply to all of § 548.2(1), a mark that becomes distinctive of the applicant's goods or services may be registered even if it consists of immoral, deceptive, or scandalous matter or matter which may disparage, bring into contempt or disrepute, or falsely suggest a connection with persons. It is unlikely that the Legislature intended such a result.

In conclusion, 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. A construction resulting in a broader application of the exception clause would conflict with legislative drafting guidelines and with public policy.

Sincerely,

Patricia J. McFarland

PATRICIA J. McFARLAND
Assistant Attorney General

PJM:sh

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

Mr. Brian P. Andersen
Audubon County Attorney
720 1/2 Market Street
Audubon, Iowa 50025

Dear Mr. Andersen:

You have requested an opinion from our office regarding recent revisions in the law governing the involuntary commitment of substance abusers. You are particularly concerned with the section of the revised law which provides that an application for involuntary commitment or treatment may be filed by the county attorney. Specifically you have asked the following:

1. For the county attorney to maintain an action for involuntary commitment, must the county attorney verify the application?

2. If a person other than the county attorney files an application for involuntary commitment, does the county attorney have either a permissive or mandatory duty to appear on behalf of the applicant at the commitment hearing?

3. If the county attorney's duties under the law are not mandatory, what potential liability does a county attorney face in maintaining such an action?

4. Is there any indication of the legislature's intent as to when a county attorney should institute proceedings for involuntary commitment?

Your questions will be answered in light of principles of statutory construction and perceived legislative intent.

Iowa Code chapter 125 constitutes Iowa's Chemical Substance Abuse law. Prior to recent legislative changes, however, statutory procedures governing the involuntary commitment of substance abusers were found at Iowa Code §§ 229.50-229.53. 1982 Iowa Acts, ch. 1212, House File 2426 (effective July 1, 1982) repealed §§ 229.50-229.53 and amended Iowa Code chapter 125 to provide for the involuntary commitment of substance abusers. Iowa Code §§ 125.75-.94 (1983). In so amending chapter 125, the legislature also substantially changed the earlier statutory provisions providing for involuntary commitment. For the most part, procedures governing the involuntary commitment of substance abusers now parallel the statutory procedures for the involuntary commitment of the mentally ill. Iowa Code chapter 229 (1983). In doing so, it appears the legislature guaranteed greater due process protection to alleged substance abusers than had been provided under the repealed provisions of chapter 229.

House File 2426, Iowa Code § 125.75 (1983), provides as follows:

> Proceedings for the involuntary commitment or treatment of a substance abuser to a facility may be commenced by the county attorney or an interested person by filing a verified application with the clerk of the district court of the county where the respondent is presently located or which is the respondent's place of residence. The clerk or clerk's designee shall assist the applicant in completing the application. The application shall:
>
> 1. State the applicant's belief that the respondent is a substance abuser.

2. State any other pertinent facts.

3. Be accompanied by one or more of the following:

a. A written statement of a licensed physician in support of the application.

b. One or more supporting affidavits corroborating the application.

c. Corroborative information obtained and reduced to writing by the clerk or the clerk's designee, but only when circumstances make it infeasible to obtain, or when the clerk considers it appropriate to supplement, the information under either paragraph a or paragraph b.

At the outset, it must be noted with respect to your question on whether the county attorney has a duty to appear on behalf of the applicant that this section provides that involuntary commitment or treatment proceedings may be commenced by the county attorney or an interested person. Unless specifically provided for otherwise, the use of the word "may" in a statute confers a power while the use of the word "shall" imposes a duty. Iowa Code § 4.1(36)(a), (c).

Furthermore, unless a contrary legislative intent appears, when the word "or" is used, it is presumed to be disjunctive rather than conjunctive. Kearney v. Ahmann, 264 N.W.2d 768, 769 (Iowa 1978). Nothing in House File 2426 indicates an intent on the part of the legislature that the word "or" in section 3 should be read in the conjunctive rather than the disjunctive sense. If the legislature had meant that an application should be filed by the county attorney and an interested person, the legislature could have used the word "and" or could have indicated in some other fashion that the conjunctive use of the word "or" should prevail.

Consequently, it appears that House File 2426 anticipates that actions may be brought by either the county attorney or by another interested person as defined by section 1 of that House File.[1] Nothing in that section indicates that when an interested person files an appli-

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[1] "Interested person" is a person who, in the discretion of the court, is legitimately concerned that a respondent receive substance abuse treatment services. 1982 Iowa Acts, ch. 1212, sec. 1, H.F. 2426.

cation for involuntary commitment or treatment that the county attorney has any duty at all, either mandatory or permissive, to join in that application or to appear on behalf of the applicant at the commitment hearing.

This conclusion is borne out by a reading of other provisions in House File 2426. The meaning and intent of any one provision of a statute must be determined by reading the statute as a whole. Robinson v. Department of Transportation, 296 N.W.2d 809, 811 (Iowa 1980). Section 4 provides, in part, that "[t]he applicant, if not the county attorney, may apply for the appointment of counsel if financially unable to employ an attorney to assist the applicant in presenting evidence in support of the application for commitment." Iowa Code § 125.76 (1983) [Emphasis added.] Furthermore, section 10(1) provides: "At the commitment hearing, evidence in support of the contentions made in the application shall be presented by the applicant, or by an attorney for the applicant, or by the county attorney if the county attorney is the applicant." Iowa Code § 125.82(1) (1983) [Emphasis added.] Also, section 10(3) states that "[t]he person who filed the application . . . shall be present at the hearing . . . ." Iowa Code § 125.82(3) (1983) These provisions clearly indicate that proceedings may be maintained by either the county attorney or an interested person and that if an interested person other than the county attorney institutes proceedings for involuntary commitment or treatment, the county attorney is in no way required to join in those proceedings or to assist the applicant in his or her efforts to receive an order for commitment or treatment.

Legislative history would also support this conclusion. House File 2426, as originally introduced into the legislature, provided that an application for involuntary commitment or treatment was to be filed by an interested person; the county attorney was not mentioned. H.F. 2426, as introduced, sec. 3, p. 1, l. 26. After the filing of an application, the court, among other things, was to cause copies of the application and supporting documentation to be sent to the county attorney for review. H.F. 2426, as introduced, sec. 5, p. 3, ll. 3-4. In addition, the bill provided that at the commitment hearing, evidence in support of the contentions made in the application shall be presented by the county attorney. H.F. 2426, as introduced, sec. 9, p. 6, ll. 18-20.[2] A Senate amendment to the Bill, S-5559, which

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[2] This process as initially introduced into the legislature paralleled the present provisions of Iowa Code chapter 229 (1981) on the involuntary hospitalization of the

was accepted by the House, H-5925, and which was then further amended by the House, H-5943, amended section 3 to provide for the filing of an application by the county attorney or any interested person, eliminated that portion of section 5 providing for notification by the court to the county attorney of applications received, and amended section 9 to provide that evidence at the commitment hearing was to be presented by the applicant, or by the attorney for the applicant, or by the county attorney. 1982 S.J. 1181, 1334; 1982 H.J. 1650, 1675, 1677. These changes brought the bill into its present form.

In construing statutes, statutory language, legislative history, and statutory scheme may be examined. United States v. Kinsley, 518 F.2d 665, 668 (8th Cir. 1975). Legislative history, however, cannot be used to defeat the plain words of a statute. LeMars Mutual Insurance Co. of Iowa v. Bonnecroy, 304 N.W.2d 422, 424 (Iowa 1981). In this particular situation, legislative history is consistent with the conclusion that the plain words of H.F. 2426 indicate that the county attorney is required to present evidence at a commitment hearing only where the county attorney is the applicant or where the county attorney has formally joined with another applicant in seeking involuntary commitment of or treatment for a substance abuser.

Thus, in answer to your second question, it is our opinion that the county attorney has no duty, either mandatory or permissive, to appear on behalf of an applicant who is not the county attorney at a commitment hearing. Section 125.75 grants a power to the county attorney to institute involuntary commitment or treatment proceedings if the county attorney decides in his or her own discretion to do so. Certainly this power would allow the county attorney to join in an application with another person; once the county attorney would so join in, then the county attorney would be required to appear at the commitment hearing pursuant to §§ 125.82(1) and 125.82(3). Furthermore, the county attorney

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[2] (cont'd) mentally ill. Section 229.6 provides for the filing of a verified application by an interested person. Section 229.8(2) provides for copies of the application to be sent by the clerk to the county attorney for review. Section 229.12(1) provides that evidence in support of the application shall be presented by the county attorney. Op.Att'yGen. #79-6-6 discusses the role of the county attorney in the chapter 229 process and also points out that the process for involuntary commitment of the mentally ill under chapter 229 was a separate and distinct process from the process for involuntary commitment of substance abusers under then Iowa Code sections 229.50-.53 (1981).

could, in his or her discretion, agree to present evidence on behalf of an interested person who had filed a verified application.

In returning to your first question, once a county attorney decides in his or her discretion to pursue an action for involuntary commitment or treatment, then Iowa Code § 125.75 does, in our opinion, provide that a verified application must be filed by the county attorney. While the county attorney or another interested person is not required by statute to initiate involuntary commitment proceedings, once a decision is made to maintain such action, proceedings are commenced by the filing of a verified application by the applicant. The word "may" in § 125.75 refers to the power to initiate or not initiate involuntary commitment proceedings; the word "may" does not mean that proceedings may be initiated by the filing of a verified application or by some other means. Certainly if the legislature had intended that some other method for proceeding would be satisfactory, it would have said so. The legislature in § 125.75, however, refers only to a verified application.

In addition, other sections of House File 2426 refer directly to the application, indicating a clear legislative intent that the verified application serve as the basis for an involuntary commitment or treatment proceeding. For instance, section 5 provides that the clerk shall docket the case and immediately notify the court upon the filing of an application; furthermore, the clerk shall send the application to the sheriff for immediate service upon the respondent. Iowa Code § 125.77 (1983). Section 7 provides that the court shall direct the clerk to furnish at once copies of the application to respondent's attorney. Iowa Code § 125.79 (1983). Section 10(4) provides in part that burden of evidence and support of the contentions made in the application shall be upon the person who filed the application. Iowa Code § 125.82(4) (1983). Also, section 10(4) states that if the court finds that the necessary contentions have not been sustained, the court shall deny the application and terminate the proceedings.

Furthermore, Iowa Code § 125.75 makes it clear that the required application must be verified and filed by the applicant and not some other person. In particular, the application shall state the applicant's belief that the respondent is a substance abuser as well as provide any other pertinent facts. Section 125.75(1), (2). Consequently, the applicant must have reason to believe that the respondent named in the application is a substance abuser

requiring commitment or treatment. Where the county attorney is the applicant, it does appear that the county attorney must verify the application stating such belief.

It might be noted, however, that a certain amount of flexibility exists with respect to the contents of the verified application beyond the required statement of the applicant's belief that respondent is a substance abuser. The application is mandated apparently to insure that involuntary commitment proceedings are not brought frivolously and without factual basis. The county attorney may believe a person is a substance abuser who requires involuntary commitment or treatment but he or she may also be primarily relying upon information supplied by other persons. The verified application by the county attorney might, thus, state the county attorney's belief and then refer to incidents in support of that belief which are based upon the accounts of others who have supplied affidavits as to the truth of the facts alleged. The application must be supported by such affidavits where the county attorney has no personal knowledge of such facts. Section 125.75(3)(b). In addition, if the county attorney is relying on the opinion of a physician who has had cause to observe the respondent, a statement of the physician should be attached to the application. Section 125.75(3)(a). Other corroborative facts may also be provided.

Your third question concerns the liability of the county attorney in maintaining an action for commitment. While protection of certain persons from civil liability when acting in certain situations is directly provided for in the Act,[3] such immunity is not specifically guaranteed applicants, including county attorneys, who proceed in good

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[3] Iowa Code § 125.91(4) (1983) provides that emergency detention of a person in accordance with the procedures and time periods of the Act "shall not render the peace officer, physician, or facility detaining the person liable in a criminal or civil action for false arrest or false imprisonment if the peace officer, physician, or facility had reasonable grounds to believe that the circumstances described in subsection 1 were applicable." 1982 Iowa Acts, H.F. 2426, ch. 1212, section 19(4).

Iowa Code § 125.34 (1983), as amended, states: "A licensed physician and surgeon or osteopathic physician and surgeon, facility administrator, or an employee or a person acting as or on behalf of the facility administrator, is not criminally or civilly liable for acts in conformity with this chapter, unless the acts constitute willful malice or abuse. 1982 Iowa Acts, H.F. 2426, ch. 1212, section 24(7).

faith or otherwise in the filing of an application. General principles of law governing immunity of a county attorney from suit must, therefore, be examined.

The leading case concerning prosecutorial immunity is Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). The question before that Court was whether a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution was amenable to suit under 42 U.S.C. § 1983 for alleged deprivation of defendant's constitutional rights. Defendant Imbler claimed that the prosecuting attorney, Pachtman, had knowingly used false testimony and suppressed material exculpatory evidence at defendant's criminal trial. The Supreme Court explored common law principles of immunity from suit for prosecuting attorneys and concluded that the same absolute immunity enjoyed by prosecutors at common law should extend to § 1983 actions. The test for determining whether absolute immunity should attach to the activities of a prosecutor is a functional one. A prosecutor engaging in advocating or quasi-judicial activities is entitled to absolute immunity whereas a prosecutor engaging in investigative or administrative activities is entitled to only qualified immunity. Id. at 430, 96 S.Ct. 994, 47 L.Ed.2d at 143. See also Gray v. Bell, 542 F.Supp. 927, 929-930 (D. D.C. 1982).

The Iowa Supreme Court has also addressed the issue of prosecutorial immunity and has basically adopted the Imbler approach. Moser v. County of Black Hawk, 300 N.W.2d 150, 152 (Iowa 1981); Burr v. City of Cedar Rapids, 286 N.W.2d 393, 394-396 (Iowa 1979); Blanton v. Barrick, 258 N.W.2d 306, 308-310 (Iowa 1977). The Iowa court has stated that "prosecutors, as quasi-judicial officers, are generally cloaked with the same immunity afforded judges when their duties are primarily judicial--the filing and vigorous prosecution of criminal charges." Burr, 286 N.W.2d at 395; Blanton, 258 N.W.2d at 308. See also Gartin v. Jefferson County, 281 N.W.2d 25, 29-30 (Iowa Ct. App. 1979) (prosecutors are absolutely immune from liability for the performance of official acts). The Iowa court also recognizes the functional approach adopted by Imbler for determining whether absolute or qualified immunity should attach to the acts performed by a prosecuting attorney in the course of fulfilling his or her official duties. Burr, 286 N.W.2d at 395-396. Acts which are intimately associated with the judicial phase of the criminal process are granted absolute immunity. Id. at 396.

The filing of an application by a county attorney for the involuntary commitment of a substance abuser is not a criminal prosecution, nor is the county attorney mandated to file such applications. It is our opinion, however, that absolute immunity should nonetheless attach to such an activity. The Iowa cases cited above all involve criminal prosecutions so their holdings necessarily address the criminal functions of the prosecutors involved. Both Burr, 286 N.W.2d at 395, and Blanton, 258 N.W.2d at 308, however, cite favorably to the following language:

> The prosecuting attorney is, as a matter of public policy, immune from civil liability for acts done in his official capacity, and this is true even though he has acted wilfully or maliciously, where he has acted in the proper performance and course of his duties. Acting as he does in a judicial or quasi-judicial capacity, he enjoys the same immunity from liability for damages that protects a judge. However, since immunity is conferred on the prosecuting attorney solely by virtue of the office he holds, the rule is different if he acts in a matter clearly outside the authority or jurisdiction of his office.

(Emphasis added) 63 Am.Jur.2d Prosecuting Attorneys § 34 at 361 (1972). While county attorneys generally are involved heavily in criminal matters, many of their duties and functions involve matters of a non-criminal nature as well. See Iowa Code § 336.2 (1981). The above language appears to indicate that immunity derives from the nature of the function performed by a county attorney in the course of fulfilling the duties and responsibilities of his or her office whether civil or criminal in nature.

The Imbler case, as well as the Burr and Blanton cases, certainly indicate that the initiation of an action in a court of law by a county attorney acting within the scope of his or her authority is a quasi-judicial function deserving of the protection of absolute immunity whether the action be civil or criminal in nature. The act of filing an application for the involuntary commitment or treatment of a substance abuser, while a discretionary function, is clearly an activity that falls within the scope of the county attorney's authority; such activity also is a quasi-judicial function. Consequently, it is our belief that absolute immunity would

attach to the action of a county attorney in filing an application for involuntary commitment or treatment of a substance abuser.

Apparently the Iowa Supreme Court has not directly addressed the issue of absolute immunity for county attorneys in bringing civil suits. At least two federal courts have determined, though, that no reason exists to distinguish between absolute immunity for the prosecution of a criminal matter and absolute immunity for the initiation of a civil suit by a county attorney. Flood v. Harrington, 532 F.2d 1248, 1251 (9th Cir. 1976); Carlsberg v. Gatzek, 442 F.Supp. 813, 817 (D.C. Cal. 1977). As the Flood court stated: "Nor do we see any significant reason to distinguish actions involving underlying criminal prosecution. The reasons supporting the doctrine of absolute immunity, Imbler, 424 U.S. at 424-429, 96 S.Ct. at 992-995, 47 L.Ed.2d at 140-143, apply with equal force regardless of the nature of the underlying action." Flood, 532 F.2d at 1251. The holdings in these two federal cases support our above opinion that absolute immunity should attach to the action by a county attorney in filing an application for the involuntary commitment or treatment of a substance abuser.[4]

Recent amendments to Iowa Code chapter 613A also provide further protection for county attorneys in the performance of statutorily-mandated duties as well as discretionary duties. Chapter 613A concerns the tort liability of governmental subdivisions. Section 613A.2, as amended by 1982 Iowa Acts, ch. 1018, Senate File 474, section 3, states in part: "Except as otherwise provided in this chapter, every municipality is subject to liability for its torts and those of its officers and employees acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function." By virtue of chapter 613A, "[a]ny common-law immunity in tort previously accorded governmental subdivisions was eliminated except for those torts specifically excluded by § 613A.4." Symmonds v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 242 N.W.2d 262, 264 (Iowa 1976).

Section 613A.4 generally provides that "[t]he liability imposed by section 613A.2 shall have no application to any

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[4] It should be noted that while absolute immunity might attach to the activities of county attorneys, depending upon the circumstances, other liability might arise, such as criminal liability or ethical liability under rules of professional conduct. See Imbler, 424 U.S. at 429, 96 S.Ct. 984, 47 L.Ed.2d at 142-143; Blanton, 258 N.W.2d at 311-312.

claim enumerated in this section." Four specific claims are enumerated, including the following:

> Any claim based upon an act or omission of an officer or employee of the municipality, exercising due care, in the execution of a statute, ordinance, or regulation whether the statute, ordinance or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the municipality or an officer or employee of the municipality.

Iowa Code § 613A.4(3) (1981), as amended, 1982 Iowa Acts, ch. 1018, Senate File 474, section 4 [Emphasis added]. We believe protection from liability would also be accorded county attorneys pursuant to this provision. Section 613A.8, as amended by Senate File 474, section 6, however, must be noted with respect to punitive damages and willful and wanton acts or omissions.

Your final question is whether the legislature has indicated when a county attorney should maintain an action for involuntary commitment or treatment. It is interesting to note at the outset that chapter 229, a parallel statute involving involuntary hospitalization of the mentally ill, makes no reference to applications filed by county attorneys, Iowa Code § 229.6 (1981), although it could be argued that a county attorney could file such an application as an interested person.

In looking at the legislative history briefly noted above, it is apparent that House File 2426, as originally introduced, envisioned that all proceedings for involuntary commitment or treatment, while commenced by interested persons, would, in essence, be prosecuted by the county attorneys. Subsequent amendments indicate that the legislature, while not opposed to applications by county attorneys, did not believe that all such actions should be maintained by the county attorneys. No reason is apparent in reading the minimal legislative history available on this Act which might explain the motives of the legislature in amending the bill as proposed. It would be reasonable to suggest that the legislature felt it would be unrealistic and overly burdensome for county attorneys to become involved in a matter which is generally more personal and domestic in nature.

Consequently, neither legislative history nor the language of the Act provide direct assistance in determining

when the legislature believed county attorneys should maintain an action for involuntary commitment or treatment of a substance abuser. Generally it would seem that actions for commitment or treatment should be instituted by family and/or friends close to an alleged substance abuser who would have knowledge of facts to support an application. There may be situations, however, where a person who appears to be a substance abuser has no ties to particular persons or has family or friends who will not take action for commitment or treatment. Also there may be situations where a substance abuser comes to the attention of a county attorney because of a crime or crimes committed by that person or because that person, through his or her actions while under the influence of one or more chemical substances, in some other way poses a threat to others in the community. It is in situations such as these that a county attorney may, in his or her discretion and where appropriate, choose to initiate or become involved in proceedings for the involuntary commitment of a substance abuser.

In conclusion, it is our opinion that 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 apply to actions filed by a county attorney for the involuntary commitment or treatment of a substance abuser; furthermore, § 613A.4 provides additional protection for county attorneys. Neither legislative history nor language in the Act itself provides guidance on when a county attorney should consider the filing of an application for involuntary commitment or treatment, and yet, there are certain situations where a county attorney may choose to initiate or become involved in an involuntary commitment proceeding.

Sincerely yours,

Jeanine Freeman

JEANINE FREEMAN
Assistant Attorney General

JF:rcp

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 4, 1983

The Honorable Catherine Tinker
Webster County Attorney
Courthouse
Fort Dodge, Iowa 50501

Dear Ms. Tinker:

We are in receipt of an opinion request from the former Webster County Attorney concerning self-supported municipal improvement districts. Specifically, our office has been asked:

1. Should machinery and equipment be taxed as real estate in a Self-Supported Municipal Improvement District?

2. Should utilities be taxed as real estate within the Self-Supported Municipal Improvement District?

3. Should personal property be taxed as real estate within the Self-Supported Municipal Improvement District?

Self-supported municipal improvement districts are provided for in Iowa Code Chapter 386 (1981). That Chapter authorizes a municipality to create three district funds: an operation fund, see Iowa Code § 386.8 (1981), a capital improvement fund, see Iowa Code § 386.9 (1981), and a debt service fund. See Iowa Code § 386.10 (1981). With the creation of each fund, a municipality "may certify taxes . . . each year to be levied for the fund against all of the property in the district." [Emphasis added] Iowa Code §§ 386.8, 386.9, and 386.10 (1981).

The chapter contains its own definition of property. "Property," according to Iowa Code § 386.1(7) (1981), "means real

property as defined in section 4.1, subsection 8." That definition is in conflict with Iowa Code § 427A.1 (1981) which has a specific list of what is deemed real property for property tax purposes. To the extent that the definition of real property in Iowa Code §§ 4.1(8) and 427A.1 (1981) overlap, it appears that they are congruent. Nevertheless, Iowa Code Chapter 386, because it was adopted subsequent to Iowa Code Chapter 427A and as a statute authorizing a special tax, is a more specific statute. As a specific statute, and because the legislature expressly included its own definition for purposes of Iowa Code Chapter 386, the definition of property taxes generally in Iowa Code Chapter 427A is inapplicable to a determination of whether property is subject to taxation under Iowa Code Chapter 386.

The specific definition of property subject to taxation under Iowa Code Chapter 386 is the definition of real property contained in Iowa Code § 4.1(8) (1981). That is the general definition of real property used elsewhere in the Code. It defines real property to include, "lands, tenements, hereditaments, and all rights thereto and interests therein, equitable as well as legal." The phrase "lands, tenements, [and] hereditaments" is a restatement of the common law definition of real property. See 1 Thompson on Real Property (1980 Replacement), Chapter 1, § 22. Therefore, in determining whether property is property subject to taxation under Iowa Code Chapter 386, we look to the common law definition of real property, in accordance with the definition in Iowa Code § 4.1(8) (1981), rather than statutory construction of Iowa Code Chapter 427A.

At common law, real property signified the interest in such things as are permanent, fixed and immovable, as lands, and rights arising out of, or connected with, lands. See 73 C.J.S., Property, § 7, p. 158 (1951). Also, the term was used to designate rights arising out of, or connected with, lands; including land and whatever is erected or growing on, or affixed to, the land. Id. As a general rule, real property constitutes whatever underlies or forms a part of the surface of the earth, voluntarily grows on or is permanently attached to the land, and is essential to the use and enjoyment of the land. See 1 Thompson on Real Property (1980 Replacement), Chapter 1, § 22.

The Iowa Supreme Court has examined the definition of real property in a statute similar to Iowa Code § 4.1(8) (1981), including use of the phrase "land, tenements, [and] hereditaments." In Oskalooska Water Co. v. Board of Equalization, 84 Iowa 407, 51 N.W. 18 (1892), the Supreme Court held that buildings and machinery of a waterworks company were, for purposes of taxation, real property. Pertinent to the Supreme Court's decision was the attachment of the buildings and machinery to the land in a manner adopted for permanent structures. 84 Iowa at

411, 51 N.W. at 19. Also, relevant to the Court's finding was the designated use of the buildings and machinery as part of the freehold. Id. Accordingly, the Iowa Supreme Court, in determining whether property was real property subject to taxation under a statute similar to Iowa Code § 4.1 (1981), focused on the attachment to the land, the permanent nature of the structure, and the use of the attachment as a part of the freehold.

Finally, we draw attention to the law of fixtures in Iowa. Considerations as to whether an item is real property as a fixture include: (1) annexation to the realty, actual or constructive, (2) adoption or application to the use or purpose to which that part of the realty to which it is connected is appropriated, and (3) intention to make the article a permanent accession to the freehold. See Marty v. Champlin Refining Co., 240 Iowa 325, 36 N.W.2d 360 (1949).

With the foregoing serving as background, we now focus on the three items concerning which you have inquired. The first item we examine, machinery and equipment, cannot be predetermined as either real or personal property. A final determination will require a consideration of Iowa's law of fixtures. Accordingly, machines 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.

A determination of whether utility property is to be taxed under Iowa Code Chapter 386 requires an understanding of the methodology of assessment of such property. For purposes of this opinion, the term "utility property" includes operating property assessed by the department of revenue in accordance with Iowa Code §§ 428.24 to 428.29 and Iowa Code Chapter 433, 434, 436, 437 and 438. See also department of revenue rules 730 I.A.C. chs. 76 and 77. Nonoperating utility property and all other property is assessed by local assessing officials.

Pursuant to Iowa Code § 427A.1(1)(h), all operating utility property is assessed as real property by the department of revenue. In making such assessments, the department does not establish a value for items of personal property and real property separately, but rather establishes a "unit value" of the entire operating real and personal property of the taxed utility.

If the utility has operating property within and without Iowa, the total unit value established for the entire property of the utility must be allocated to Iowa by means of an apportionment formula. See department rules 730 I.A.C. § 76.8 and 730 I.A.C. § 77.9. See also Norfolk & Western Railway Co. v. Missouri State Tax Commission, 390 U.S. 317, 19 L.Ed.2d 1201, 88

S.Ct. 995 (1968). In addition, after the Iowa portion of the unit value is determined, such Iowa portion must be allocated again to the appropriate county where some operating property of the utility is located. See Iowa Code §§ 433.8, 434.17, 437.9, and 438.14.

Even if the utility's property is wholly located in the State of Iowa, the department must still make an allocation of Iowa unit value to the appropriate counties where any portion of the total property is located.

While Iowa Code § 386.8 imposes the property tax for self-supported municipal improvement districts, the statute does not purport to determine the methodology of property valuation. It is our understanding that the "unit value" method for utilities, in which the operating real and personal property is valued as one unit, is generally appropriate for determining the assessed value of utility operating property. See Chicago and Northwestern Railway Company v. Iowa State Tax Commission, 257 Iowa 1359, 137 N.W.2d 246 (1965).

In light of the use of the "unit value" methodology for assessing utility operating property and the allocation of that unit value to the appropriate geographical source in Iowa, it is a virtual impossibility for utility real property, as defined in Iowa Code § 386.1(7), to be separately assessed by the department. In the construction of statutes, unreasonable and absurd consequences should be avoided. Isaacson v. Iowa State Tax Commission, 183 N.W.2d 693 (Iowa 1971).

By reason of the foregoing discussion, a reasonable interpretation of the interplay of Iowa Code §§ 386.1(7) and 386.8 is that operating property of utilities, assessed by the department of revenue, does not come within the contours of the tax imposed in Iowa Code Chapter 386. This construction is reasonable in light of the impossibility of actual segregation of value of real and personal operating property of utilities. Iowa Code Chapter 386 can be reasonably construed to encompass within the § 386.8 property tax all nonoperating utility property and other locally assessed property (except residential property expressly exempted from the tax).

The final item we examine, personal property, is summarily resolved. Personal property includes everything which is the subject of ownership not coming under the denomination of real property. See A. C. Gingerich v. Protein Blenders, Inc., 250 Iowa 654, 95 N.W.2d 522 (1959). Therefore, personal property is not property subject to taxation under Iowa Code Chapter 386.

In summary then, 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.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/jkp

cc: Monty L. Fisher

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 3, 1983

The Honorable Richard A. Johnson
Chairman
State Appeal Board
State Capitol
L O C A L

Dear Mr. Johnson:

The State Appeal Board has requested an opinion of the Attorney General on the following question:

> May the levy authorized by § 346A.2, Iowa Code (1983) be used to fund the provision of services at county health centers, or is the use of that levy limited to the provision of physical space for a county health center?

STATUTES

Pertinent statutes include the following:

* * *

> 2. 'Health Center' means a building or buildings, together with necessary equipment, furnishings, facilities, accessories and appurtenances and the site or sites therefor used primarily for the purposes of providing centralized locations, at which a county having a population as required by section 346A.2 may:
>
> a. Provide those health, welfare and social services which such a county is presently or hereafter authorized or required by law to provide;

> b. Lease space in such building or buildings to other public corporations, public agencies and private nonprofit agencies which provide health, welfare and social services.
>
> * * *

Section 346A.1(2), Iowa Code (1983).

> Counties having a population over seventy thousand, as determined by the last official United States census, may undertake and carry out any project as defined in section 346A.1, and the boards may operate, control, maintain and manage health centers and additions to and facilities for health centers. The boards may appoint committees, groups, or operating boards as they may deem necessary and advisable to facilitate the operation and management of health centers, additions and facilities. A board may lease space in any health center to other public corporations, public agencies and private nonprofit agencies engaged in furnishing health, welfare and social services which lease shall be on terms and conditions as the board deems advisable. All contracts for the construction, reconstruction, completion, equipment, improvement, repair or remodeling of any buildings, additions or facilities shall be let in accordance with section 331.341, subsection 1. To pay the cost of operating, maintaining and managing a health center the board of any such county may levy an annual tax in accordance with section 331.422, subsection 21.

Section 346A.2, Iowa Code (1983).

Ch. 117, § 421(21), Acts of the 69th G.A., 1981 Session which, in pertinent part, provides:

> The board [of supervisors] may levy the following taxes each year on the assessed value of all taxable property in the county, except as otherwise provided by state law:
>
> * * *

> For operation, maintenance, and management of a health center in a county of over seventy thousand population, not to exceed fifty-four cents per thousand dollars, in addition to all other levies authorized by law for similar purposes.
>
> * * *

Finally, in 1982, the Legislature, in Ch. 1156, Acts of the 69th G.A., 1982 Session, amended the above statutes to extend the application of this levy to all counties, eliminating the requirement that they have a population of over 70,000.

OPINION

It is our opinion that § 346A.2, Iowa Code (1983), allows the use of the authorized levy to fund the provision of services at county health centers, as well as funding the provision of physical space.

BACKGROUND

On two previous occasions, our office has informally advised the Supervisor of County Budgets that § 346A.2, Iowa Code (1981), authorized the use of this tax levy for the provision of services as well as facilities. (See attached letter from Fortney to Snyder (10-9-81); and Weeg to Snyder (9-2-82). We believe the conclusion in both of these letters is accurate and see no reason to change the advice we have previously given.

While our opinions do not normally make factual determinations, some factual background is instructive here. Chapter 346A, Iowa Code (1983), was originally enacted in 1967. Since then, Scott, Linn, Dallas, Dubuque, Story, Black Hawk, Johnson and Woodbury counties have all established county health centers and use the § 346A.2 levy, in varying degrees, to provide services at the centers as well as providing the physical space itself. No state audits of these expenditures for services pursuant to § 346A.2 have criticized these expenditures or suggested they were illegal. In addition, counties have previously relied upon the advice of the Supervisor of County Budgets that this levy could be used to provide services with emphasis on the word "provide." (See attached letter, Schneider to Wierson, Scott County, 11-26-79).

In short, the use of this levy to fund the provision of services is an established practice. Counties have relied upon this levy in the past, and it is now part of their budgeting pattern. While this is not itself determinative, it is a pertinent consideration in rendering an opinion which would reverse this practice.

RATIONALE

We believe there is ample justification for the legal interpretation which has been heretofore applied to § 346A.2.

The construction of § 346A.2 is influenced by its interrelationship with § 346A.1(2). When the language of this subsection is boiled down to its essentials, it reads as follows:

> 'Health Center' means a building at which a county may provide health, welfare, and social services which a county is authorized or required by law to provide.

Similarly, pertinent § 346A.2 language simplifies to:

> [counties] are authorized to operate, control, maintain and manage health centers.

The definition of health center set forth above, standing alone, could lead one to believe that the levy authorized in § 346A.2 can be used only for a building, i.e. providing physical space. This would be true if the statute read merely "Health Center means a building." But that is not the case. The term "building" is modified by the words "at which a county may provide health, welfare, and social services which a county is authorized or required by law to provide."

In interpreting statutes, all parts must be considered together without giving undue importance to one single or isolated portion. Peffers v. City of Des Moines, 299 N.W.2d 675 (Iowa 1980). Effect is to be given a statute in its entirety and the statute should be construed in such manner that no part will be rendered superfluous. Millsap v. Cedar Rapids Civil Service Comm'n., 679 (Iowa 1977).

In applying these rules of statutory construction to § 346A.1, it is apparent that effect must be given to all the language modifying "building", not just the word building. When this is done, it is our opinion that the Legislature intended that the term "health center" includes more than bricks and mortar. It also includes the services provided.

It could be argued that the modifying language in § 346A.1(2)(a) is simply a recognition of other statutes which require that certain services be provided by counties. However, as noted in Ms. Weeg's letter of 9-2-82, we do not believe that to be the case, since the language allows counties to provide at health centers services which they are authorized to provide, as well as required to provide. Under county home rule, counties may provide any services they are not prohibited from providing by state law. Thus, the statute would seem to contemplate that Chapter 346A may be used to fund health center services not expressly set out by statute.

In § 346A.2 itself, the statutory construction centers on the word "operate." In the absence of statutory definitions, terms in a statute are attributed their ordinary meaning. State v. Jackson, 305 N.W.2d 420 (Iowa 1981). The word "operate" is defined by Webster's New World Dictionary as "to be in action so as to produce an effect; act; function; work." Courts have also followed this definition. State v. Thompson, 224 Iowa 499, 276 N.W. 619, 620 (1957).

Thus, in this statute, "operate a health center" means to produce an effect in a health center, or make it function or work. We are of the opinion that this means to carry out the services provided with a health center, not merely operate a building. The word "maintain" would adequately cover that. "Operate," we believe, has a broader meaning here.

It should be noted that the Legislature has recently amended § 346A.2 twice. In 1981, as a part of county home rule implementation the last sentence was altered by moving the levy authorization from § 346A.2 to § 331.422(21), Iowa Code (1983), set out at the start of this opinion (Ch. 117, § 921(21) Acts of the 69th G.A., 1981 Session). This language authorizes a tax of fifty-four cents per thousand dollars of valuation for operation of a health center "in addition to all other levies authorized by law for similar purposes." This underlined language is very significant in that it shows that the Legislature recognized that other levies may be authorized to provide services at a health center, and that the Legislature intended to make clear that this levy was in addition to those levies. The § 346A.2 levy did not supplant those other levies, nor do other levies limit by inference the use of the § 346A.2 levy.

In 1982, the Legislature extended the use of § 346A.2 to all counties, regardless of population. Previously, it had been limited to counties with populations over 70,000.

Both the 1981 and 1982 legislative enactments are significant because they occurred at a time when counties were using the § 346A.2 levy for provision of services at health centers. In the face of this fact, the Legislature did nothing to change this practice, despite debating and amending § 346A.2 in two consecutive years. This is certainly legislative acquiescence in this use of the § 346A.2 levy and, we believe, evidence of legislative intent that this levy be used to provide services.

CONCLUSION

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.

Sincerely,

Earl M. Willits

EARL M. WILLITS
Deputy Attorney General

EMW:sh

Attachments

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 3, 1983

Mr. Bruce Foudree
Commissioner of Insurance
Insurance Department
Lucas State Office Building
L O C A L

Dear Mr. Foudree:

You have requested an opinion of the Attorney General concerning the maintenance of investigative files and the conduct of disciplinary hearings for licensed insurance agents by the Insurance Department. You indicate that you are concerned about the confidentiality of investigative files and disciplinary hearings maintained and conducted, respectively, pursuant to Chapters 507B and 522 of the Code. You further indicate that you have treated these matters as confidential under the terms of Chapter 258A. You specifically pose the following questions:

> 1. When a notice of intended action has not yet been issued to an insurance agent licensee by the Insurance Department, or where a disciplinary hearing has not yet been commenced against an insurance agent licensee by the Department, are the confidentiality requirements of Section 258A.6(4) of the Code applicable to complaints, investigation data, information, and evidence which are in the Department's possession and which are being relied upon by the Department to conduct its investigation or to determine whether it should institute disciplinary proceedings against an insurance agent licensee?

2. Are disciplinary proceedings commenced under Chapters 17A, 522, and 507B of the Code subject to the directive of Section 258A.6(1) of the Code, that "[n]otwithstanding Chapters 17A and 28A a disciplinary hearing shall be open to the public at the discretion of the licensee."?

In our opinion 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.

The conduct of investigations and disciplinary hearings by a wide range of professional and occupational licensing boards is controlled by Chapter 258A of the Code. The Commissioner of Insurance is specifically included as a licensing board with respect to a statutorily described class of insurance agents. This class of insurance agents includes agents licensed pursuant to Chapter 522 except those agents authorized to sell only credit life and credit accident and health insurance. Iowa Code § 258A.1(1)(z) (1981).

Chapters 507B and 522 of the Code to which you refer authorize initiation of disciplinary action against licensed insurance agents. Chapters 507B and 522 of the Code predate Chapter 258A. Chapter 507B authorizes the Commissioner to conduct hearings against persons including licensed insurance agents upon reason to believe the person "has been engaged or is engaging in any unfair method of competition or any unfair or deceptive act or practice" when a hearing would be in the interest of the public. Iowa Code §§ 507B.2(1), 507B.6, 507B.7 (1981). Chapter 522 authorizes the Commissioner to suspend or revoke the license of an insurance agent after hearing for good cause. Iowa Code § 522.3 (1981).

Proceedings initiated against licensed insurance agents, as limited in § 258A.1(1)(z), under either Chapter 507B or Chapter 522 would constitute "disciplinary proceedings" within the meaning of Chapter 258A. A disciplinary proceeding means "any proceeding under the authority of a licensing board pursuant to which licensee discipline may be imposed." Iowa Code § 258A.1(2)(6) (1981). "License discipline," in turn, means "any sanction a licensing board may impose upon its licensees for conduct which threatens or

denies citizens of this state a high standard of professional or occupational care." Iowa Code § 258A.1(2)(5) (1981). Proceedings under either Chapter 507B or Chapter 522 may result in suspension or revocation of a license. See Iowa Code §§ 507B.7(1)(b), 522.3 (1981). Suspension or revocation of a license under these chapters, moreover, is specifically included as licensee discipline which may be imposed pursuant to Chapter 258A. Iowa Code § 258A.3(2)(a) (1981).

The confidential nature of investigative files which relate to licensee discipline is controlled by § 258A.6. Section 258A.6(4) provides, in relevant part, that "all complaint files, investigative files, other investigative reports, and other investigative information in the possession of a licensing board . . . or its employees or agents which relates to licensee discipline are privileged and confidential, and are not subject to discovery, subpoena, or other means of legal compulsion for their release to a person other than the licensee and the boards, their employees and agents involved in license discipline, and are not admissible in evidence in a judicial or administrative proceeding other than the proceeding involving licensee discipline." Iowa Code § 258A.6(4) (1981) as amended 1982 Iowa Acts, ch. 1005, § 8. Construing this language, the Iowa Supreme Court has ruled that investigative information in the possession of a licensing board is confidential under § 258A.6(4). Doe v. Iowa State Board of Physical Therapy and Occupational Therapy Examiners, 320 N.W.2d 557, 561 (Iowa 1982). If and when a disciplinary proceeding is initiated against the licensee, disclosure may be made to the licensee. Id. at 560-561. Accordingly, we must conclude that complaints, investigative data, information, and other evidence 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.

Chapter 258A addresses not only the investigation stage but also the hearing stage of the disciplinary process. Section 258A.6(1) specifically provides that "[n]otwithstanding Chapters 17A and 28A a disciplinary hearing shall be open to the public at the discretion of the licensee." Iowa Code § 258A.6(1) (1981).

We find no authority which would render § 258A.6(1) inapplicable to disciplinary proceedings commenced under Chapter 17A of the Code. The language of § 258A.6(1) originally provided that "[n]otwithstanding Chapter 28A a

disciplinary hearing shall be open to the public at the discretion of the licensee." 1977 Iowa Acts, ch. 95, § 6. In a 1978 opinion we pointed out that Chapter 17A provides that contested case proceedings shall be open to the public. See Iowa Code § 17A.12(7) (1981). We concluded, based on an analysis of Chapter 17A, that the requirement that contested case proceedings be open to the public was not overridden by Chapter 258A in absence of specific reference to Chapter 17A. 1978 Op.Att'yGen. 564, 564-565. Section 258A.6(1), however, was subsequently amended by the legislature to expressly override this requirement of Chapter 17A. See 1980 Iowa Acts, ch. 1012, § 32.

Similarly, we find no authority which would render § 258A.6(1) inapplicable to disciplinary proceedings commenced under Chapter 507B or 522 of the Code. Neither of these chapters addresses the question whether such hearings are open to the public. In order to resolve the question whether disciplinary hearings commenced under Chapter 507B or 522 are subject to the specific provisions of § 258A.6(1), we apply principles of statutory construction. Generally, statutes in pari materia should be harmonized to the extent possible. State v. Stands, 280 N.W.2d 370, 371 (Iowa 1979). Because Chapters 507B and 522 do not address the question of open hearings and because § 258A.6(1) authorizes disciplinary hearings to be open at the discretion of the licensee, the statutes may be harmonized by giving effect to § 258A.6(1). Accordingly, we advise that disciplinary hearings against licensees who are subject to Chapter 258A are open to the public at the discretion of the licensee.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:rcp

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 1, 1983

John L. Sandy
Dickinson County Attorney
710 Lake Street
Spirit Lake, Iowa 51360

Dear Mr. Sandy:

You have requested the opinion of this office concerning an interpretation of the operating while intoxicated (OWI) statute, Iowa Code § 321.281 (1981); as amended 1982 Iowa Acts, Ch. 1167, § 5. The question posed is whether the enhanced penalty provisions for multiple offenders are applicable to those defendants whose prior offenses have occurred in a state other than Iowa.

An answer to your question requires an analysis of this chapter under well settled rules of statutory construction. The polestar of statutory interpretation is legislative intent. State v. Conner, 292 N.W.2d 682, 684 (Iowa 1980). To determine that intent, courts may properly consider the evil sought to be remedied and the purposes or objectives of the enactment. State v. Williams, 315 N.W.2d 45, 49 (Iowa 1982). However, "[i]t is settled rule in this state that criminal statutes are to be strictly construed, and not extended to include an offense not clearly within the fair scope of the language employed." State v. Wilson, 287 N.W.2d 587, 589 (Iowa 1980) quoting State v. Campbell, 217 Iowa 848, 853, 251 N.W. 717, 719 (1933).

Relevant portions of section 321.281 provide:

> 1. A person shall not operate a motor vehicle upon the public highway of this state in either of the following conditions:
>
> a. While under the influence of an alcoholic beverage, a narcotic, hypnotic, or other drug, or any combination of such substances.
>
> b. While having thirteen hundredths or more of one percent by weight of alcohol in the blood.
>
> 2. A person convicted of a violation of this section, upon conviction or a plea of guilty, is guilty of:
>
> a. A serious misdemeanor for the first offense and shall be imprisoned in the county jail for not less than forty-eight hours, less credit for any time the person was confined in a jail or detention facility following arrest. The court may accommodate the sentence to the work schedule of the defendant.
>
> b. An aggravated misdemeanor for a second offense and shall be imprisoned in the county jail or community-based correctional facility not less than seven days, which minimum term cannot be suspended notwithstanding section 901.5, subsection 3 and section 907.3, subsection 2.
>
> c. A class "D" felony for a third offense and each subsequent offense.
>
> No conviction for, or plea of guilty to, a violation of this section which occurred more than six years prior to the date of the violation charged shall be considered in determining that the violation charged is a second, third, or subsequent offense.

(emphasis added).

The substantive offense defined in section 321.281(1) is restricted to violations which occur "upon the public highways of this state." Obviously, the State of Iowa has no power to regulate conduct that occurs outside its boundaries. The State can, however, enhance the penalty for an offense committed in Iowa based on prior convictions that were had in other states. See Iowa Code § 902.8 (1981) (Minimum sentence--habitual offender). The question, here, is whether the legislature in section 321.281(2) did in fact do so.

The crucial language of subsection 2 refers only to "[a] person convicted of a violation of this section." (emphasis added). The terms "second offense" and "third offense" used in sections 321.281(2)(b) and (c), as does the term "first offense" in section 321.281(2)(a), refer to "a violation of this section." As noted above, the substantive offense of OWI is limited to violations which occur in Iowa. Thus, construction of the statute, specifically the language of subsection 2, limits the enhanced penalty provisions to prior offenses that were committed in Iowa.

A comparison of the language of the OWI statute to Iowa's habitual offender statute reinforces our opinion.

> 902.8 Minimum sentence--habitual offender. An habitual offender is any person convicted of a class "C" or a class "D" felony, who has twice before been convicted of any felony in a court of this or any other state, or of the United States. An offense is a felony if, by the law under which the person is convicted, it is so classified at the time of his or her conviction.

(emphasis added). The habitual offender statute clearly contemplates and specifically states that prior convictions from other jurisdictions can be used as a basis for enhanced punishment. The OWI statute contains no such language.

In conclusion, as the OWI statute stands now, the enhanced punishment provisions for multiple offenders are limited to those defendants whose prior offenses have occurred in the State of Iowa.

Sincerely,

Steven M. Foritano

STEVEN M. FORITANO
Assistant Attorney General

SMF:djs

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

Honorable Emil S. Pavich
State Representative
State Capitol
L O C A L

Dear Representative Pavich:

You have requested an opinion of the Attorney General as to whether a county board of supervisors can deny support services such as bookkeeping, accounting, and fiscal services to the county civil defense board.

We understand that the county attorney has already advised the Pottawattamie County board of supervisors that the county is not required to provide the services in question. He based his opinion on the fact that nowhere in the Iowa Code can there be found language making performance of these duties by the county mandatory. We agree with the county attorney's opinion, but with one qualification.

Iowa Code Ch. 29C (1981) sets forth procedures and policies for state and local governmental bodies to follow in providing disaster services and controlling public disorders. This chapter consistently promotes cooperation between governmental bodies and disaster services agencies, but nowhere in this chapter can we find an express requirement that the county provide bookkeeping or other services to joint county-municipal civil defense boards. However, there is one duty imposed on the county that may encompass provision of some services.

There are two statutory provisions which we believe are relevant to the question of administering a disaster services office. One is § 29C.9, which requires that county boards of supervisors and city councils create joint civil defense boards. This section provides in relevant part as follows:

> 1. The county board of supervisors, city councils and boards of directors of school districts shall cooperate with the office of disaster services to carry out the provisions of this chapter. Boards of supervisors and city councils shall form a joint county-municipal disaster services and emergency planning administration. . . . Each county and city located within the county may appropriate money from the general fund of the county or city for the purpose of paying expenses relating to disaster services and emergency planning matters of such joint administration and establish a joint county-municipal disaster services fund in the office of the county treasurer. The county and cities located in that county may deposit moneys in such fund, which fund shall be for the purpose of paying expenses relating to disaster services and emergency planning matters of such joint administration. . . .
>
> 2. No later than November 15 of each year the joint county-municipal disaster services co-ordinator and the joint administration shall prepare a proposed budget of all expenses for the ensuing fiscal year. The proposed budget shall include . . . an itemized list of the proposed salaries of disaster services and emergency planning personnel, their number and their compensation, the estimated amount needed for personnel benefits, travel . . ., supplies and material, equipment, and other services needed. Each year, the chairperson of the joint administration shall, by written notice, call a meeting of the joint administration to consider such proposed budget. . . . At such meeting, the joint administration shall authorize:
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> * * *

> a. The number of personnel for disaster services and emergency planning activities, . . .
>
> b. The salaries and compensation of disaster services and emergency planning employees. . . .
>
> c. The amount of operating expenses as contained in the proposed budget. . . .
>
> 3. . . . The co-ordinator may, with the approval of the joint administration, employ such technical, clerical and administrative personnel as may be required and necessary to carry out the purposes of this section. The joint administration shall fix the compensation of such persons so employed to be paid out of the disaster services and emergency planning fund created by this chapter.[1] (emphasis added)

* * *

This section does not expressly require a county to provide available services to a joint county-municipal civil defense board. The only mandatory duty imposed on the county by this section is the requirement that a joint disaster services fund be established in the county treasurer's office. This fund is then to be used by the joint county-municipal board to meet the expenses of administering its duties under Ch. 29C. While creation of this fund is not mandatory, the county treasurer does have a mandatory duty to keep this fund if established. Though not expressly stated, it is our opinion that implicit in the requirement that the fund be established in the treasurer's office is the requirement that the treasurer fulfill his or her statutory duties with regard to that fund. For example, Iowa Code § 331.552(3) (1981) requires the treasurer to keep an "account of all receipts and disbursements of the county," and § 331.555 sets forth the treasurer's duties with regard to management of county or other funds created by law. Presumably fulfillment of these statutory duties would include provision of bookkeeping and other accounting services. Therefore, the county would be required to provide bookkeeping and other accounting services to the extent

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[1] In the event of a multi-county agreement to provide joint disaster services, § 29C.10 provides that the governing board is to pay "the salary and expenses of the coordinator and such other necessary expenses as may be incurred."

necessary to comply with the requirement of § 29C.9 that a permissive disaster services fund be established in the county treasurer's office. We can find no requirement in § 29C.9 that the county provide these or other services in any other context.

We further note that § 29C.9 does expressly provide that the joint administration's annual budget is to include salaries of disaster services and emergency planning personnel, and necessary "supplies, materials, equipment and other services needed." It is our opinion that this language authorizes the administration to use monies from the joint county-municipal disaster services fund to purchase bookkeeping, accounting, and other services the administration believes necessary to execute its statutory duties. While Pottawattamie County has apparently been providing these services to the administration in the past at no cost, there is no requirement under this section that the county do so unless these services are rendered by the county treasurer in the course of fulfilling his or her statutory duties relating to the disaster services fund.

The second statutory provision we believe is relevant is § 29C.12, which provides that:

> In carrying out the provisions of this chapter, the governor and the executive director of the department of public defense, and the executive officers or governing boards of political subdivisions of the state shall utilize, to the maximum extent practicable, the services, equipment, supplies, and facilities of existing departments, officers, and agencies of the state and of political subdivisions at their respective levels of responsibility. (emphasis added)

While again not imposing a mandatory requirement on the county, this section does express a strong preference that counties provide existing services to a joint county-municipal administration "to the maximum extent practicable." We believe a county should have specific, articulable, and compelling reasons for not providing the joint administration with existing services, equipment, supplies, and facilities.

We further note that failure to comply with § 29C.12 may affect a joint administration's eligibility for federal funds. First, 650 I.A.C. § 7.1 provides that in order to receive federal assistance or funds, a joint county-municipal administration must meet several eligibility requirements.

In particular, § 7.1(5) provides that a joint administration:

> Comply with standards and procedures required by the Defense Civil Preparedness Agency (DCPA) as specified in the "Federal Assistance Handbook, CPG1-3," December 1976, current copies of which are on file and available for public view in the state office of disaster services.

Thus, while Ch. 29C does not impose a mandatory state law requirement that counties provide bookkeeping and other existing services to joint administrations (with the exception of provision of services relating to the disaster services fund, discussed above), 650 I.A.C. § 7.1(5) indicates there may be federal guidelines that could require provision of such services as a condition to receiving federal aid. See also 650 I.A.C. § 7.7(4) (federal matching funds or surplus property may be withheld in the event a joint administration fails to show continuing program progress, which could occur in the event bookkeeping and other services are not provided by the county).

In conclusion, it is our opinion that 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."

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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)

The Honorable Hurley W. Hall
State Senate
State Capitol Bldg.
Des Moines, Iowa 50309

April 29, 1983

Dear Senator Hall:

You have requested an Opinion of the Attorney General concerning the applicability of Iowa's handicapped parking law, Iowa Code Chapters 104A and 601E (1983). Specifically you ask: Is a large, private manufacturing plant which provides more than one thousand parking spaces for its employees and visitors to the facility required to set aside handicapped parking spaces as provided in Iowa Code §104A.7? What is meant by the term "sign" in §601E.9?

The relevant section of Chapter 104A reads as follows:

> Effective January 1, 1982, all public and private buildings and facilities, temporary and permanent, used by the general public, which are not residences and which provide forty-eight or more parking spaces, shall set aside at least six-tenths of one percent of the parking spaces provided as handicapped parking spaces as defined in section 601E.1. (Emphasis added.)

Sections 601E.9 and .10 contain specifications regarding the handicapped parking sign and the size and location of handicapped parking spaces.

The hypothetical manufacturing plant in your question is clearly a permanent, private, non-residential facility which provides forty-eight or more parking spaces; the only issue is whether it is "used by the general public".

In construing this statutory phrase our goal is to ascertain legislative intent. State v. Prybil, 211 N.W.2d 308 (Iowa 1973). We may not under the guise of construction extend, enlarge or

otherwise change the terms or meaning of a statute. State v. Wedelstedt, 213 N.W.2d 652 (Iowa 1973). Unless otherwise defined by the legislature or the law, we attribute to statutory terms their ordinary and usual meaning. See, e.g., State v. Jackson, 305 N.W.2d 420 (Iowa 1981); State v. Hesford, 242 N.W.2d 256 (Iowa 1976).

We first note that the statutory terms "public" and "general public" are not synonymous. In Iowa Farmers Purchasing Association, Inc. v. Huff, 260 N.W.2d 825, 287 (Iowa 1977), it was held that the statutory term "public", as opposed to "general public", means any group or segment, however characterized, of the aggregate of the citizens of a political entity. Thus, the purchasing association which usually if not always dealt with farmers necessarily dealt with the "public", but not with the "general public". In Chapter 104A, however the term used is "general public", not "public". We must assume that the legislature inserted the word "general" for a purpose. Millsap v. Cedar Rapids Civil Service Commission, 249 N.W.2d 679 (Iowa 1977); Goergen v. State Tax Commission, 165 N.W.2d 782 (Iowa 1969). Each word in a statute must, if possible be given effect. Ledyard Community School District v. County Board of Education of Kossuth County, 261 Iowa 165, 153 N.W.2d 697 (1967).

In McNeill v. McNeill, 166 Iowa 680, 703, 148 N.W. 643, 651 (1914) the word "general" was defined as "extensive, common to many or the majority". In 1976 Op. Atty. Gen. 504, 506-07, this office opined that "general public" as used in Chapter 104A means the public as a whole and is not limited to a particular group. See also 1980 Op.Atty.Gen. 778, 780; Webster's Third New International Dictionary, "general" at 944, and "public" at 1836; Black's Law Dictionary, "general" at 812 and "public" at 1393 (rev. 4th ed. 1968).

These definitions are consistent with the common law of dedication which holds that dedication of a street or other real property must be to the general public, not to an exclusive segment thereof. See, e.g.,Marksbury v. State, 322 N.W.2d 281, 285 (Iowa 1982) (dedication for public use shall be for the use of the public at large, that is, the general, unorganized public, and not for one person or a limited number of persons, or for the exclusive use of restricted groups of individuals); Henry Walker Park Association v. Mathews, 249 Iowa 1256, 91 N.W.2d 703, 710 (1958) (dedication must be to public use); Wolfe v. Kemler, 228 Iowa 740, 293 N.W. 322, 324 (1940) (dedication grants an easement for every individual in a community to pass and repass over the property).

With this background, we return to your question, and note that the hypothetical manufacturing facility is used by two segments of the public--employees and visitors. We will assume for the purposes of this opinion that the parking facilities are used primarily by employees, and that plant "visitors" means business customers, salespersons, prospective employees, etcetera.

If the manufacturing facility and its parking lot were used exclusively by plant employees, we would opine that it would not be subject to the provisions of Iowa Code §§104A.7, 601E.9 and .10. Although plant employees are members of the general public, they constitute a distinct segment which would exclude the vast majority of the public at large. Therefore, the facility would not be "used by the general public," as contemplated by Chapter 104A, but by a small, identifiable, limited number of people.

On the other hand, if the manufacturing facility were used primarily by business invitees, with incidental parking provided for employees, it would be "used by the general public" and require compliance with Chapter 104A.

Where a facility such as your hypothetical manufacturing plant is primarily but not exclusively used by its employees, we encounter a factual, or mixed legal and factual, question as to where to draw the line for requiring compliance with Chapter 104A. See, e.g., Willis v. Pickrick Restaurant, 231 F.Supp. 396 (D.Ga.1964) (since each place of public accommodation conducts an entirely separate operation, factual determination from which court must decide that it either is or is not within class described in civil rights act must be made on circumstances of each case); Wright v. Salisbury Club, Ltd., 479 F.Supp. 378 (D.Va.1979) (whether a particular club is truly private is a determination to be made in light of facts of each case); Cornelius v. Benevolent Protective Order of Elks, 382 F.Supp. 1182 (D.Conn.1974) (in determining whether organization is a "private club" within civil rights act, use of club by nonmembers is one factor which court will consider); United States Jaycees v. McClure, 305 N.W.2d 764 (Minn.1981) (court must examine nature of organization, its membership policies and its activities in order to decide applicability of state civil rights statutes).

Unlike trial courts, the Attorney General's office is not empowered to decide issues of fact, but only issues of law. Iowa Code §13.2(4). Questions submitted must be of a public nature and not relate to a specific private controversy. Id.; see also 1972 Op.Atty.Gen. 686. We therefore decline to decide the factual issue of how much use by visitors as opposed to employees would be necessary to constitute use by the general public.

We also express no opinion concerning compliance with state or federal civil rights law. See, e.g., Iowa Code Chapter 601A; Civil Rights Act of 1964, 42 U.S.C. §§2000a et seq.; Rehabilitation Act of 1973, 29 U.S.C. §§701 et seq.; Architectural Barriers Act of 1968, 42 U.S.C §§4151-4156. It is possible that a facility which complied with the provisions of Chapter 104A could nevertheless be in violation of such laws, particularly if the facility contained establishments on its premises which which would be covered by civil rights law. See, e.g., Adams v. Fazio Real Estate Co., 268 F.Supp. 630 (D.La. 1967) (covered establishment located within otherwise noncovered establishment may by its very presence make larger establishment subject to civil rights act; there is no percentage test and it is not necessary to show that covered establishment occupies a substantial part of the premises, or that its sales are substantial); U.S. v. Medical Society of South Carolina, 298 F.Supp. 145 (D.S.C. 1969) (otherwise noncovered hospital which contained covered snack bar is a covered establishment under civil rights act); Annot., 11 A.L.R. Fed. 753 (1972); 15 Am.Jur.2d Civil Rights §33 (1976).

We note, for example, that the Architectural Barriers Act of 1968 contains language which contrasts sharply with that of Iowa Code §104A.7. The federal act applies to:

> ... any building or facility ... the intended use for which either will require that such building be accessible to the public, or may result in the employment or residence therein of physically handicapped persons, which building or facility is -- [limiting criteria omitted].

42 U.S.C. §4151.

The Iowa legislature had the opportunity to adopt such language in 1974 and 1981 when it amended Chapter 104A, but it

did not do so. Compare Hubbard v. State, 163 N.W.2d 904 (Iowa 1969) (where state legislature adopts federal statute, it is presumed to have same objective in mind and to employ statutory terms in same sense).

You also ask what is meant by the word "sign" in Iowa Code §601E.9, and whether it would include pavement markings. In traffic engineering parlance a "sign" is a mounted, non-electric traffic control device. It is distinct from a "signal" or a "pavement marking". See U.S. Dept. of Transportation, Manual on Uniform Traffic Control Devices for Streets and Highways, 2A-1, 3A-1, 4A-1 (1978). The legislature obviously intended that where handicapped parking spaces are required, they must be designated by a clearly visible mounted device, not merely by pavement markings.

CONCLUSION

It is our opinion that a large, private manufacturing plant which provides more than one thousand parking spaces for the exclusive use of its employees would not be subject to the provisions of Iowa Code §§104A.7, 601E.9 and .10. If such a facility provided parking primarily for its employees but also for business invitees, then it would become an issue of fact as to the point at which the facility became "used by the general public". This office cannot decide issues of fact.

Compliance with Chapter 104A does not necessarily assure compliance with civil rights law.

The word "sign" in §601E.9 means a mounted device, not merely pavement markings.

Sincerely,

R. P. Ewald

ROBERT P. EWALD
Assistant Attorney General

RPE:plr

SCHOOLS: Transportation to Nonpublic Schools. The Code §§ 285.1(2), (14), (16) (1983). In order for the use of the alternative in § 285.1(16)(a) to relieve the district of residence of the duty to provide transportation to a student who attends a nonpublic school ourside 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)

The Honorable Michael W. Connolly
State Representative
House of Representatives
State Capitol

LOCAL

Dear Representative Connolly:

You have asked whether Iowa Code § 285.1(16)(a) permits a school district to meet its duty to provide transportation with respect to a student who attends a nonpublic school located outside the pupil's resident district by simply transporting such a student to a public school within the district of residence.

Subsection 285.1(16)(a) states as follows:

> If the nonpublic school designated for attendance of a pupil is located outside the boundary line of the school district of the pupil's residence, the pupil may be transported by the district of residence to a public school or other location within the district of the pupil's residence. A public school district in which a nonpublic school is located may establish school bus collection locations within its district from which nonresident nonpublic school pupils may be transported to and from nonpublic school located in the district. If a pupil

> receives such transportation, the district of the pupil's residence shall be relieved of any requirement to provide transportation.

See also, 1976 Op.Att'yGen. 850.

A 1975 Attorney General's Opinion, 1975 Op.Att'yGen. 115, construed §§ 285.1(14) and 285.1(16)(a) as follows:

> Assuming that the child attending a nonpublic school designated for attendance lives such a distance from the school that transportation is mandated, the Corwith-Wesley Community school district would be obliged to transport such child to the private school designated for attendance unless the child is transported to and from a school bus collection place located within the district where he attends school by the school district where the nonpublic school is located.

1976 Op.Att'yGen. at 115. That opinion concluded that a school district had three options in providing transportation to its resident students attending a nonpublic school outside the district of residence.

> This transportation may be furnished in any one of the following ways: (1) by taking the child on a school bus operated by the public school district to a spot where the child can be picked up by a school bus of the district in which he attends; (2) by contracting with private parties as provided in § 285.5; or (3) by reimbursing the parents of the students for the cost of transportation in an amount not exceeding forty dollars per pupil per year.

1976 Op.Att'yGen. at 116.

The 1975 opinion was based on § 285.1(16) before the 1975 amendments thereto became effective. These amendments added present § 285.1(16)(b), permitting as an alternative transportation beyond district boundaries by either the district of residence or the district in which the nonpublic school is located. These amendments and Iowa Code § 285.1(17)(c) (1975) to the extent it authorized reimbursement for cross-district transportation were held to constitute an impermissible advancement of religion in violation of the First Amendment in Americans United for Separation of Church and State et al. v. Benton, et al., 413 F.Supp. 955 (S.D. Iowa 1976). The legislature then amended Ch. 285 to provide that a claim for transportation of a resident pupil to a nonpublic school located outside the district of residence "shall not exceed the average transportation costs of the district per pupil transported." Iowa Code § 285.2 (4th unnumbered para.) (1983). This legislative response to the decision in Americans United thus left the earlier statutes intact and resolved the constitutional question by limiting the extent of reimbursement.

The 1975 opinion in effect construed § 285.1(16)(a) in the context of chapter 285 as authorizing a district to meet its duty to provide transportation by transporting pupils to a location within the district if the pupil can obtain transportation from an accessible pickup location in the district in which the nonpublic school is located to the nonpublic school. As in 1976 Op.Att'yGen. 850, these provisions should be read in pari materia with § 285.1(2) by which a student may be required to meet a school bus at a distance of three-fourths of a mile without reimbursement.

While the statutory alternatives are confusing and legislative clarification would be desirable, we do not find the prior opinion to be clearly erroneous, and we therefore follow it here. In order for the use of the alternative in § 285.1(16)(a) to relieve the district of residence of the duty to provide transportation to the 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.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:ab

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 21, 1983

Mr. Ron Walters
Acting Director
Iowa Department of Substance Abuse
202 Insurance Exchange Building
L O C A L

Dear Mr. Walters:

Your office has requested an opinion from this office concerning Iowa Code § 125.45 (1983). In particular, you have raised questions concerning the $500 limitation language for counties found in § 125.45. Specifically you stated:

> We are requesting an opinion that will explore the $500 limitation provision in the Code and clarify what the $500 limitation really means and how the counties can legally interpret that provision. Does the county's obligation extend beyond the $500 limitation? Can county boards legally deny payments after the $500 limitation has been reached? Is the year used the past twelve months, the calendar year, or a fiscal year?

Your questions will be answered by reference to statutory language, principles of statutory construction, and legislative history.

The starting point in the analysis of any statute is the statute itself. United States v. Hepp, 497 F.Supp. 348, 349 (D.C. Iowa) aff'd 656 F.2d 350 (8th Cir. 1980). Iowa Code § 125.45(1) provides as follows:

> Except as provided in section 125.43, each county shall pay for the remaining twenty-five percent of the cost of the care, maintenance, and treatment under this chapter of residents of that county from the levy authorized by section 331.421, subsection 14. The commission shall establish guidelines for use by the counties in estimating the amount of expense which the county will incur each year. The facility shall certify to the county of residence once each month twenty-five percent of the unpaid cost of the care, maintenance, and treatment of a substance abuser. However, the approval of the board of supervisors is required before payment is made by a county for costs incurred which exceed a total of five hundred dollars for one year for treatment provided to any one substance abuser, except that approval is not required for the cost of treatment provided to a substance abuser who is detained pursuant to section 125.91. A facility may, upon approval of the board of supervisors, submit to a county a billing for the aggregate amount of all care, maintenance, and treatment of substance abusers who are residents of that county for each month. The board of supervisors may demand an itemization of billings at any time or may audit them. (Emphasis added.)

The dilemma pointed out by you is apparent in a literal reading of this provision. At the outset, § 125.45(1) states that each county shall pay for the remaining cost of care, maintenance and treatment of residents from that county who receive treatment in a substance abuse facility with whom the Iowa Department of Substance Abuse has a contract of care entered into pursuant to Iowa Code § 125.44. The word "shall" ordinarily imposes a duty. Iowa Code § 4.1(36)(a) (1983). One would conclude after an initial reading of this provision, then, that the counties are required to pick up the twenty-five percent cost. The legislature, however, has added the caveat that the approval of the board of supervisors is needed, with exception,

before payment is made by a county for costs exceeding five hundred dollars for treatment provided to any one substance abuser in one year; the one exception to approval by the board of supervisors is for costs associated with the treatment of substance abusers detained on an emergency basis pursuant to Iowa Code § 125.91. Consequently, the question arises as to whether the counties are required to pay the twenty-five percentage cost of care and treatment of a substance abuser but only up to a five hundred dollar limit in the course of one year of care and treatment.

In seeking to determine the meaning of a statute, the statute must be given a logical, sensible construction while harmonizing the meaning of related sections and accomplishing its legislative purpose. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980). In construing a statute, the main purpose is to give effect to legislative intent; the manifest intent of the legislature prevails over the literal import of words used. Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530, 532 (Iowa 1981). In an effort to harmonize the above-stated provisions of § 125.45, an examination of legislative history may prove helpful. Where a statute is ambiguous or unclear, reference may be made to prior statutes and legislative history for purpose of ascertaining legislative meaning and intent. Le Mars Mutual Insurance Company of Iowa v. Bonnecroy, 304 N.W.2d 422, 424 (Iowa 1981); Iowa Code § 4.6(3) (1983).

The statutory predecessor of Iowa Code Ch. 125 was Ch. 123B (1971) providing for the treatment of alcoholism. A system providing for contracts for care with facilities and shared payments pursuant to such contracts by the Iowa Commission on Alcoholism and the counties of patients' residence was established pursuant to §§ 123B.4 and 123B.5; this system was similar to the structure provided by present Code §§ 125.44 and 125.45. Section 123B.5, providing for the counties share of costs, read, in contrast to its successor, § 125.45(1), as follows:

> Counties shall pay for the remaining one-half of the cost of the care, maintenance, and treatment of an alcoholic from its state institutions fund as provided in section 444.12. The facility shall certify to the county of the alcoholic's legal settlement once each month one-half of the unpaid cost of the care, maintenance, and treatment of an alcoholic who has been confined as a voluntary patient. Such county shall

> pay the cost so certified to the facility from its state institutions fund. A facility may, upon approval of the board of supervisors, submit to a county a billing for the aggregate amount of all care, maintenance, and treatment of alcoholics for each month. The board of supervisors may demand an itemization of such billings at any time or may audit the same. (Emphasis added.)

Under this provision, counties had a mandatory duty to pay a certain percentage cost of an alcoholic's care received in a facility with a contract of care. Unlike § 125.45, however, § 123B.5 contained no proviso necessitating approval by a county's board of supervisors.

Section 123B.5 remained unchanged until amendments were passed in 1974 affecting Ch. 123. 1974 Iowa Acts, chapter 1131, Senate File 1354. Senate File 1354, an act relating to the establishment of an alcoholism division and providing for a comprehensive program for the treatment, education and rehabilitation of alcoholics in Iowa, was variously amended after introduction. Section 123B.5 was also variously amended to provide, among other things, for a twenty-five percentage share of costs for counties; one particular amendment pertinent to this discussion qualified § 123B.5 by adding the following:

> However, the approval of the board of supervisors shall be required before payment is made by a county for costs incurred which exceed a total of five hundred dollars for one year for treatment provided to any one alcoholic or intoxicated person, except that such approval is not required for the cost of treatment provided to an alcoholic or intoxicated person who is committed pursuant to sections eighteen (18) and nineteen (19) of this Act.

1974 Senate Journal 1392, 1477; 1974 Iowa Acts, chapter 1131, section 38. This qualifying provision has remained essentially unchanged since the time of its adoption in 1974.

In construing statutes, it is presumed that the legislature, in amending a statute, intended some change in the existing law. Mallory v. Paradise, 173 N.W.2d 264, 267 (Iowa 1969). It should not be said that a legislative

amendment served no purpose. Id. at 268. Clearly the above-cited amendment resulted in a change to § 123B.5, now 125.45(1). While the earlier version of § 123B.5 mandated the payment of a share of costs of care, maintenance and treatment, the amended version goes on to state that certain costs, regardless of whether the costs are part of a county's twenty-five percent share, must be first approved by the county board of supervisors before payment is made.

An examination of the legislative history also helps to make clear that the board-approval clause affecting costs over five hundred dollars is meant to be a precondition of payment. The use of the word "however" is further indication of such intention on the part of the legislature. Words in a statute are generally assigned their ordinary meanings unless the statute, itself, defines them with particularity. American Home Products v. Iowa State Board of Tax Review, 302 N.W.2d 140, 143 (Iowa 1981). "However" means, inter alia, "nevertheless," or "notwithstanding." Webster's Third New International Dictionary Unabridged 1097 (1967); Chicago, Rock Island and Pacific Railroad Co. v. Hughes, 250 Ark. 526, 467 S.W.2d 150, 153 (1971). The word is often used to indicate a reservation after something conceded or a decision after consideration of adverse points. Webster's supra at 1097. Furthermore, "however" indicates an alternative intention, a contrast with the previous clause, and a modification of it under other circumstances. Kist v. Butts, 71 N.D. 436, 1 N.W.2d 612, 613 (1942). Consequently, § 125.44(1) provides that counties shall pay twenty-five percent of the remaining cost of care. Nonetheless, that mandatory duty is modified in those circumstances where the total cost of a county's share in the course of one-year of treatment received by a substance abuser exceeds five hundred dollars; in such cases, a county may not pay costs exceeding five-hundred dollars -- even though those costs fall within the ambit of the county's twenty-five percent share -- without first receiving approval for payment by the county board of supervisors.

Little dispute over the above conclusion is likely. The next question that must be addressed, though, is how much discretion, if any at all, does a board of supervisors have to refuse payments for costs over five hundred dollars but within the limits of the county's twenty-five percent share. In requiring prior board approval, did the legislature intend to delegate discretion to the board to either approve or deny payment? In answering the above, an examination of the general powers and duties of county boards of supervisors as well as an examination of funding provisions for expenses incurred by county boards may prove helpful.

Iowa Code Ch. 331 (1983) provides for county home rule. Section 331.301(1) addresses the general powers that may be exercised by counties, including those powers and functions deemed "appropriate to protect and preserve the rights, privileges, and property of the county or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort and convenience of its residents." Section 331.301(2) provides that powers of a county are vested in that county's board of supervisors and "a duty of a county shall be performed by or under the direction of the board except as otherwise provided by law." The general powers of a county may be exercised "subject only to the limitations expressly imposed by a state law." Iowa Code § 331.301(3). Furthermore, "[a] county shall substantially comply with a procedure established by a state law for exercising a county power unless a state law provides otherwise. Iowa Code § 331.301(5).

Various provisions of Ch. 331 detail the general duties and specific powers of county boards of supervisors. E.g., Iowa Code §§ 331.303, 331.321-.324, 331.341-.342, 331.361-.362, 331.381-.383, 331.401-.471. In looking at these provisions it is clear that county boards of supervisors have considerable statutory authority with respect to governing the affairs of a county and that this authority often involves the exercise of discretion by the boards in the course of their decisionmaking functions. It is also clear, however, that state law may and often does, by its terms, limit the exercise of a county board of supervisors' authority in a particular situation. Consequently, even though boards of supervisors generally have significant powers and duties involving the exercise of discretion in the decisionmaking process, the question still remains whether such discretion is allowed by § 125.45 where the cost of care and treatment of a substance abuser over a year period of time exceeds five hundred dollars.

Iowa Code § 331.401(1)(c) should also be noted. That section lists as one of the duties of county board of supervisors the provision of "payment of a portion of the cost of care, maintenance, and treatment of substance abusers who are residents of the county, as provided in sections 125.45, 125.47 and 125.51." Section 125.45 states that the county's share of costs shall come from the levy authorized by § 331.421(14). That section, in turn, provides that the county shall, except as otherwise provided by state law, levy certain taxes each year for county purposes, including "[f]or the county mental health and institutions fund, an amount necessary to raise the amount needed under sec-

tion 331.425(13)." Section 331.425 addresses mandatory county funds, including (13) the county mental health and institutions fund. That section further states:

> The board shall make appropriations from the county mental health and institutions fund for all of the following and for no other purposes:
>
> (a) Charges which the county is obligated by statute to pay for: . . .
>
> (4) Care and treatment of persons at the alcoholic treatment center at Oakdale or facilities as provided in chapter 125. However, the county may require that an admission to a center or other facility shall be reported to the board within five days by the center or facility offering treatment as a condition of the payment of county funds for that admission.

This section refers directly back to Ch. 125; it, thus, becomes clear that the provisions of Ch. 125 govern payment under this section for the treatment of substance abusers. Consequently, § 331.425(13)(a)(4) does not, by itself, provide much assistance in resolving the question at hand.

The latter provisions of § 331.425(13) should, likewise, be noted since one explanation for the five hundred dollar limitation of § 125.45 could be the recognized budgetary limits of counties and their tax levies for any one particular year. One might question how a county board of supervisors would meet its financial obligations for the care and treatment of substance abusers if the funds from the county mental health and institutions fund were depleted or nearly depleted. Section 331.425(13), however, provides that where the county fails to levy a tax sufficient to meet expenses that the county is required to pay or chooses to pay from the county mental health and institutions fund, the deficiency shall be met by a transfer of funds from the county general fund. That section, then, specifically addresses the problem of a potential overexpenditure of funds. In addition, Ch. 125 provides that the Commission on Substance Abuse shall establish guidelines for use by the counties in estimating the amount of expense the county will incur for the substance abuse treatment and care of its residents in a year. Iowa Code § 125.45(1). Thus, the legislature has taken precautions to help assure that a county's annual levy

is sufficient to meet the expenses of the care and treatment of substance abusers which a county is required to pay under § 125.45.

Consequently, it would not be unreasonable to conclude that the limitation of § 125.45(1) requiring board approval of annual costs exceeding five hundred dollars does not allow or authorize the disapproval of amounts over five hundred dollars by county boards of supervisors for the sole reason that said amounts are in excess of the five hundred dollar figure. In analyzing a statute, a reasonable construction must be placed upon it, keeping in mind the objects to be accomplished, the evils to be remedied, and the purposes to be served by it. State v. Newman, 313 N.W.2d 484, 486 (Iowa 1981). Furthermore, construction of a statute must be consistent with legislative intent. The above conclusion is consistent with legislative intent as such intent is gleaned from the expressed statement of policy found in Iowa Code § 125.1(1). That section provides:

> It is the policy of this state [t]hat substance abusers and persons suffering from chemical dependency be afforded the opportunity to receive quality treatment and directed into rehabilitation services which will help them resume a socially acceptable and productive role in society.

To satisfy this clearly articulated policy, Ch. 125 seeks to assure that a comprehensive program for treatment and care exists in the State of Iowa, that facilities providing care and treatment are quality facilities able to meet the licensing requirements of Ch. 125 and rules adopted thereunder, and that substance abusers are able to receive the care and treatment services that are available. With respect to this latter goal, however, the chapter provides that a substance abuser is legally liable to a treating facility for the total cost of providing for his or her care, maintenance and treatment. Iowa Code § 125.44. Nonetheless, the chapter recognizes that certain substance abusers, although legally liable for their care and treatment, are unable to pay for such care. Thus, §§ 125.44 and 125.45 provide for payment by the State and counties for substance abusers unable to meet their financial obligations to a facility.

We recognize that the limitation clause of § 125.45 uses the word "approval." While generally the word "approval" implies the ability to sanction or reject the matter being voted upon, legislative intent may call for a different

meaning. See Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559, 561 (S.D. 1981). See also City of Springfield v. Commonwealth, 349 Mass. 267, 207 N.E.2d 891, 894 (1965). Indeed, one commonly accepted definition of the word "approval" is "to vote into effect: pass formally." Webster's, supra at 106. Here the legislature granted the boards authority to formally pass upon amounts expended for the care of substance abusers in excess of five hundred dollars. Such approval, while not carrying with it the authority to disapprove properly-expended excess amounts, does serve the valid purpose of notifying the county boards -- which have supervisory responsibilities with respect to county finances -- of a significant financial liability. With such notification, a board may look more closely at a substance abuser's situation to determine such things as whether expenditures for the care of the substance abuser were proper and should be allowed or whether other, less costly alternatives for treatment exist; or a board may, upon review at the time of vote, determine that an itemized statement of billing is necessary or that an audit of a treating facility is required; or a board might investigate and conclude that a particular substance abuser is, indeed, able to pay for the costs of his or her own treatment. This opportunity for review in the course of approval is not unlike other situations where boards of supervisors are committed to expend certain funds, such as in previously signed contracts, but where actual warrants are not authorized until the boards review claimed expenditures to assure that monies were spent in accordance with prior terms or conditions.

In construing statutes, strained, impractical or absurd results should be avoided. Telegraph Herald, Inc. v. City of Dubuque, 297 N.W.2d 529, 532 (Iowa 1980). If under § 125.45(1) a county board of supervisors could exercise its approval authority in such a way as to disapprove amounts in excess of five hundred dollars, and if, indeed, a county board were to so routinely disapprove said amounts, the seemingly absurd result would occur where substance abusers with less serious treatment problems would be cared for by the county while those with more serious problems would receive limited county support. In the same way, great disparity could exist in the State of Iowa in the level of support afforded to substance abusers by various counties pursuant to § 125.45(1). Furthermore, because the legislature made no provision for the payment of the excess amounts by some other entity if the county does not pay, impractical results would occur where the cost of treatment for a substance abuser exceeds the county's five hundred dollar amount, where the county refuses to pay, and

where, then, the facility must essentially bear the cost of care and treatment. Certainly, if the Iowa legislature had intended that county boards enjoy the authority to disapprove all amounts in excess of five hundred dollars, the legislature would have provided a mechanism for the payment of the outstanding amounts. Without such mechanism, facilities would soon become unwilling -- if not unable -- to treat substance abusers not financially capable of paying for their own care and treatment. Such a result would clearly be contrary to legislative intent.

Consequently, we conclude that § 125.45(1), requiring approval of the county boards of supervisors for amounts in excess of five hundred dollars associated with the county's twenty-five percent share of the cost of the care and treatment of a substance abuser for one year, does not grant to the boards the authority to disapprove said excess amounts when such amounts have been properly expended. This provision does, however, provide a review mechanism whereby the boards can examine such expenditures and take further action with respect to such expenditures if deemed necessary and proper. While the provisions of § 125.45(1) could be technically read to support a contrary conclusion, such a reading would, in this case, be contrary to legislative intent. The intent of the legislature prevails over technical, literal readings of a statute. Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530, 533 (Iowa 1981).

You also ask for a clarification on the "one-year" time period. As noted above, § 125.45(1) calls for board approval "for costs incurred which exceed a total of five hundred dollars for one year for treatment provided to any one substance abuser . . . ." (Emphasis added.) It is our view that the phrase "one year" is directly related to and dependent upon the phrase "for treatment provided to any one substance abuser." Consequently, we believe that that starting point for the year period of time is the date on which a substance abuser unable to pay for his or her care begins receiving treatment; if in the course of that year of treatment twenty-five percent the substance abuser's cost of care and treatment exceeds five hundred dollars, the county board of supervisors must approve the excess amount before payment is made to the treating facility. As noted in Op.Att'yGen. #79-10-12, p. 4 n.1, the one year period does not begin anew if the substance abuser is released but readmitted throughout a particular year; the total cost of care and treatment in that one year must be examined and if twenty-five percent of the total amount exceeds five hundred

dollars, board approval is required. Thus if substance abuser "A" is admitted to "X" facility for treatment and "A" is unable to pay for his or her care, if "A's" admission date is November, 1982, if A is subsequently released in March of 1983 but readmitted in September of 1983 and is still hospitalized in November of 1983, and if the total twenty-five percent cost of "A's" care for both stays is in excess of the five hundred dollar amount in November, 1983, the approval of the county board of supervisors is necessary before the excess amount can be paid to the treating facility.

In conclusion, it is our opinion that § 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 substance abuse facility.

Yours truly,

Jeanine Freeman

JEANINE FREEMAN
Assistant Attorney General

JF:rcp

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

Mr. John G. Martens
Emmet County Attorney
703 First Avenue South
Estherville, Iowa 51334

Dear Mr. Martens:

You have requested an opinion of the Attorney General which concerns interpretation of Iowa Code § 29A.28 (1983). In your opinion request you state that a county employee is scheduled to go on five months' active duty status in the U.S. Army as special training for the Iowa National Guard. You state there is no question that pursuant to § 29A.28 the county will grant this employee a leave of absence and pay this employee full pay for the first thirty days of this leave of absence. Your question, however, asks:

> . . . whether this employee, during the subsequent four months of active duty status with the army, would be entitled to the health insurance fringe benefit of $100.00 which is paid by Emmet County, Iowa, for all of their full-time employees.

It is our opinion that 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 this thirty-day period, an employee on military leave is not entitled to continue to receive any 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. Our reasons are as follows.

Several state and federal statutory provisions are relevant to your question. We first review the applicable federal law. Federal provisions relating to veteran's reemployment rights are found in 38 U.S.C. § 2021 et seq., and govern a person's right to reemployment after service in the Armed Forces. Separate provisions apply to persons of different status in the military. See 38 U.S.C. §§ 2021, 2024. Without discussing these particulars, however, the law generally requires a person who is absent from work for military service to be considered as on leave of absence, but at the conclusion of such service that person:

> shall be . . . restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces . . .

Section 2021(b)(1). Section 2021(b)(2) further provides that these persons are to be reemployed:

> . . . in such manner as to give such person such status in such person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

Section 2021(b)(3) specifically requires that a person not be denied retention of employment because of any obligation

as a member of a Reserve component of the Armed Forces. Finally, § 2024(d) requires that persons absent for military service:

> . . . shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. . . .

The Supreme Court has reiterated on several occasions that these statutory provisions and their predecessor statutes require that a veteran be reemployed according to the statutory requirements. This reemployment is to be without loss of seniority, which simply means the veteran:

> . . . does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.

Coffy v. Republic Steel Corp., 447 U.S. 191, 65 L.Ed.2d 53, 100 S.Ct. 2100 (1980), quoting, Fishgold v. Sullivan Drydock and Repair Corp., 328 U.S. 275, 284-285, 90 L.Ed. 1230, 66 S.Ct. 1105 (1946). The question frequently arises whether a particular type of benefit is a type of seniority and therefore protected under § 2021 et seq. A two-pronged test has been set forth by the Court to be used in making this determination: first, there must be a reasonable certainty that the benefit would have accrued if the employee had not gone into the military service, and second, the nature of the benefit must be "a reward for length of service" rather than a form of "short term compensation for services rendered." Coffy, supra, 447 U.S. at 197-198; Alabama Power Co. v. Davis, 431 U.S. 581, 52 L.Ed.2d 595, 97 S.Ct. 2002 (1977). The Court has applied this test to conclude that supplemental unemployment benefits based on years of service (Coffy, supra), pension rights (Davis, supra), and severance pay benefits (Accardi v. Pennsylvania R.Co., 383 U.S. 225, 15 L.Ed.2d 717, 86 S.Ct. 768 (1966)), are in the nature of a reward for length of service, not deferred short-term compensation for services, and therefore are a perquisite of seniority to which a returning veteran is entitled. A different result was reached in Foster v. Dravo Corp., 420 U.S. 92, 43 L.Ed.2d 44, 95 S.Ct. 879 (1975), where the Court held that, even when based on number of hours worked, vacation pay was intended as a form of short term compensation for work actually performed and therefore was not a seniority

right protected by statute. Most recently, in Monroe v. Standard Oil Co., 452 U.S. 549, 69 L.Ed.2d 226, 101 S.Ct. 2510 (1981), the Court held that an employer is not required under § 2021 to provide preferential scheduling of work hours for an employee who must be absent from work to fulfill a military reserve obligation.

Applying this two-pronged test in the present case, and without distinguishing between the various types of services in the Armed Forces, we conclude first, that there is a reasonable certainty that health insurance benefits would accrue if the employee were not on military leave. Second, we conclude that insurance benefits, as vacation and sick leave benefits, are not a reward for length of service but are instead a form of short term compensation for services rendered, and therefore an employer is not generally required under the federal Act to restore these benefits to an employee returning from military leave.

While the employer is thus not generally required to restore these benefits to such a returning employee, the federal Act also provides that an employee on military leave is to be allowed the opportunity to participate "in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence . . ." Section 2021(b)(1). If, for example, an employer continues to pay health insurance benefits to employees on leave of absence, or if an employer normally provides employees on leave of absence with the opportunity to continue to receive those benefits if the employee pays the cost otherwise met by the employer during the period that employee is on leave, the same opportunity must be provided to an employee on military leave. While an employee is thus protected from adverse treatment because of his or her military service, an employer is not required to provide such an employee preferential treatment. Coffy, supra, 452 U.S. at 562, 69 L.Ed.2d at 237.

Further, because the federal Act requires that employees on military leave be permitted to return to the same status they would have been at had they not been absent, an employer is required to resume payment of insurance benefits upon the employee's return as though he or she had been continuously employed. In sum, if receipt of insurance benefits is in any way related to the period of service a person has been employed, an employee returning from military leave must be restored insurance benefits as though he or she had never been absent.

Section 2021(a)(B) of the federal Act expressly states that nothing in that Act excuses noncompliance with state laws that bestow greater or additional rights or protections than those of the Act. Iowa Code § 29A.28 in fact grants certain rights in addition to those imposed under federal law:

> All officers and employees of the state, or a subdivision thereof, or a municipality other than employees employed temporarily for six months or less, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active state or federal service, be entitled to a leave of absence from such civil employment for the period of such active state or federal service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence. (emphasis added)

The Iowa Supreme Court has held that the purpose of this statute is to protect the state employee who enters the military service, and that this section should be construed liberally. Gibbons v. Sioux City, 242 Iowa 160, 164, 45 N.W.2d 842, 844 (1951). Further, this office has previously stated that the evident purpose of the legislature in enacting this provision was to recognize the patriotic service of state and municipal employees in the military by granting to them certain privileges during their first thirty days of military leave. 1940 Op.Att'yGen. 245.

As the express language of § 29A.28 makes clear, if all the conditions of this section are satisfied, the county in the present case is required to grant the employee in question a leave of absence "without loss of status or efficiency rating, and without loss of pay during the first thirty days" of that absence. See, e.g., 1970 Op.Att'yGen. 399; 1956 Op.Att'yGen. 179.

Chapter 29A contains no definitional section. Therefore, we turn to other sources to help determine what consti-

tutes "pay" for purposes of § 29A.28. "Pay" is commonly defined as compensation, wages, salary, or remuneration. See, e.g., Black's Law Dictionary, 5th ed.; Nierotko v. Social Security Board, 149 F.2d 273, 275 (6th Cir. 1945). Further, a statutory definition of the term "wages" is found in Iowa Code Ch. 91A (1983), The Iowa Wage Payment Collection Law:

> "Wages" means compensation owed by an employer for:
>
> a. Labor or services rendered by an employee . . .
>
> b. Vacation, holiday, sick leave, and severance payments which are due an employee under an agreement with the employer or under a policy of the employer.
>
> c. Any payments to the employee . . ., including but not limited to payments for medical, health, hospital, welfare, pension, or profit-sharing, which are due an employee under an agreement with the employer or under a policy of the employer. . . .

Iowa Code § 91A.2(4). This section clearly includes health insurance benefits within its definition of compensation.

We do not find these definitions controlling, but merely instructive. While § 91A.2(4) defines wages broadly, there are situations in which such a broad reading of the terms wages, pay, or compensation is inappropriate. See, e.g., Op.Att'yGen. #81-6-7 (fringe benefits such as group insurance do not fall within the definition of compensation as that term is used in Iowa Code §§ 331.905-331.907 (1983), the provisions relating to the county compensation board's duties). Thus, the determination of whether to read the terms in question broadly or narrowly depends on the relevant statutory provisions and factual circumstances of each particular case.

In the present case, it is our opinion that the term "pay" as used in § 29A.28 requires a broad reading. First, the Iowa Supreme Court has stated that § 29A.28 is to be construed liberally. Gibbons v. Sioux City, supra, 45 N.W.2d at 844. Second, as set forth above, the purpose of § 29A.28 is clear: it acknowledges the service of state and other local government employees by allowing an extra thirty

days' pay upon entry into military service. 1940 Op.Att'yGen. 245. This incentive or bonus payment thus reflects a policy in favor of military service. In accord with this legislative intent, we believe this thirty-day payment should therefore include all forms of compensation that a particular employee would otherwise have been entitled to receive had he or she remained at work and not been absent on military leave. This payment would therefore include health insurance benefits the employee routinely received in the course of his or her employment.

After the expiration of that initial thirty day period, however, we believe the employee is no longer authorized by § 29A.28 to receive any form of compensation, including health insurance benefits, from the county. Despite the Iowa Supreme Court's direction to construe this section liberally, we nonetheless believe the express language of § 29A.28 limits compensatory benefits of any type to the thirty day period specified. However, regardless of the amount of time the employee is on military leave, he or she is entitled throughout to a leave of absence "without loss in status or efficiency rating." Section 29A.28.

This result is inconsistent with prior opinions of this office. In 1956 Op.Att'yGen. 46, we held that because the statutory military leave provisions specifically stated that employees not lose their status for the period of their military service, "the portion of time spent in the armed forces will count towards the accumulation of vacation benefits." And in 1954 Op.Att'yGen. 154, we relied on this same rationale to support our conclusion that a teacher on military leave of absence is entitled to accumulate sick leave throughout the period of that absence:

> If no credit is given the teacher for the period spent in military service it would clearly be a loss of status. This might be more clearly illustrated by the example of a teacher who had six consecutive years of employment is called into the army for a year then returns to his employment. Failing to allow credit for his military service would give him the status of a new teacher with no accumulated sick leave.

1954 Op.Att'yGen. 154. Cf. 1974 Op.Att'yGen. 280 (state employee on military leave is considered terminated for the purposes of the deferred compensation program thirty days

after being called into active duty); 1968 Op.Att'yGen. 894 (a state employee on military leave is not entitled to severance pay because that employee has not suffered a loss of pay, as required by statute); 1968 Op.Att'yGen. 789 (after the expiration of the statutory thirty day period, a state employee on military leave is not in the employment of the state insofar as the federal social security system is concerned).

Our 1956 and 1954 opinions rely on the conclusion that an employee's accumulated vacation and sick leave is a part of that employee's "status." Given our broad construction of the term "pay" as it is used in § 29A.28, we now believe that vacation and sick leave are more properly considered as constituting a part of an employee's compensation rather than as a part of an employee's "status." Furthermore, these opinions are contrary to the Supreme Court decisions discussed above, in particular, to Foster v. Dravo Corp., supra, which held that a returning veteran is not entitled to vacation benefits which had accrued in his absence. Accordingly, we hereby overrule the conclusions reached in 1956 Op.Att'yGen. 46 and 1954 Op.Att'yGen. 154 and now conclude that an employee granted a military leave of absence pursuant to § 29A.28 may continue to receive regular compensation, including vacation, sick leave, and health insurance benefits, for thirty days after the period of military leave began, but no compensation of any kind may be paid under § 29A.28 after this thirty day period has expired.[2]

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[2] This conclusion is not meant to imply that accrued vacation and sick leave time is lost when an employee is on military leave for more than thirty days, but merely that those benefits do not continue to accrue throughout the period of military leave following the initial thirty day period where compensation is paid. Instead, it is our opinion that § 29A.28 and the federal law require an employer to restore an employee to his or her prior status upon returning from military leave, and this status refers to, inter alia, the employee's accrued vacation and sick leave status at the time he or she left on military leave. 1950 Op.Att'yGen. 194; 1946 Op.Att'yGen. 138 (an employee on military leave is entitled to return to the same status as when he or she left for military service, and therefore is entitled to receive disability benefits if he or she suffers a physical or mental handicap while in the armed forces if other statutory requirements are satisfied).

The second relevant state law provision is § 29A.43, which provides:

> No person, firm, or corporation, shall discriminate against any officer or enlisted person of the national guard or organized reserves of the armed forces of the United States because of his membership therein. No employer, or agent of any employer, shall discharge any person from employment because of being an officer or enlisted person of the military forces of the state, or hinder or prevent the officer or elected person from performing any military service such person may be called upon to perform by proper authority. Any member of the national guard or organized reserves of the armed forces of the United States ordered to temporary active duty for the purpose of military training or ordered on active state service, shall be entitled to a leave of absence during the period of such duty or service from the member's private employment, other than employment of a temporary nature, and upon completion of such duty or service the employer shall restore such person to the position held prior to such leave of absence, or employ such person in a similar position, provided, however, that such person shall give evidence to the employer of satisfactory completion of such training or duty, and further provided that such person is still qualified to perform the duties of such position. Such period of absence shall be construed as an absence with leave, and shall in no way affect the employee's rights to vacation, sick leave, bonus, or other employment benefits relating to the employee's particular employment. Any person violating any of the provisions of this section shall be guilty of a simple misdemeanor. (emphasis added)

The Iowa Supreme Court recently held that this section prohibits public, as well as private, employers from discriminating against employees because of membership in the national guard or other branch of military service. Bewley v. Villisca, Iowa Community School District, 299 N.W.2d 904 (Iowa 1980). In Bewley, the Court concluded that § 29A.43 was violated when the school district required an employee to take his

vacation during the same time he was attending national guard training camp. The Court found it unnecessary to discuss § 29A.28 because it found that § 29A.43 was violated. However, the Court did state in dicta that these two statutes are not incompatible or redundant, but deal with different subject matter: § 29A.28 requires that a governmental employer grant military leave without pay for the first thirty days of leave, while § 29A.43 only provides that an employee may not be discriminated against because of his military service. Bewley, supra, 299 N.W.2d at 907.

Arguably, the language of § 29A.43 emphasized above supports the position that an employee's absence on military leave allows an employee to continue to accrue vacation and other employment benefits during his or her absence. We do not read § 29A.43 so broadly. We believe that § 29A.43 protects an employee's rights to employment benefits which have accrued up until the time that employee is absent on military leave. As discussed above, in the case of a governmental employee, these benefits accrue through the first thirty days of military leave. Section 29A.28. An employer cannot, as in Bewley, supra, act in a manner that deprives an employee of existing benefits or otherwise deleteriously affects these benefits. In sum, an employee maintains existing employment benefits as though no military leave was taken. However, there is nothing in § 29A.43 that indicates employees continue to accrue these benefits through the entire period of military leave. Thus, we conclude that for the purposes of both § 29A.28 and § 29A.43 an employer must allow an employee to maintain any employment benefits existing at the time that employee goes on military leave. However, an employee does not continue to accrue these benefits throughout his or her period of military leave.

In conclusion, it is our opinion that 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.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

LAW ENFORCEMENT: POLICEMEN AND FIREMEN: IOWA LAW ENFORCEMENT ACADEMY: Academy Certificates. §§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)

Mr. Ben Yarrington
Acting Director
Iowa Law Enforcement Academy
LOCAL

April 6, 1983

Dear Mr. Yarrington:

Former Director Callaghan asked this office for its opinion on the authority of the Iowa Law Enforcement Academy to deal with certified officers who fail to maintain compliance with the appointment standards set by the academy. Specifically Mr. Callaghan asked:

1. Does the issuance of a certificate under the authorization of the I.L.E.A. Council to a law enforcement officer who has satisfactorily completed mandated basic training constitute a certification to practice the profession of law enforcement, and

2. If so, does the I.L.E.A. Council have the implied authority to suspend or revoke this certification for a serious breach of professional standards on the part of a law enforcement officer, or failure to comply with a mandatory inservice training program established under the authority of §80B.11(3), Iowa Code (1983)?

There are several provisions of Chapter 80B, Iowa Code (1983), which are pertinent to these questions. Section 80B.2, Iowa Code (1983), states:

> It is the intent of the legislature in creating the academy and council to maximize training opportunities for law enforcement officers, to co-ordinate

> training and to set standards for the law enforcement service, all of which are imperative to upgrading law enforcement to professional status.

Section 80B.11, Iowa Code (1983), states:

> The director of the academy, subject to the approval of the council, shall promulgate rules in accordance with the provisions of this chapter and chapter 17A, giving due consideration to varying factors and special requirements of law enforcement agencies relative to the following:
>
> 1. Minimum entrance requirements, minimum qualifications for instructors, course of study, attendance requirements, and equipment and facilities required at approved law enforcement training schools. Minimum age requirements for entrance to approved law enforcement training schools shall be eighteen years of age.
>
> 2. Minimum basic training requirements law enforcement officers employed after July 1, 1968, must complete in order to remain eligible for continued employment and the time within which such basic training must be completed.
>
> 3. Categories or classifications of advanced inservice training program and minimum courses of study and attendance requirements for such categories or classifications.
>
> 4. Minimum standards of physical, educational, mental and moral fitness which shall govern the recruitment, selection and appointment of law enforcement officers.
>
> 5. Exemptions from particular provisions of this chapter in case of any state, county or city, if, in the opinion of the council, the standards of law enforcement training

> established and maintained by such governmental agency are as high or higher than those established pursuant to this chapter; or revocation in whole or in part of such exemption, if in its opinion the standards of law enforcement training established and maintained by such governmental agency are lower than those established pursuant to this chapter.

Section 80B.13, Iowa Code (1983), states in pertinent part:

> The council may:
>
> * * * *
>
> 3. Authorize the issuance of certificates of graduation or diplomas by approved law enforcement training schools to law enforcement officers who have satisfactorily completed minimum courses of study.
>
> * * * *

The academy council is not given the authority by these provisions to revoke or suspend certificates issued to law enforcement officers. Any such policy would only be valid if followed pursuant to a lawfully promulgated rule. The academy cannot promulgate a rule unless authorized by the legislature. Iowa Auto Dealers Ass'n. v. Iowa Dept. of Revenue, 301 N.W.2d 760, 762 (Iowa 1981); Patch v. Civil Service Com'n. of Des Moines, 295 N.W.2d 460, 464, (Iowa 1980); Motor Club of Iowa v. Dept. of Transportation, 251 N.W.2d 510, 518 (Iowa 1977). The authority to promulgate a rule can be implied when it can rationally conclude that the rule is within its statutory authority. Iowa Auto Dealers Ass'n. v. Iowa Dept. of Revenue, 301 N.W.2d at 762, Hiserote Homes, Inc. v. Riedeman, 277 N.W. 2d 911, 913 (Iowa 1979). However, the rule is invalid if inconsistent with statutory language or legislative intent. See, McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 196 (Iowa 1980). When determining the intent of the legislature, it is necessary to review all pertinent parts of the statute. Peffers v. City of Des Moines, 299 N.W.2d 675, 678 (Iowa 1980).

While the legislature does indicate that the academy may set standards for appointment in §80B.11, Iowa Code (1983), it does not give the academy the authority to appoint officers or to discharge them. Furthermore, §80B.13(3),

Iowa Code (1983), indicates that the certificates issued by the academy council are "certificates of completion or diplomas [issued to] law enforcement officers who have satisfactorily completed minimum courses of study." This does not describe a license issued by an agency charged with the regulation of a profession. When coupled with the absence of authority to revoke the certificate, it appears clear that the academy has no authority to promulgate a rule allowing for revocation.

In summary, certificates of completion issued by the Iowa Law Enforcement Academy Council pursuant to §80B.13(3), Iowa Code (1983), are in the nature of a diploma and may not be revoked because of future conduct or capability of the officer.

Nothing in this opinion should be construed to mean that the academy must allow persons who do not meet the minimum qualifications for appointment to be admitted to the academy, or that such persons must be initially certified. Neither should it be construed to prevent the withdrawal of certification if issued upon a misrepresentation or misunderstanding as to the officer's eligibility at the time of issuance. While we conclude that the Academy has no authority to revoke a certificate, it does have authority to require additional training, §80B.11(3), and to establish standards for the recruitment, selection, and appointment of law enforcement officers, §80B.11(4). Nothing in this opinion should be construed as preventing the Council from exercising its authority under these sections by, for example, requiring additional certificates of completion of in-service training requirements or of fitness at the time of appointment.

Respectfully yours,

Gary L. Hayward (SCG)

GARY L. HAYWARD
Assistant Attorney General

GLH:dkl

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)

The Honorable Lee W. Holt
State Senator
State Capitol
L O C A L

April 6, 1983

Dear Senator Holt:

We are in receipt of your request for an opinion of the Attorney General regarding the selection of an official newspaper. A resolution, we have been told, was passed by a city council instructing the municipal employees to place the publication of notices and reports of proceedings as required by law in either the local newspaper or a local free circulation shopper. The factors to be considered in the selection are expediency and costs.

As a result, we have been asked:

1) What types of publications are eligible to publish the material described in 618.3, specifically "all notices and reports of proceedings required by statute"? Could a publication with no second class postal permit (issued only to publications with paid circulation) and no list of bona fide paid subscribers be allowed to publish this material in return for compensation from the governmental body?

2) What types of publications are eligible to publish the material described in 618.14, specifically "any matter of general public importance, not otherwise authorized or required by law"? Could a publication with

> no second class postal permit (issued only to publications with paid circulation) and no list of bona fide paid subscribers be authorized to publish this material in return for compensation from the governmental body?

I.

The mandatory publication of notices and reports of proceedings is found in Iowa Code § 618.3 (1983). That section provides:

> For purpose of establishing and giving assured circulation to all notices and reports of proceedings required by statute to be published within the state, where newspapers are required to be used, newspapers of general circulation that have been established, published regularly and mailed through the post office of current entry for more than two years and which have had for more than two years a bona fide circulation recognized by the postal laws of the United States shall be designated for the publication of notices and reports of proceedings as required by law.

Thus, two requirements are imposed for eligibility for designation as a newspaper for publication of notices and reports of proceedings as required by law. First, a newspaper must 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. Secondly, a newspaper must have had a second class postal permit for an equal period of time.[1] A newspaper which does not satisfy both requirements of Iowa Code § 618.3 is ineligible for designation as the newspaper for mandatory publication of notices and reports of proceedings.

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[1] For a general discussion of second class postal permits, two opinions of our office, 1980 Op. Att'y Gen. 101 and 1978 Op. Att'y Gen. 480, should be examined.

II.

Optional publication of any matter of general public importance is provided for in Iowa Code § 618.14 (1983). That section provides:

> The governing body of any municipality or other political subdivision of the state is authorized to make publication, as straight matter or display, of any matter of general public importance, not otherwise authorized or required by law, by publication in one or more newspapers, as defined in section 618.3 published in and having general circulation in such municipality or political subdivision, at the legal or appropriate commercial rate, according to the character of the matter published.
>
> In the event there is no such newspaper published in such municipality or political subdivision or in the event publication in more than one such newspaper is desired, publication may be made in any such newspaper having general circulation in such municipality or political subdivision.

Thus, publication of any matter of general public importance, not authorized or required by law, 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 newspaper published in the municipality or political subdivision or in the event publication in more than one newspaper is desired.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LWM:sh

JUVENILE LAW: Detention costs. §§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 5, 1983

Mr. Michael V. Reagen
Commissioner
Iowa Department of Social Services
L O C A L

Dear Commissioner Reagen:

You have requested an opinion of the Attorney General regarding liability for juvenile detention costs. More particularly, you have inquired as to whether the State can be billed for detention costs when a child under the control of the Iowa Juvenile Home escapes and commits a criminal act in another county. It is our opinion that this cost is to be assumed by the county of detention and may not be billed to the county of legal settlement or to the State.

In 1980 Op.Att'yGen. 518, we discussed the statutory scheme in funding the juvenile justice system under Iowa Code Chapter 232 (1983).

> Division VIII of Chapter 232 relates to expenses and costs of the juvenile justice system. At present, Division VIII consists of only two section, to-wit: §§232.141 and 232.142. Section 232.142 relates solely to the maintenance and cost of juvenile homes operated by counties....
>
> Section 232.141 sets out a procedure by which expenses are allocated between the counties and the State. This section establishes a rather basic framework for financial responsibility for juvenile justice. Essentially, this framework consists of a mechanism by which each county determines what is referred

> to as its "base cost." [See §232.141(4)(a)] This is arrived at by adding the actual expenditures for certain juvenile services in three designated fiscal years. Once this base cost is established, it serves as the benchmark by which a county's future liability is measured. With the exception of an inflationary escalator clause contained in §232.141(4)(b), each county is expected to expend an amount equal to its base cost in each fiscal year. Once a county has reached its base cost, as adjusted for inflation, the balance of the year's expenditures are assumed by the State.

The first question we must ask is whether detention costs are to be included in the base cost computation under §232.141. Section 232.141 provides in pertinent part:

> 232.141 Expenses charged to county.
> 1. The following expenses upon certification of the judge or upon such other authorization as provided by law are a charge upon the county in which the proceedings are held to the extent provided in subsection 4.
>
> e. The expense of treatment or care ordered by the court under an authority of subsection 2.
>
> 2. Whenever legal custody of a minor is transferred by the court or whenever the minor is placed by the court with someone other than the parents or whenever a minor is given physical or mental examinations or treatment under order of the court and no provision is otherwise made by law for payment for the care, examination, or treatment of the minor, the costs shall be charged upon the funds of the county in which the proceedings are held upon certification of the judge to the board of supervisors.

Detention is defined in Iowa Code §232.2(13) (1983) as "the temporary care of a child in a physically restricting facility designed to ensure the continued custody of the child at any point between the child's initial contact with the juvenile authorities and the final disposition of his or her case." Although §232.141 appears to include detention costs, closer review reveals that liability is to be imposed under this section only "when no provision is otherwise made by law for payment for the care, examination, or treatment

of the minor." Section 232.142 makes specific provision for costs incurred in the operation and maintenance of juvenile homes. Payment is not made on a per-child reimbursement system as in §232.141, but is instead a combination of funding from the county where the juvenile home is located, the state, and the area education agency. In counties where there is no juvenile home, juveniles are separately confined in the jail. See Iowa Code §356.3 (1983). The cost of maintaining juveniles in the jail is assumed by the county operating the jail. See Iowa Code §356.15 (1983). Therefore, §232.142 and §356.15 are the operative sections in determining liability for juvenile detention costs, and these costs are quite clearly placed on the county detaining the child and operating the juvenile home or jail. However, this does not prevent counties from providing juvenile detention for other counties and contracting for payment from the county responsible for detention.

Even if detention costs were included in the §232.141 computation, the state could never be billed directly simply because they have custody. Children placed under the control of the state do not have legal settlement with the state. See Op.Att'yGen. #82-6-3. The state incurs liability under §232.141 only when actual expenditures exceed the county base.

Statutory analysis supports our conclusion. In addition, it should be noted that historically the cost of detention has been assumed by the county where the detention takes place. Parents of children detained have never been asked to assume the cost of detention, and no authority exists to impose liability on the state simply because the child requiring detention is under their care and custody.

Sincerely,

Diane Munns

Diane C. Munns
Assistant Attorney General

jlf

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

The Honorable Charles N. Poncy
State Representative
L O C A L

Dear Representative Poncy:

You have asked for our opinion on the following question:

> Absent a specific statutory provision to the contrary, is the superintendent of a merged area school organized pursuant to Chapter 280A of the Code required to hold a valid certificate pursuant to Chapter 260 of the Code?

This question requires us to engage in a careful examination of the history of the statutes pertaining to the creation of the Iowa community colleges and vocational schools. We conclude that superintendents of these institutions are not required to hold certificates pursuant to Iowa Code ch. 260 (1983).

I. The Statutory History

The entire area community college and area vocational school system was authorized by the General Assembly in 1965. Prior to that time a few public school districts in Iowa operated K through 14 systems, i.e. a public junior college. The Iowa Departmental Rules required that superintendents in school districts that maintained junior colleges "must hold a master's degree and must have preparation in educational administration, and supervision or curriculum." See 1962 Iowa Dep. Rules 329, (Public Instruction) ch. VII, n. 1. [Hereinafter IDR. After ch. 17A was enacted, successor publication to IDR is Iowa Administrative Code.]

By the adoption of 1965 Iowa Acts 386, ch. 247, the General Assembly set in motion a flurry of activity that led to the creation and development of what is, in 1983, a thriving statewide system of area community colleges and area vocational schools. The original legislation did not contain any specific provisions with respect to the appointment, qualifications or salary of the executive officers of the institutions that were authorized to be created. See 1965 Iowa Acts 386, ch. 247. In a brief section of that Act, the legislature vested authority for the promulgation of standards jointly in the board of public instruction and the board of regents. See 1965 Iowa Acts, ch. 247, § 33 at 396. That provision was codified as 1966 Iowa Code § 280A.33 (1966), cf. same section, Iowa Code (1983). Thus, from the beginning, rulemaking authority with respect to the area colleges and schools was contained in the enabling statute, codified as ch. 280A.

Chapter 260 does not contain any reference to the area colleges and schools nor does it contain any reference to the board of regents. In our view, Chapter 260 pertains to elementary and secondary schools only. The language of Iowa Code § 260.5 (1983) provides support for that view. Section 260.5 identifies the fields covered by it as the elementary school field and the secondary school field. In addition, it defines the "administrative and supervisory field" for "all public schools." Id. We do not believe that the term "all public schools" in § 260.5 or "the public schools" in § 260.6 can be construed to include personnel at tax-supported post-secondary schools. Section 260.5 was not amended to add a field that would encompass certification of teachers at the post-secondary level, i.e. those employed by regents institution or by the area colleges and schools. Chapter 262 assigns rulemaking power to the board of regents and Chapter 280A assigns the rulemaking power with respect to area colleges and schools to the board of public instruction and the regents. Throughout the code chapters pertaining to the elementary and secondary system the term "public schools" is used to distinguish schools operated by school districts from nonpublic, i.e. private schools. See, e.g., ch. 280 entitled Uniform School Requirements and which clearly pertains to elementary and secondary schools; ch. 285, State Aid for Transportation.

Pursuant to the authority granted to the Regents and the board of public instruction by 1965 Iowa Acts, ch. 247, § 33, those boards acting jointly, promulgated a rule filed on May 10, 1966, adding a "superintendent-of-an-area-vocational-school-or-community-college" classification to the list of certificate classes set out in the Iowa Departmental Rules. See Iowa Departmental Rules, July 1966, Supp., at 64 [Public Instruction Department] which amended the rule appearing at 1962 IDR 320 as

§ 14.14(3) for "the purpose of implementing section 33 of chapter 247." Id.

In 1967, the General Assembly amended extensively the law which created the area school and college system during the previous session. See 1967 Iowa Acts 482-490, ch. 244. That Act included, inter alia, the following paragraph:

> The area board, when setting the salary of the area superintendent, shall take into consideration the salaries of administrators of educational institutions in the area, and the enrollment of the area schools; the salary range shall be from seventeen thousand (17,000) dollars to twenty-five thousand (25,000) dollars per annum. The superintendent shall not be required to hold any teacher's certificate. 1967 Iowa Acts, ch. 244, § 14(3) (emphasis supplied).

Thus, the joint rules that had been adopted which required superintendents of the area schools and colleges to hold certificates were invalidated and became obsolete although they were not repealed immediately by joint action of the Iowa boards. In addition to adoption of 1967 Iowa Acts, ch. 244, § 14(3) above, the legislature repealed Iowa Code § 280A.33 (1966) and enacted the following:

> Approval standards, except as hereinafter provided, for area and public community and junior colleges shall be initiated by the area schools branch of the department and submitted to the state board of public instruction and the state board of regents, through the state superintendent of public instruction, for joint consideration and adoption. No proposed approval standard shall be adopted by the boards until the standard has been submitted to the advisory committee created by this chapter and its recommendations thereon obtained.
>
> Approval standards for area vocational schools and for vocational programs and courses offered by area community colleges shall be initiated by the area schools branch and submitted to the state board of public instruction, through the state superintendent of public instruction, for consideration and adoption. No such proposed approval standard shall be adopted by the state board until the standard has been submitted to the advisory committee created by this chapter and to the

> advisory committee created by chapter two hundred fifty-eight (258) and their recommendations thereon obtained.
>
> For purposes of this section, 'approval standards' shall include standards for administration, qualifications and assignment of personnel, curriculum, facilities and sites, requirements for awarding of diplomas and other evidence of educational achievement, guidance and counseling, instruction, instructional materials, maintenance, and library. 1967 Iowa Acts, ch. 244, § 22 (emphasis supplied); current version Iowa Code § 280A.33(1), (2), and (3) (1983).[1]

Thus, in one section of an Act, the legislature expressly provided that area superintendents are not required to hold "certificates." In another section of the same Act, the legislature delegated the authority for establishing "standards for administration, qualifications, and assignment of personnel" to the board of regents and the board of public instruction jointly in the case of community and junior colleges and to the board of public instruction in the case of vocational schools. Pursuant to the 1967 legislation, the joint boards promulgated the following rule:

> 5.2(4) Certification. All administrative staff except for the superintendent shall hold such certificates as required to authorize service in their respective areas of responsibility. I.D.R., July 1944 Supp., at 95, filed March 11, 1974.

That rule now appears in the Iowa Administrative Code in identical form. See Vol. VIII I.A.C. 670-5.2(4), chapter 5, entitled Area Vocational Schools and Community Colleges.

During the 1974 session, the General Assembly abolished the office of county school superintendent and created the area education agencies to replace the county system. See 1974 Iowa Acts 550, ch. 1172. In creating the new system, the legislature took care to provide expressly that the chief executive officer of an area education agency would be a certificated person. See 1974 Iowa Acts at 564, ch. 1172, § 22, which required the board of

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[1] These three subsections of § 280A.33 (1983) are in the same form as set forth here except that the sentences requiring submission to the advisory committee were deleted by 1975 Iowa Acts ch. 160, § 1.

educational examiners to "establish a certificate for area education administrators." Id. ch. 1172, § 22(1), current version, Iowa Code § 260.9 (1983).

During the 1975 session, the legislature adopted a brief statute entitled "An Act relating to the salaries of area school superintendents." 1975 Iowa Acts 405, ch. 159. That Act struck Iowa Code § 280A.23(9) (1975), which contained the sentence "The superintendent shall not be required to hold any teacher's certificate," earlier enacted in 1967 Iowa Acts 482, ch. 244, § 14(13) as set out in full above, and inserted in lieu thereof the following:

> 9. Set the salary of the area superintendent. In setting the salary, the board shall consider the salaries of administrators of educational institutions in the merged area and the enrollment of the area school. 1975 Iowa Acts 405, ch. 159, codified as Iowa Code § 280A.23(9) (1977); Current version Iowa Code § 280A.23(8) (1983).

Iowa Code Section 280A.33 (1975) relating to approval standards was not altered by the 1975 legislature and remained in effect. Cf. Iowa Code § 280A.33 (1983). We cannot construe the deletion of the reference to certification of superintendents from § 280A.23(9) (1977) while leaving the power to establish approval standard intact in § 280A.33, as an indication that the legislation meant for the superintendents to be required to be certificated pursuant to Chapter 260.

In sum, the legislature expressly exempted the area colleges and school superintendents from holding teacher's certificates in 1967. At the same time, the legislature delegated the authority with respect to rulemaking on "approval standards" for area schools to the board of public instruction and the board of regents and that power was exercised. Neither the relevant statutes nor the relevant rules have been changed since 1975.

II. Analysis

In our opinion, an area school superintendent is not required to hold a teacher's certificate. This conclusion is based on our examination of the statutes and rules and the history of those statutes and rules in the light of important principles of statutory construction.

Principles of statutory construction are set out in Iowa Code ch. 4 (1983) and in case law. An overriding principle of statutory construction is that when a statute is plain and its

meaning is clear, we are not permitted to search for meaning beyond its express terms. State v. Rich, 305 N.W.2d 739, 745 (Iowa 1981); State v. Sunclades, 305 N.W.2d 491, 493 (Iowa 1981). Moreover, the legislature is presumed to know the existing state of the law and if it intends to alter the law, it will do so. See Sunclades, supra, and Peffers v. City of Des Moines, 299 N.W.2d 675, 678 (Iowa 1980). Furthermore, in considering the meaning of a statute, all parts must be considered without giving undue importance to a single or isolated portion. Id. See also State v. Broten, 295 N.W.2d 453, 454 (Iowa 1980). In addition, we may not, under the guise of construction, add words or qualifications to a statute or change its terms, State v. Hesford, 242 N.W.2d 256, 258 (Iowa 1976). Finally, when a general statute is in conflict with a specific statute, the specific statute ordinarily prevails whether it was enacted before or after the general statute. Doe v. Ray, 251 N.W.2d 496, 501 (Iowa 1977); Ritter v. Dagel, 261 Iowa 870, 881, 156 N.W.2d 318, 324 (1968); State v. Halverson, 261 Iowa 530, 538, 155 N.W.2d 177, 181 (1967).

With these principles in mind, we note that at no time did a statute require area school superintendents to hold a teacher's certificate. Instead, such a requirement was imposed by rule in 1966 and the legislature immediately and expressly stated that superintendents were not required to be certificated.

In examining the section of the 1967 Act expressly exempting area college and school superintendents from certification requirements, we may not ignore the section which dealt with the same subject matter, i.e. 1967 Iowa Acts, ch. 244, § 22, which placed power to establish requirements relating to "administration, qualification and assignment of personnel" in the board of public instruction and the board of regents. Peffers, 299 N.W.2d at 678. Moreover, we must presume that the legislature was aware of the rules relating to qualifications of superintendents in 1975 when it adopted an act "relating to the salaries of area superintendents." 1975 Iowa Acts 405, ch. 159, title of the Act. See Sunclades, supra and Peffers, supra. We believe that it is significant that the legislature delegated responsibility for rulemaking in connection with community colleges to the two boards, regents and public instruction. This action demonstrates that the legislature was sensitive to the status of community colleges as institutions of higher learning and that the students or graduates may transfer, carrying credits earned, to other institutions of higher education including the regents institution. In contrast, rulemaking power with respect to vocational schools and vocational programs at community colleges was delegated to the board of public instruction alone. See 1967 Iowa Acts, ch. 244, § 22 above. Subsequently, in requiring the administrators of the area education agencies to be certified, the legislature demonstrated an awareness that these agencies are an integral part of the Iowa elementary and secondary system.

The principle that we may not, under the guise of construction, add to statutes is especially important in this context. See Hesford, supra. The legislature expressly required area education agencies administrators to be certificated, Iowa Code § 260.9 (1983), and in contrast, expressly delegated power to establish by rule the necessary qualifications for area community college and vocational school superintendents. We cannot insert in chapter 260, under the guise of construction, a requirement that area college and school superintendents hold teacher's certificates.

A conclusion that superintendents must be certificated would require us to infer that the legislature, in adopting 1975 Iowa Acts 405, ch. 159, intended, by implication, to repeal rules that had been adopted pursuant to 1967 Iowa Acts 482, ch. 244, § 14(3), codified as Iowa Code 280A.23(9) (1971), and to reinstate rules that had been promulgated in 1966. In our view, Chapter 280A is a special statute which contains all of the provisions relating to promulgation of all rules to govern the programs and personnel at the area colleges and schools. The rule of statutory construction that special statutes, i.e. Chapter 280A, prevail over general ones, i.e. Chapter 260, prevents us from finding, by inference, that Chapter 260 applies to area school superintendents. This is not to say that the legislature could not impose a certification requirement. It did so in the case of area education agency administrators and it did so expressly. See Iowa Code § 260.9 (1983).

In sum, it is our opinion that area community college and area vocational school superintendents are not required to hold teacher's certificates.

Respectfully submitted,

Merle W. Fleming

MERLE W. FLEMING
Assistant Attorney General

MWF/jkp

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

The Honorable Berl Priebe
State Senator
State Capitol
L O C A L

Dear Senator Priebe:

You have requested the opinion of the Attorney General pertaining to the bracket system, adopted by the department of revenue, which is to be used by retailers for collection of sales tax from their customers. Specifically, you question whether the department can devise a bracket system in which the actual amount of sales tax collected from the customer may exceed the new sales tax rate of four percent imposed by 1983 Iowa Acts, Senate File 184.[1]

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[1]According to the March 2, 1983, Iowa Administrative Bulletin, pages 1085-6, the department adopted emergency rule amendments to its rule 730 I.A.C. §14.2, so that such rule now provides for the following sales tax bracket system:

In your opinion request, you set forth, as an example, that the department's bracket system will result in a collection of sales tax by the retailer from the consumer of four cents on a sale of eighty-eight cents.[2]

The department of revenue has the statutory authority to establish a bracket system for collection of sales tax by the retailer from the consumer. The department's bracket system 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 of Iowa. In addition, the bracket system avoids tax collections of a fraction of a cent.

Iowa Code §422.43 (1983) imposes the Iowa sales tax at the rate of four percent upon the gross receipts of retailers from retail sales of tangible personal property and from certain services. Iowa Code §422.48(1) (1983) requires that retailers must "as far as practicable,

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(footnote 1 continued)

TAX SCHEDULE

"$0.00	- $0.12	= $0.00	$2.88	- $3.12	= $0.12
0.13	- 0.37	= 0.01	3.13	- 3.37	= 0.13
0.38	- 0.62	= 0.02	3.38	- 3.62	= 0.14
0.63	- 0.87	= 0.03	3.63	- 3.87	= 0.15
0.88	- 1.12	= 0.04	3.88	- 4.12	= 0.16
1.13	- 1.37	= 0.05	4.13	- 4.37	= 0.17
1.38	- 1.62	= 0.06	4.38	- 4.62	= 0.18
1.63	- 1.87	= 0.07	4.63	- 4.87	= 0.19
1.88	- 2.12	= 0.08	4.88	- 5.12	= 0.20
2.13	- 2.37	= 0.09	5.13	- 5.37	= 0.21
2.38	- 2.62	= 0.10	5.38	- 5.62	= 0.22
2.63	- 2.87	= 0.11	5.63	- 5.87	= 0.23

For sales larger than $5.87 tax shall be computed at a straight four percent; one-half cent or more is treated as one cent."

The department and its predecessor, state tax commission, have, in prior years, promulgated bracket system rules. See, e.g. tax commission rule 18, 1962 IDR 547; 730 I.A.C. §14.2(1978). These regulations have never been challenged, but have been extensively relied upon by retailers.

[2]A sale of 88 cents, if multiplied by 4 percent, would produce a result of 3.52 cents. The rounding of this figure to the nearest cent would result in a tax of 4 cents, the amount set forth in the department's bracket system.

add the tax imposed under this division, or the average equivalent thereof, to the sales price or charge," to the consumer. Iowa Code §422.48(2) (1983) allows the director of revenue to adopt rules "for adding such tax, or the average equivalent thereof, by providing different methods applying uniformly to retailers. . . for the purpose of enabling such retailers to add and collect, as far as practicable, the amount of tax." Iowa Code §422.68 (1983) authorizes the director of revenue to prescribe rules, consistent with Iowa Code Chapter 422 (1983) "necessary and advisable for its [Iowa Code ch. 422] detailed administration and to effectuate its purposes." Iowa Code §§422.51 and 422.52 (1983) provide for the filing of sales tax returns and remittance of sales tax by retailers.

The Iowa retail sales tax scheme, as set forth in the above cited statutes, imposes the tax upon the gross receipts of retailers, requires that retailers shall, when practicable, collect the tax from consumers, authorizes the department to adopt by regulation a bracket system to enable retailers to collect the tax, and requires retailers to file tax returns and remit the tax. Since the establishment of a bracket system is authorized by the Iowa sales tax law, the system promulgated by the department should be valid as long as it is reasonable.

In White v. State, 49 Wash. 2d 716, 306 P.2d 230 (1957), app. dismissed, 355 U.S. 10, 2 L.Ed.2d 21, 78 S.Ct. 23 (1957), retailers, operators of vending machines, had sold items for amounts between five cents and thirteen cents. The sales tax bracket system, as adopted by the Washington Tax Commission, to implement collection of the three percent tax did not provide for any collection of tax from the consumer for sales in such amounts (less than thirteen cents). The Court examined the relevant Washington statutes, which were similar in import to the Iowa sales tax statutes previously cited herein, upheld the bracket system, and stated:

> "It is apparent, in reading the statute as a whole, that a distinction is made between the tax imposed and the tax to be paid by the buyer and collected by the seller. The former remains constant--3 percent on each sale--while the latter varies according to the schedule which the tax commission is authorized to issue. The inevitable result is that in some instances, a seller will collect more tax than he is required to remit to the state, and in others, he will collect less. The requirement of the statute is simply that the schedule shall be calculated to produce, in the aggregate as nearly as possible, the amount of the tax imposed, while at the same time eliminating the collection of fractions of 1 cent. It is not suggested that a schedule

> could be devised which would accomplish this purpose better than the one adopted by the tax commission."

306 P.2d at 235.[3]

In Robert H. Hinckley v. State Tax Commission, 17 Utah 2d 70, 404 P.2d 662 (1965), the Court, in upholding the sales tax bracket system, observed:

> "The bracket system is so devised that sales in the lower portion of a given bracket are slightly overtaxed while those in the upper portion of that bracket are slightly undertaxed, so that a vendor in averaging total sales will have collected approximately the correct amount of tax required to be remitted."

404 P.2d at 665.

An examination of the bracket system increments in the department's rule 730 I.A.C. §14.2, in footnote 1 of this opinion, appears to disclose that while in some instances a retailer will collect more or less sales tax than is required to be remitted to the State, the system seems calculated to produce, in the aggregate, an approximate amount of four percent tax while also eliminating the collection of fractions of one cent. The authority to devise a bracket system is vested, by statute, with the department. The bracket system which the department has devised appears to be reasonable and within the exercise of sound discretion.

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[3]The bracket system which was alluded to in the White case and which was established to implement collection of the three percent tax provided:

"Amount of Sale	Tax Due
1¢ to 13¢	No tax
14¢ to 49¢	1 cent
50¢ to 84¢	2 cents
85¢ to $1.14	3 cents
$1.15 to $1.49	4 cents
$1.50 to $1.84	5 cents
$1.85 to $2.14	6 cents"

306 P.2d at 231.

It is our opinion that the department'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 collection of fractions of one cent.

Very truly yours,

Harry M Griger

Harry M. Griger
Special Assistant Attorney General

WP2

WORKERS' COMPENSATION: Corporate officers' exemption. Iowa Code sections 3.7, 4.5 85.1, 85.3(1), 85.61(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)

May 31, 1983

The Honorable Bob Skow
State Representative
604 Division
Guthrie Center, Iowa 50115

Dear Representative Skow:

You have asked the opinion of our office as to whether acceptances of exemption filed by corporate officers for purposes of obtaining an exemption from the workers' compensation law between March 2, 1983 and April 27, 1983 are legally effective.

Iowa Code ch. 85 (1983) creates a comprehensive scheme of workers' compensation benefits payable by employers to their employees for injuries arising out of and in the course of their employment. See Iowa Code section 85.3(1) (1983). A number of specific exemptions are made to the scope of this scheme of benefits. See Iowa Code section 85.1 (1983). One was created in 1982 Iowa Acts, ch. 1221, §2, and applied to the president, vice-president, secretary, and treasurer, the total not exceeding four officers, of a non-family farm corporation. Textually, this "exemption" was not placed in Iowa Code section 85.1, where the other exemptions from the workers' compensation benefit system are located but was placed in Iowa Code section 85.61(3)(d) (1983) which was a part of a definitional section in Iowa Code ch. 85. Under this "corporate officers' exemption," as originally written, an officer seeking exemption was to file an "acceptance of exemption" in the statutorily prescribed form on or before sixty days of the first day of employment. See 1982 Iowa Acts, ch. 1221, §2. Chapter 1221 became

effective January 1, 1983. See 1982 Iowa Acts, ch. 1221, §4. Existing corporate officers as of January 1, 1983 who wished to obtain the exemption were to file an acceptance of exemption on or before sixty days after January 1, 1983. Section 4 of ch. 1221 provided:

> This Act takes effect January 1 following enactment. A corporate officer employed on or before the effective date of this Act who chooses to sign an acceptance of exemption under section 2 of this Act shall sign, and the corporation shall file, the acceptance of exemption on or before sixty days after the effective date of this Act.

An exempted corporate officer was required to refile an acceptance of exemption on or before January 1 of each successive year after the exemption was originally obtained. See 1982 Iowa Acts, ch. 1221, §2.

Apparently because the legislature believed this procedure to be burdensome, and perhaps because it was unclear whether placing the "corporate officers' exemption" in the definitional section instead of in the section containing other exemptions was actually effective to create an exemption, and for other reasons, it enacted 1983 Iowa Acts, Senate File 51, which rewrites the "corporate officers' exemption". Under Senate File 51, section 85.61(3)(d) is repealed and new sections are created which essentially reincorporate the exemption as originally written. See 1983 Iowa Acts, S.F. 51, §§1, 3, 5. However, under these new sections, the requirement that an officer file his or her acceptance of exemption (referred to as a "rejection of coverage") within sixty days of commencing employment is deleted. Id. The requirement of an annual filing thereafter is also dropped. Id. Provision is made for waiver of benefits not only under Iowa Code ch. 85 but also under Iowa Code ch. 85A (occupational disease) and Iowa Code ch. 85B (occupational hearing loss) as well as for rejection or declination of employers' liability insurance coverage. (These latter changes do not concern us here).

Senate File 51 became effective by publication, the last date thereof being April 27, 1983. See 1983 Iowa Acts,

S.F. 51, §8; Iowa Code section 3.7 (1983). However, by express direction, only §7 of Senate File 51 actually became effective at that time. The other provisions of Senate File 51, including those that repeal section 85.61(3)(d) and replace it by new sections, become effective January 1, 1984. See 1983 Iowa Acts, S.F. 51, §8. Thus, until January 1, 1984, section 85.61(3)(d) is still in effect. Section 7 of Senate File 51 eliminates the effect of existing corporate officers failing to meet the sixty day filing deadline contained in section 85.61(3)(d). Section 7 states:

> A corporate officer employed on or before January 1, 1983 who chooses to sign an acceptance of exemption for calendar year 1983 under section 85.61, subsection 3, paragraph d, shall sign, and the corporation shall file, the acceptance of exemption any time prior to December 31, 1983.
>
> Notwithstanding the sixty-day limitation in section 85.61, subsection 3, paragraph d, an acceptance of exemption for a newly employed officer may be signed and filed with the industrial commissioner at any time prior to December 31, 1983.

Under the sixty day deadline of section 85.61(3)(d), March 2, 1983 was the last date for filing an acceptance of exemption on the part of an existing officer, that is, an officer as of January 1, 1983. Section 7 of Senate File 51 clearly gives those officers who had not yet, as of April 27, 1983, the effective date of §7 of Senate File 51, filed an acceptance of exemption until December 31, 1983 to do so. However, are acceptances of exemption filed by existing officers after March 2, 1983 but before April 27, 1983 valid? In other words, are those interim filings legalized by Senate File 51?

The general rule is that statutes are presumed to be prospective in operation unless expressly made retrospective. See Iowa Code section 4.5 (1983). However, an exception to this rule has been deemed to exist for

statutes which are remedial or procedural in nature. See State ex rel. Leas v. Interest of O'Neal, 303 N.W.2d 414, 419 (Iowa 1981). Such statutes are construed to be retrospective as well as prospective. Id. Here, §7 of Senate File 51 has the effect of ameliorating the sixty day filing deadline of section 85.61(3)(d), itself a procedural requirement. Section 7 is clearly remedial and procedural in nature and, while not explicit as to filings made prior to its effective date, has the effect of legalizing all filings not timely made under section 85.61(3)(d). Moreover, §7 of Senate File 51 appears to be expressing a legislative intent that it be given a retroactive effect. It would be ironic indeed if an existing corporate officer who had not filed any acceptance of exemption at all prior to the effective date of §7 of Senate File 51 on April 27, 1983 could avail himself or herself of the grace period therein but a corporate officer who had filed an acceptance prior to that date, but did not do so in a timely manner under section 85.61(3)(d), would find his or her filing void. Since the latter corporate officer could merely refile a new acceptance after April 27, 1983, it makes little sense to say that an acceptance filed between March 2, 1983 and April 27, 1983 is invalid. In effect, the sixty day filing deadline of section 85.61(3)(d) was retroactively repealed by §7 of Senate File 51. Thus, it is as if that deadline never existed. See Women Aware v. Reagan, 331 N.W.2d 88, 91 (Iowa 1983).

In sum, an acceptance of exemption filed by an existing corporate officer as of January 1, 1983 under section 85.61(3)(d) 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.

Very truly yours,

THOMAS J. MILLER
Attorney General of Iowa

Fred M. Haskins

FRED M. HASKINS
Assistant Attorney General

FMH/pm

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 26, 1983

Mr. Stephen E. Reno
Assistant Van Buren County Attorney
P.O. Box 496
Keosauqua, Iowa 52565

Dear Mr. Reno:

You have requested an opinion of the Attorney General on two questions, which are as follows:

> (1) Should the Sheriff's budget or the Court fund be used to pay for an anabuse treatment program ordered by a Magistrate with regard to an indigent person charged with O.W.I.?
>
> (2) Should the Sheriff's budget or the Court fund be used to purchase medications of any sort for a person being held in a County Jail, said medication being ordered by a Magistrate or District Court Judge?

We shall address these questions in reverse order.

I.

First, we conclude that court-ordered medication for prisoners held at the county jail should be paid by the

county but not from the court expense fund. Iowa Code § 331.653 (1983) sets forth the duties of the county sheriff. In particular, § 331.653(36) provides that the sheriff shall:

> Have charge of the county jails in the county and custody of the prisoners committed to the jails as provided in chapter 356.

Later, § 331.658 provides in relevant part that:

> 1. The sheriff shall provide board and care for prisoners in the sheriff's custody in the county jail without personal compensation except for the sheriff's annual salary.
>
> 2. 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. The board may determine the manner in which meals are provided for the prisoners.

* * *

Chapter 356 contains additional provisions relating to the operation of county jails. In particular, § 356.2 requires that the sheriff have charge and custody of all prisoners in the county jail. Section 356.5 imposes several specific duties on the sheriff, one of which is to furnish each prisoner with necessary medical aid. Section 356.5(2). In addition, § 356.15 provides that:

> All charges and expenses for the safe-keeping and maintenance of prisoners shall be allowed by the board of supervisors, except those committed or detained by the authority of the courts of the United States, in which cases the United States must pay such expenses to the county, and those committed for violation of a city ordinance, in which case the city shall pay expenses to the county.

Finally, § 331.401(1)(f) requires the supervisors to "provide for the expenses of persons committed to the county jail or a regional detention facility" pursuant to §§ 356.15 and 356.45.

We believe that these provisions, when read together, impose on the county sheriff the duty to provide prisoners at the county jail with necessary medical care. The expense of this care is ultimately to be borne by the county if the prisoner is not held on federal or municipal charges. We assume that in most cases these expenses are met from the sheriff's budget, as established by the supervisors, or from the county general fund. However, it is our opinion that these expenses may never be paid from the court expense fund.

Section 331.426 permits the county to establish certain permissive county funds. In particular, § 331.426(9) authorizes the supervisors to establish:

> A court expense fund, which shall not be used for a purpose other than expenses incident to the maintenance and operation of the courts, including but not limited to salary and expenses of the clerk, deputy clerks, and other employees of the clerk's office, establishment and operation of a public defender's office, costs otherwise payable from the general fund under section 331.424, subsection 3, paragraph "q", the county's expense for confinement of prisoners under chapter 356A, temporary assistance to the county attorney, and claims filed under section 622.93. (emphasis added)

Thus, the county is specifically authorized to pay the expenses of confining prisoners under Ch. 356A from the court expense fund.[1] However, there is no express reference to expenses of county jail prisoners under Ch. 356. Chapter 356A allows a county to establish a county detention facility "in lieu of or in addition to the county jail." Section 356A.1. Section 356A.3 expressly states the county's expenses for maintaining a person at such a detention facility are to be paid out of the court expense fund provided for in § 331.426(9). No such provision is found in Ch. 356 relating to the expenses incurred in confining prisoners in the county jail. Under the principle of "expressio unius est exclusio alterius," the express mention of one thing implies the exclusion of another. In re Wilson's Estate, 202 N.W.2d

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[1] We assume for the purposes of responding to your questions that your county has established a court expense fund pursuant to § 331.426(9). In the event such a fund has not been created, § 331.424(3)(q) provides that the county general fund is to meet those expenses otherwise met from the court expense fund.

41 (Iowa 1972); Maytag Co. v. Alward, 253 Iowa 455, 112 N.W.2d 654 (1962). Applying this principle in the present case, we conclude that the express authorization in § 331.426(9) and § 356A.3 of payment of expenses for county detention facilities from the court expense fund impliedly prohibits payments from that fund for expenses of county jail prisoners under Ch. 356.

II.

In answer to your initial question, we first note that, based on the rationale given in answer to your first question, expenses incurred in providing any medical treatment to county jail prisoners must be paid by the county but not from the court expense fund, while expenses incurred by county detention facility prisoners are to be paid from the court expense fund pursuant to § 331.426(9). However, in a recent telephone conversation you indicated that in your county this treatment program is often ordered by the court when alcohol abuse is related to commission of a crime. You state that this treatment is ordered in two specific instances: first, as a condition for release in lieu of or in addition to other bail requirements, and second, as a condition of probation. See Iowa Code §§ 811.2(1) and 907.6 (1983). Your question asks whether in the case of an indigent defendant the expense of this program should be paid from the county sheriff's budget or from the court expense fund.

It is our opinion that if the program is ordered as a condition of release in lieu of or in addition to bail, the expense is in the nature of any other expense imposed by bail requirements. Therefore, if the defendant is unable to meet this expense because of indigency, that defendant foregoes release on bail. However, if the program is ordered as a condition of probation following a deferred sentence and the defendant is indigent, it is our opinion that the expense no longer constitutes a bail expense, but is instead part of the probation services to be provided by the judicial district department of correctional services pursuant to Iowa Code § 907.2 (1983). In neither case are these expenses to be met from the county sheriff's budget.

As set forth above, § 331.426(9) provides that a court expense fund may be established for the purpose of meeting "expenses incident to the maintenance and operation of the courts." These expenses include certain costs of the clerk of court, the public defender, and the county attorney, as well as "costs otherwise payable from the general fund under [§ 331.424(3)(q)] . . ." Section 331.424(3)(q) requires the

county "to pay court costs if the prosecution fails or if the costs cannot be collected from the person liable, in lieu of payment from the court fund." Thus, any court costs incurred by an indigent defendant are to be paid from the court expense fund if it exists, otherwise from the general fund under § 331.424(3)(q). The question then becomes whether an anabuse treatment program ordered as a condition of bail or as a condition of probation constitutes a court cost.

We can find no Iowa law which addresses this particular question. Generally speaking, court costs are the expenses incurred in prosecuting or defending a lawsuit. In the case of an indigent defendant in a criminal action, specific statutory provisions authorize payment by the county of certain expenses related to the legal proceedings. See, e.g., Iowa Code §§ 230.1 and 223.8 (psychiatric evaluations);[2] 815.4 (witness fees); 815.5 (expert witness fees); 815.7 (attorney's fees) (1983). In sum, these costs are incurred as part of the prosecution or defense of a criminal action and therefore are expenses properly payable from the court expense fund if that fund exists. See footnote 2, supra.

On the other hand, the procedure for setting bail requirements as set forth in Iowa Code Ch. 811 (1983) does not constitute a part of the legal proceedings surrounding the prosecution or defense of a criminal action, but is instead a separate procedure for ensuring that a defendant appear at trial. Section 811.1. The cost of meeting bail requirements set by the court is therefore not a court cost payable from the court expense fund in the event a defendant is indigent. Bail requirements are optional in that, while the courts establish bail requirements pursuant to Ch. 811 and may impose any conditions reasonably necessary to secure the defendant's appearance pursuant to § 811.1(e), these conditions are not imposed on defendants as mandatory. Instead, if a defendant is unable to satisfy a particular requirement of bail, that defendant foregoes release on bail. Failure to satisfy this requirement, e.g., failure in the present case to complete an anabuse treatment program, in no way affects a defendant's position in subsequent criminal proceedings, but merely affects that defendant's ability to be released pending those proceedings. Accordingly, as the county has no responsibility to meet the bail requirements of indigent criminal defendants, neither is the county required to meet the expense of an anabuse treatment

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[2] See also 1980 Op.Att'yGen. 177 (court-ordered psychiatric evaluation for adult charged with criminal offense to be paid from county of defendant's legal settlement).

program ordered for an indigent criminal defendant as a condition of bail.

Further, we do not believe that a treatment program ordered by the court after commission of a public offense constitutes an expense payable from either the court expense fund as a part of the legal proceedings surrounding that conviction, nor do we believe this expense should be paid from the sheriff's budget. Instead, it is our opinion that if a court orders an indigent criminal defendant to complete an anabuse treatment program as a condition of probation, that defendant should seek treatment from a community agency that provides medical services without charge to indigent persons. Following the court's order, the judicial district department of correctional services would become involved pursuant to its statutory responsibility, which is found in Iowa Code § 907.2 (1983). That section provides in relevant part that:

> Pursuant to designation by the court, probation services shall be provided by the judicial district department of correctional services . . .

This section clearly imposes on the district department of correctional services a mandatory duty to provide probation services when probation is ordered by the court. While we do not believe the department is required to actually provide treatment services and meet the expenses of such services, the department is responsible for supervising a defendant who is on probation and ensuring that that defendant complies with the terms of probation. In the event one of the terms of probation is completion of an anabuse treatment program, the department should provide the defendant guidance as to how to secure this treatment. In the event the defendant is indigent, the department should direct the defendant to local agencies which could provide such a treatment program for a reduced charge or for no charge.

In conclusion, it is our opinion that 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 should direct an indigent defendant to an agency which could provide this treatment for a reduced charge or for no charge.

Sincerely,

Theresa O'Connell Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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)

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

GARY L. HAYWARD
ASSISTANT ATTORNEY GENERAL

ADDRESS REPLY TO:
3RD FLOOR
WALLACE STATE OFFICE BUILDING
DES MOINES, IOWA 50319
PHONE: 515/281-5261

The Honorable Forrest V. Schwengels
Iowa Senate
State Captiol
LOCAL

May 13, 1983

Dear Senator Schwengels:

You have asked this office for an opinion concerning the difference between the computation of sick leave payout upon retirement for supervisory peace officer members of the Iowa Department of Public Safety and the computation of sick leave payout upon retirement of other peace officer members of the department. Iowa Code §79.23 (1983) provides in pertinent part:

> When an employee retires, is eligible for and has benefits under a retirement system authorized under chapter 97A or 97B. . . the employee shall receive a cash payment for the employees accumulated, unused sick leave in both the active and banked sick leave accounts except when, in lieu of cash payment, payment is made for monthly premiums for health or life insurance or both as provided in a collective bargaining agreement negotiated under chapter 20. An employee of the department of public safety or the state conservation commission who has earned benefits of payment of premiums under a collective bargaining agreement and who becomes a manager or supervisor and is no longer covered by the agreement shall not lose the benefit of payment of premium earned while covered by the agreement.

In a similar vein 1982 Iowa Acts, Ch. 1184, § 2, provides:

> An employee of the department of public safety or the state conservation commission who retires during the year beginning on the effective date of this Act shall be eligible for payment of life or health insurance premiums as provided for in the collective bargaining agreement covering the public safety bargaining unit if that employee previously served in a position which would have been covered by that agreement. The employee shall be given credit for the service in that prior position as though it was covered by the agreement.

The first collective bargaining agreement involving peace officer members of the Department of Public Safety and Conservation Commission was effective July 1, 1977, and provided that upon retirement covered officers would have their unused sick leave dedicated to the payment of health and/or life insurance premiums. Subsequent agreements have retained this benefit.

To effectuate these provisions the Comptroller has issued a directive providing in pertinent part:

> Those employees who were promoted prior to July 1, 1977, and retire prior to June 30, 1983, will receive credit for the lesser of 720 hours or the hours accrued at the time of retirement; and, those employees promoted since July 1, 1977, will receive credit for the lesser of actual hours accrued at the time of retirement or time of promotion.

Procedure 560.15, p. 4, of the State Comptroller. The significance of the date, July 1, 1977, in this directive is that until that date employees could not accrue more than ninety days (720 hours) of sick leave, Iowa Code § 79.1 (1977), and also that it was the effective date of the initial collective bargaining agreement covering public safety and conservation officers. The reference to June 30, 1983, is to the time limitation set in 1982 Iowa Acts, Ch. 1184 § 2.

This procedure is in compliance with the law. There are four categories of officers affected: (1) Officers who are in

the collective bargaining unit until retirement, (2) officers promoted on or after July 1, 1977, (3) officers promoted before July 1, 1977, who retire before July 1, 1983,[1] and (4) officers promoted before July 1, 1977, who do not retire before July 1, 1983. Public Safety and Conservation Officers who remain in the collective bargaining unit receive insurance benefits for the full value of unused sick leave at retirement as provided in their collective bargaining agreement. Officers of these agencies promoted out of the collective bargaining unit after July 1, 1977, receive such insurance benefits upon retirement equal in value to the sick leave earned while in the bargaining unit which is unused at retirement. (The Comptroller properly requires that sick leave earned past promotion must be exhausted before this benefit is diminished.) Officers of these agencies promoted before July 1, 1977, who retire before July 1, 1983, are eligible to receive such insurance benefits upon retirement equal in value to the sick leave earned in positions now covered by the collective bargaining agreement which is unused at retirement. Officers of these agencies so promoted before July 1, 1977, who do not retire before July 1, 1983, are not eligible for such insurance benefits at all. Upon retirement they receive the cash payment, not exceeding $2,000.00, available to state employees not benefiting from such a collective bargaining unit pursuant to Iowa Code §79.23 (1983).

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:dkl

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[1]This opinion is based on the 1982 Act. Pending legislation could extend the July 1, 1983, date.

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)

The Honorable Dennis L. Renaud
House of Representatives
L O C A L

May 12, 1983

Dear Representative Renaud:

You have requested an opinion on the following questions:

1. As a result of the voluntary annexation which placed two parcels within the boundaries of the Saydel Consolidated School District within the corporate limits of the City of Des Moines, is it mandatory that the Saydel Consolidated School District become a seven-member board pursuant to the provisions of section 277.23?

2. If the answer to question 1 is "yes," is this accomplished as a matter of law pursuant to section 277.2? Or, must an election be held as provided in section 275.35 and the second paragraph of section 277.23?

We understand that the Saydel Consolidated School District board members are elected at large pursuant to Iowa Code § 275.12(2)(a) (1983). Our answer to the first question is yes. The answer to the second question is that the change should be accomplished as a matter of the operation of law under the language of Iowa Code § 277.23.

Ordinarily when we are asked to construe a statute we are required to apply various principles of statutory construction. When the language of a statute is clear and unambiguous there is no need to apply such principles. We believe this is such a case. Section 277.23 provides in pertinent part as follows:

> In any district including all or part of a city of fifteen thousand or more population . . . the board shall consist of seven members; . . .
>
> A change from five to seven directors shall be effected in a district at the first regular election after . . . a district becomes wholly or in part within a city of fifteen thousand population or more in the following manner: If the term of one director of the five-member board expires at the time of said regular election, three directors shall be elected to serve until the third regular election thereafter; if the terms of two directors expire at the time of said regular election, three directors shall be elected to serve until the third regular election thereafter and one director shall be elected to serve a term the expiration of which coincides with the expiration of the term of the director heretofore singly elected. (Emphasis supplied).

Inasmuch as the Saydel district includes a part of the City of Des Moines which has a population of more than fifteen thousand, we believe the clear language quoted above requires the Saydel board of directors to be composed of seven members.

Moreover, since the language clearly requires the change to occur "at the first regular election" after a school district acquires the status of requiring a seven member board, no consent of the voters is required pursuant to Iowa Code § 277.2 (1983). That statute provides for the calling of special elections for, inter alia, authorization of a seven member board.

We note that the change-over process would be more complicated if the Saydel district elected its board members from director districts pursuant to Iowa Code §§ 275.12(2)(b) or (c) or (d) or (e). In a district that elects board members under one of those provisions, use of one of the alternative processes for changing director district boundaries would be necessary.

In sum, a school district which includes all or part of a city of fifteen thousand or more population is required to have a seven member board of directors. The change in circumstance gives rise to the requirement, and an election authorizing the change from five to seven is not required. No other steps are needed if the board members are elected at large. If school board members are elected from director districts, one of the

methods for changing director district boundaries would be needed to implement the change from a five to a seven member board.

Sincerely,

Merle W. Fleming

MERLE W. FLEMING
Assistant Attorney General

MWF/jkp

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)

The Honorable Jack N. Nystrom
Iowa Senate
State Capitol
LOCAL

May 12, 1983

Dear Senator Nystrom:

You have asked this office for an opinion regarding the proper means of computing the "earnable compensation" of members of the Public Safety Peace Officers' Retirement, Accident and Disability System. Specifically you have asked:

> Is "earnable compensation", as defined in Iowa Code §97A.1(10) (1983) computed based upon the actual monies paid to the officer or the monies which would have been paid to the officer assuming the officer was at the top of the pay range for his or her rank?[1]

"Earnable compensation", for purposes of construing the provisions of Iowa Code Ch. 97A (1983) is defined in §97A.1(10) as follows:

> 'Earnable compensation' or 'compensation earnable' shall mean the regular compensation which a member would earn during one year on the basis of the stated compensation for longevity and the daily amount received for meals under section 80.8 and

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[1]Your question was phrased solely with reference to the Iowa State Patrol. However, the same issue would arise with regard to the special agents, special agent supervisors, special agents in charge and other ranks in the Division of Criminal Investigation of the Iowa Department of Public Safety.

> excluding any amount received for overtime compensation or other special additional compensation, other payments for meal expenses, uniform cleaning allowances, travel expenses, and uniform allowances and excluding any amount received upon termination or retirement in payment for accumulated sick leave or vacation.

This definition is incorporated into the definition of "average final compensation" in Iowa Code § 97A.1(12) (1983) which states:

> 'Average final compensation' shall mean the average earnable compensation of the member during the member's highest three years of services as a member of the state department of public safety, or if the member has less than three years of service then the average compensation of the member's entire period of service.

The term "earnable compensation" is itself, or as incorporated into the definition of "average final compensation" used to compute benefits paid by the system, Iowa Code § 97A.6 (1983), and to compute contributions paid to the system. Iowa Code § 97A.8 (1983). Thus, the interpretation of the definition of "earnable compensation" has widespread ramifications for the entire system.

It is axiomatic that whenever construing a statute the primary goal is to determine and then effect the intent of the legislature. LeMars Mut. Ins. Co. v. Bonnecroy, 304 N.W. 2d 422 (Iowa 1981). The intent of the legislature is to be determined generally by considering the entire statute as a whole rather than by considering its sections as isolated units. Peffers v. City of Des Moines, 299 N.W.2d 675 (Iowa 1980). While longstanding administrative interpretations of statutes cannot alter the clear meaning of statutory language, they may be considered and given weight when construing ambiguous provisions.

The crux of the issue is what "stated compensation for the member's rank or position" in § 19A.1(10) means. Does it mean that the figure is based upon the highest possible salary

payable to officers of a given rank or does it mean that the figure is based upon the amount of money actually paid to the officer? We believe that the latter interpretation is correct.

First it is necessary to generally state how the base pay of officers is determined. Not unlike the pay scales established for state merit employees, a salary continuum is established for each rank, e.g. trooper, sergeant, lieutenant, captain, major, colonel, special agent, special agent supervisor and special agent in charge. Nonsupervisory pay ranges are determined by collective bargaining. An officer's base pay is determined by his or her rank and time in rank. Some special assignments such as detached service have additional pay included. To this base pay longevity pay and other allowances mentioned in § 97A.1(10) are added where appropriate. Thus, the "stated compensation for the member's rank or position" is not a given figure for all officers of a particular rank. Instead, it is found somewhere on the continuum ranging from the lowest step to the highest step of the applicable pay range. There is no more linguistic support for setting pension benefits and contributions at the highest possible pay for a given rank than there would be for setting them at the lowest.

The intent of the legislature that "earnable compensation" is based upon salary paid rather than maximum potential salary is found in its appropriation to the retirement system. Appropriations are based upon a percentage of money appropriated for salaries. 1981 Iowa Acts, Ch. 14, § 2. We are not prepared to assume that the legislature is intentionally funding the Public Safety Peace Officers' Retirement, Accident and Disability System at a level lower than is required by law. Iowa Code § 97A.8(1)(a) (1983), states that the state's contribution is to be based upon a percentage of "earnable compensation." By setting it on a percentage of salaries paid, the legislature has evidenced its intention that salary paid is the basis of "stated compensation for the member's rank or position" in § 97a.1(10).[2]

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[2]Nothing in this opinion can be construed as a finding that the current rate of contribution is or is not actuarily sound.

This interpretation is consistent with the longstanding administrative interpretation placed on Chapter 97A by the system's board of trustees. As is stated above, such interpretations are to be given weight in construing a statute, unless they are contrary to the clear language of the statute.

In conclusion, it is our opinion that the phrase "regular compensation for the member's rank or position" used 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.

Respectfully yours,

Gary Hayward

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:dkl

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 4, 1983

Mr. Terry L. Wilson
Marion County Attorney
401 E. Robinson
Knoxville, IA 50138

Dear Mr. Wilson:

A letter opinion has been requested of this office as follows:

1. Does the exception for "implements of husbandry" under Section 321.383 apply to required safety chains under Sections 321.462 or does the Section 321.383 exception apply only to "equipment" such as lights and reflectors?

2. Assuming the safety chain requirement is an exception under Section 321.383, does it apply where there is a pickup truck pulling an implement of husbandry, since the pickup clearly is not an implement of husbandry?

Iowa Code Section 321.383 (1983) states in part:

> 1. This chapter with respect to equipment on vehicles does not apply to implements of husbandry, road machinery, bulk spreaders and other fertilizer and chemical equipment defined as special mobile equipment, road rollers, or farm tractors except as made applicable in this section.

The word "equipment" in Webster's New Collegiate Dictionary, p. 386 is defined as "the set of articles or physical resources serving to equip a person or thing . . . the implements used in an operation or activity."

From the above code section and definition, equipment on a vehicle would include safety equipment as stated in §321.462. It is our opinion that if the legislature had intended safety chains to be required for implements of husbandry, it would have stated "that said section is applicable to those vehicles referred to in section 321.383." Therefore, the implement of husbandry exception for equipment under §321.383 includes the safety chains requirement under §321.462.

While the farm wagon is an implement of husbandry within the definition of §321.1(16), the pickup truck is not. Section 321.1(16) states in part: '"Implement of husbandry" means every vehicle which is designed for agricultural purposes and exclusively used, except as herein otherwise provided, by the owner thereof in the conduct of his agricultural operations . . ..'

Iowa Code Section 321.383 (1983) also states in part:

> . . . the movement of implements of husbandry between the retail seller and a farm purchaser or the movement of indivisible implements of husbandry between the place of manufacture and a retail seller or farm purchaser under section 321.453 is subject to safety rules adopted by the department. The safety rules shall prohibit the movement of any power unit towing more than one implement of husbandry from the manufacturer to the retail seller, from the retail seller to the farm purchaser, or from the manufacturer to the farm purchaser.

The word "indivisible" in Webster's New Collegiate Dictionary, p. 428, is defined as "not capable of being divided."

From the above code section and definition, implements of husbandry which cannot be separated and are moved between the manufacturer or retail seller or farm purchaser are subject to safety rules implemented by the department. These sections pertain exclusively to the towing of implements of husbandry by a power unit from the manufacturer to the retail seller, from the retail seller to the farm purchaser, or from the manufacturer to the farm purchaser. Safety rules adopted in the future by the department would apply to such a situation but section 321.462 does not.

"Power Unit" is not defined in Chapter 321. However, in reviewing Webster's New Collegiate Dictionary, it is construed to mean, "an apparatus supplying energy". This would include a pickup truck.

Therefore, if the pickup truck was moving an implement of husbandry or an indivisibile implement of husbandry between the specific points stated in §321.383, the safety rules of the department would govern as to any safety chain requirements. Again, if the pickup truck was pulling more than one implement of husbandry, the safety rules of the department would also apply as to any safety chain requirements. However, the above section of §321.383 does not apply to the question presented.

"Pickup" is defined in §321.1(5). It means "any motor vehicle designed to carry merchandise or freight of any kind, not to exceed two thousand pounds." While a pickup may be used for agricultural purposes, it is not "designed" for such purposes.. A pickup does not come within the meaning of the phrase "designed for agricultural purposes" used in the first sentence of the "implement of husbandry" definition. Also, there is no indication of the use of this particular pickup exclusively for agricultural purposes.

A pickup truck pulling a farm wagon is not transformed into an implement of husbandry. There is nothing in Iowa Code Chapter 321 defining pickup as an implement of husbandry when a farm wagon is attached to it. The pickup is not an implement of husbandry under §321.1(16).

Section 321.462 states in part: "When one vehicle is towing or pulling another vehicle . . . there shall be a safety chain which shall be so fastened as to be capable of holding the towed vehicle . . .." Thus, a pickup truck not an implement of husbandry, pulling a farm wagon, must meet the safety chain requirement of §321.462.

Sincerely,

Susan E. Lamb

SUSAN E. LAMB
Assistant Attorney General

MUNICIPALITIES: Council Members. Eligibility for City Employment. Iowa Code §§ 362.5, 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

The Honorable Denny Renaud
State Representative
State Capitol
L O C A L

Dear Representative Renaud:

We are in receipt of your letter dated March 8, 1983, requesting an opinion of our office. Specifically, you have asked whether a city council member, upon resignation, is eligible for appointment as a salaried employee with his or her city.

An examination of the Iowa Code has failed to reveal a statutory prohibition against the employment of a resigned council member.[1] Thus, in our opinion a city council member may accept employment with his or her city upon resignation.

Nevertheless, we draw your attention to a statute which may limit the desirability of such employment. Iowa Code § 372.13(8) (1983), in language added by 1975 Iowa Acts, Chapter 203, § 23, provides in pertinent part that: "Except as provided in section 362.5, an elected city officer shall not receive any other compensation for any other city office or city employment during that officer's term of office, but may be reimbursed for actual expenses incurred." There can be no doubt that a city council member is an "elected city officer." See 1974 Op.Att'yGen. 21. Further, the phrase "term of office," as used in Iowa Code § 372.13(8) (1983), refers to the fixed legal period during which an officer may legally hold office. See Sueppel v. City Council

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[1] Iowa Code § 372.13(9) (1983), however, would prohibit the appointment of a council member to a city office during the officer's term of office under certain conditions.

of Iowa City, 257 Iowa 1350, 136 N.W.2d 523 (1965) (construing the same phrase in another statute). Term of office is not synonymous with and is to be distinguished from the phrase "tenure in office," which means the right to perform the duties and to receive the emoluments of the office. See 3 McQuillin, Municipal Corporations, § 12.108 (1982). The terms for council members are two or, by petition and election, four years. See Iowa Code § 376.2 (1983).

Our examination is not complete, however, without addressing the exception clause in § 372.13(8). Section 372.13(8) says, "Except as provided in section 362.5, an elected city officer shall not receive any other compensation for any other city office or city employment during that officer's term of office . . ." The underlined proviso was added to the sentence by 1980 Iowa Acts, Chapter 1125, § 2, an act which also amended § 362.5 to permit city officers or employees in towns up to 10,000 in population to engage in competitively bid projects with the city. Confusion arises because § 362.5(1) exempts from its prohibition against city officers or employees having any interest in city contracts the following:

> "The payment of lawful compensation of a city officer or employee holding more than one city office or position, the holding of which is not incompatible with another public office or is not prohibited by law. [Emphasis added.]

Thus the question arises whether this, by virtue of the exception clause in § 372.13(8), permits elected city officers to receive compensation for more than one city office or position.

While this argument has some logical strength, the result would be that the exception in the relevant sentence in § 372.13(8) would cause the remainder of that sentence to be a nullity.

An exception should not be construed as broader than the rule. Kane v. City of Marion, 251 Iowa 1157, 1163-64, 104 N.W.2d 626, 629-31 (1960). If the legislature had intended to repeal this sentence, it would have done so expressly rather than indirectly by creating an exception that abolished the prohibition. Id.

In order to give the statutes a reasoned construction, it is our view that the prohibition of additional compensation to elected city officers under § 372.13 is compensation "prohibited by law" under § 362.5(1). This gives meaning to both sections. The prohibition in § 372.13(8) stands. The amendment adding the exception is given effect by virtue of § 362.5(2)-(9) and permits

elected city officers to have an interest in certain competitively bid projects, etc. This appears to be the primary intent of 1980 Iowa Acts, Chapter 1125, which created the exception to § 372.13(8). Also, § 362.5(1) is not a provision legalizing all dual compensation, but only that not incompatible with another office or prohibited by law. The section covers all city officers and employees and not just elected city officers, the class covered by § 372.13(8). It does not do violence to this section to give effect to the express legislative intent to prohibit dual compensation to elected city officers under § 372.13(8). The exception clause in § 372.13(8) will not avail a city council member seeking any other compensation for city employment during that officer's term of office. The consequences of Iowa Code § 372.13(8) (1983), therefore, cannot be avoided by resignation. Accordingly, a city council member, upon resignation, shall not receive any other compensation for any other city employment during the officer's term of office.

In conclusion then, 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.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/jkp

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 28, 1983

The Honorable Ralph Rosenberg
State Representative
111 State Street
Ames, Iowa 50010

Dear Representative Rosenberg:

We are in receipt of your request for an opinion of the Attorney General regarding the impact of House File 108, enacted this last session of the General Assembly, on a municipal zoning ordinance. Specifically, our office has been asked whether a zoning classification in Ames, Iowa, designated "A-1, Agricultural District," comes within the ambit of House File 108.

House File 108 is designed to remove existing barriers to the establishment of group homes for developmentally disabled persons in the residential areas of the state. The intent of the statute is: "to assist in improving the quality of life of developmentally disabled persons by integrating them into the mainstream of society by making available to them community residential opportunities in the residential areas of the state."

Under House File 108, which amends the city and county zoning statutes, Iowa Code Chapters 414 and 358A, respectively, a city or county cannot require a developmentally disabled group home to obtain a special use permit, special exception, or variance prior to operation. For instance, if the Ames A-1 Agriculture district is included within the scope of House File 108, a family home for developmentally disabled persons in that district need not obtain a special use permit. Also, the legislation prohibits the use of restrictive devices by private property owners to exclude developmentally disabled persons. All restrictions, reserva-

tions, conditions, exceptions, and covenants prohibiting the use of residential property as a family home for developmentally disabled persons are voided. Finally, in an effort to further integration into mainstream society, a quarter mile restriction on the location of developmentally disabled family homes is imposed. No new family home is to be located within a fourth of a mile of an existing facility.

We must determine whether the legislation is intended to apply to exclusively residential zones or districts or whether it includes all zoning classifications which permit residential use of property in the zone or district. According to House File 108, a city or county: "shall consider a family home a residential use of property for the purposes of zoning and shall treat a family home as a permitted use in all residential zones or districts, including all single-family residential zones or districts, of [that political subdivision]." Because the first quoted clause requires a city or county to treat group homes as a residential use for purposes of zoning, it is our belief that group homes must be permitted to the same extent as other residential uses in any zoning district.

Any contrary argument requires that the second quoted clause be construed to mean all exclusively residential zones or districts. Such a construction is contrary to the stated intent of integrating the developmentally disabled into "residential areas." Also, it is noted that the legislation is to be "liberally construed." Finally, to be consistent with the alternative construction, the prohibition against restrictive devices should have been restricted to all exclusively residential zones or districts, instead of applying to all "residential use of property." Accordingly, it is our view that all zoning classifications which permit residential use of property in the zone or district come within the ambit of House File 108.

One of the permitted uses of a building or premise in the Ames A-1 Agricultural district is single-family dwellings. CITY OF AMES, IA. ORDINANCES § 29.12 (1980). That district, therefore, permits residential use of property in the zone. Accordingly, the classification "A-1, Agricultural District" in the Ames zoning ordinances comes within the ambit of

House File 108. As such, a family home for developmentally disabled persons in that district need not obtain a special use permit.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:sh

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)

NOTE: Since issuance of this opinion, the Court has adopted several new rules which may have some affect on our conclusions.

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319

June 28, 1983

Mr. William J. O'Brien
Court Administrator
State Capitol
L O C A L

Dear Mr. O'Brien:

You have requested our opinion on a number of questions concerning S.F. 549, an act accompanying the recently enacted court reform bill.

1.

Your first question is:

> Is the twenty-five dollar advance fee for various services in civil cases assessed against the defendant as well as the plaintiff?

It is our opinion that the twenty-five dollar advance fee is to be assessed against the plaintiff at the beginning of a lawsuit, but is a fee that can be taxed as a part of the costs to either party at the conclusion of the lawsuit.

1982 Iowa Acts, Senate File 549, Section 2(b) simply provides that the clerk of court is to collect the following fee:

> For payment in advance of various services and docketing procedures for civil cases, excluding small claims, twenty-five dollars.

Section 14(b) of this same Act contains a provision identical to this except that the word "civil" is omitted. Section 2(b) amends Iowa Code Section 331.705(1) (1983), and § 14(b) amends 1982 Iowa Acts, Senate File 495, Section 9105(1). Both § 331.705(1) and § 9105(1) formerly listed a number of

various services to be performed by the clerk and the fee to be assessed for each particular service. Senate File 549, §§ 2(b) and 14(b), replaced those fee lists with a single comprehensive filing fee. There are no express provisions in §§ 2(b) or 14(b) stating which party is responsible for paying this advance fee, and it is unclear from our reading of this statute what the legislature intended in this regard. We therefore refer to relevant principles of statutory construction to assist us in ascertaining the legislature's intent. See Le Mars Mutual Insurance Co. of Iowa v. Bonnecroy, 304 N.W.2d 422 (Iowa 1981) (rules of statutory construction to be referred to only when terms of statute are ambiguous or susceptible of two constructions).

In construing a statute, it must be read as a whole and given a sensible and logical meaning. Hamilton v. City of Urbandale, 291 N.W.2d 15 (Iowa 1980). To determine the legislature's intent, one must look to, inter alia, the language used in the statute and the object sought to be accomplished, and interpret the statute reasonably to effect its purpose. Rodman v. State Farm Mutual Automobile Insurance Co., 208 N.W.2d 903 (Iowa 1973). Strained, absurd, or extreme results should be avoided. Hansen v. State, 298 N.W.2d 263 (Iowa 1980).

Applying these general principles in the present case, we believe that S.F. 549, §§ 2(b) and 14(b), were an effort by the legislature to simplify the procedure for collecting filing fees due the clerk of court by eliminating the numerous charges for various services provided for in § 331.705(1) and S.F. 495, § 9105(1) and replacing them with one single fee which is to be collected by the clerk at the beginning of a lawsuit. This fee is to cover the costs of various services incurred by the clerk throughout the course of the lawsuit. We believe that, absent express provisions to the contrary, § 2(b) is comprehensive in scope and that this single advance fee is to cover the expense of all services and docketing procedures provided by the clerk throughout a lawsuit. We believe this result is a practical one in that the fee is presumably to be paid at the time the lawsuit is filed because the statute requires payment "in advance of various services and docketing procedures for civil cases." (emphasis added) Accordingly, because the plaintiff files the petition commencing a lawsuit, the plaintiff is the most logical choice as the party to pay the advance fee.

We believe a contrary conclusion would result in assessment of a twenty-five dollar fee against each named plaintiff and defendant, which in some lawsuits could result in the assessment of a sizeable fee. We believe such a result

would be a strained and extreme interpretation of § 2(b), particularly in light of the various fees expressly listed in former §§ 331.705(1) and 9105(1), which were replaced by §§ 2(b) and 14(b), respectively. Reviewing the statutes as they existed prior to the enactment of S.F. 549, we believe there were few lawsuits in which the total fees provided for would exceed twenty-five dollars.

Accordingly, we conclude that the twenty-five dollar advance fee provided for in S.F. 549, § 2(b), should be assessed against the plaintiff at the beginning of the lawsuit, and is a cost which may be taxed along with other costs to either party at the conclusion of the lawsuit.

2.

Your second question is:

> Does the thirty-five dollar fee "for filing a petition, appeal or writ of error and docketing them. . ." [S.F. 549, section 2, paragraph a] apply to petitions, motions and applications to modify a dissolution decree as well as the original action? [See, A.G. Opinion #82-3-29(L)]

It is our opinion that the fee provided for in S.F. 549, §§ 2(a) and 14(a), applies to any petition, motion, or application to modify a dissolution decree.

In Op.Att'yGen. #82-3-29(L) we held that a separate filing fee is required for initiating an action in district court to modify a previously-entered decree of dissolution. In that opinion we relied in part on 1981 Iowa Acts, Ch. 189, § 4, which provided that:

> The clerk shall collect the following fees:
>
> a. For filing a petition, appeal, or writ of error and docketing them, twenty-five dollars.

That provision later became Iowa Code § 331.705(1)(a) (1983), and was recently amended by 1983 Iowa Acts, Senate File 549, Section 2(a), to read as follows:

> a. For filing a petition, appeal, or writ of error and docketing them, thirty-five dollars.

An identical provision is found in S.F. 549, § 14(b), which amends S.F. 495, § 9105(1). The effect of these amendments is only to increase the filing fee provided for, and in no way affects the rationale or conclusion of our prior opinion. Thus, for the reasons set forth in Op.Att'yGen. #82-3-29(L), we again conclude that a separate fee, in addition to the fee charged for filing the original dissolution action, is required for a petition, motion, or application to modify a dissolution decree.

3.

Your third question is:

> Does the twenty-five dollar fee "for payment in advance of various services and docketing procedures for civil cases. . ." [S.F. 549, section 2, paragraph b] apply to petitions, motions and applications to modify a dissolution decree as well as the original action?

It is our opinion that the twenty-five dollar advance fee of S.F. 549, §§ 2(b) and 14(b), may be assessed by the clerk in an action to modify a dissolution decree, and that this fee may be assessed in addition to the fee charged in the original dissolution action.

As set forth in our answer to your second question, we held in Op.Att'yGen. #82-3-29(L) that a separate filing fee is required for initiating an action to modify a decree of dissolution. In that opinion we discussed the fact that a modification action is auxiliary or supplementary to the original dissolution action, and the court retains jurisdiction for modification purposes. Van Gundy v. Van Gundy, 244 Iowa 488, 56 N.W.2d 43 (Iowa 1953). However, a separate petition is required to initiate a modification action. Op.Att'yGen. #82-3-29(L). A thirty-five dollar fee is to be assessed by the clerk pursuant to S.F. 549, §§ 2(a) and 14(a), for filing this petition. Id. See also Part 2, above.

Thus, while a modification action is technically a continuation of the original action, the actual effect of a modification petition is to commence a new set of proceedings, during which the clerk will be required to perform once again many of the services performed in the original dissolution action. Because the costs provided for in S.F. 549, §§ 2(b) and 14(b), are designed in part to compensate the clerk for performing certain services, and because

these services will be repeated in a modification action, we conclude that when a party seeks to modify a dissolution decree the clerk may assess costs pursuant to S.F. 549, §§ 2(b) and 14(b), in addition to the costs assessed in the original dissolution action.

4.

Your fourth question is:

> Does the flat twenty-five dollar fee for various services apply to criminal cases?

It is our opinion that the twenty-five dollar fee provided for in S.F. 549, §§ 2(b) and 14(b) applies to criminal as well as civil cases.

Iowa Code § 331.705(1)(aa) (1983) provides that in criminal cases the clerk is to collect "the same fees for the same services as in civil cases . . ." This provision was unaffected by the amendments of other portions of § 331.705(1). A similar provision was enacted in S.F. 495, § 9105(1)(aa), which states the clerk is to collect the following fees:

> In criminal cases, the same fees for the same services as in civil cases, to be paid by the county or city initiating the action as provided in section 602.9109. . . .

While portions of S.F. 495, § 9105(1), were later amended by S.F. 549, § 9105(1)(aa) remained unaffected by these later amendments.[1]

As set forth above, the provisions governing fees for "various services and docketing procedures" performed by the clerk in civil cases are now found in S.F. 549, §§ 2(b) and 14(b). Accordingly, pursuant to the express terms of § 331.705(1) and S.F. 495, § 9105(1)(aa), the fee requirements of §§ 2(b) and 14(b) apply in criminal as well as civil cases.

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[1] We note that § 2(b) expressly refers to costs "for civil cases," while § 14(b) does not include that term. While this difference creates some confusion as to legislative intent, we believe the legislature's recent enactment of S.F. 495, § 9105(1)(aa), firmly establishes its intent to generally assess the same fees in criminal cases as in civil cases.

5.

Your fifth question is:

> Does the service fee apply to all indictable and non-indictable criminal cases, except simple misdemeanors (including scheduled and non-scheduled violations) where the defendant admits guilt? [Iowa Code §§805.6, .9 (1983) as amended by S.F. 549, sections 4, 7, 8 and 9.]

It is our opinion that the fee provided for in S.F. 549, §§ 2(b) and 14(b) applies to all criminal cases with the exception of those cases in which a specific statute separately provides for fees.

As set forth in our answer to your fourth question, S.F. 549, §§ 2(a) and (b) and 14(a) and (b) apply to criminal cases pursuant to § 331.705(1)(aa) and S.F. 495, § 9105(1)(aa). Thus, while these statutes generally establish that the costs in criminal cases are to be assessed as in civil cases, there are express exceptions. For example, S.F. 549, § 10, amends Iowa Code § 805.9 (1983) and states that court costs for scheduled violations are to be eight dollars. Subsection (6) of that amendment provides that the eight dollars in costs are the total costs collectible from a defendant.[2] In addition, S.F. 549, § 15, expressly provides that the fee for docketing a complaint or information for a simple misdemeanor is eight dollars, except in overtime parking cases, in which no such fee is to be collected.[3]

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[2] We note that S.F. 549, § 10(6) further states that fees shall not be imposed "for the purposes specified in section 331.705, subsection 1, paragraph 'i,' 'j,' or 't.'" However, § 331.705(1) was amended by S.F. 549, § 2 and subsections (i), (j), and (t) were eliminated.

[3] Senate File 549, § 4, purports to amend Iowa Code Section 602.63(1) (1983), and provides in part that "the cost of filing and docketing a complaint or information for a nonindictable misdemeanor shall be eight dollars . . . ." However, Iowa Code Ch. 602 (1983) was repealed by S.F. 495, § 10203(1). We do not attempt to clarify this confusion. However, for the purpose of your question, we note that the category of simple misdemeanors includes all nonindictable misdemeanors. Iowa Const., Art. I, § 11; Iowa Code Sections 701.8, 801.13, and 903.1 (1983). Therefore, despite the distinction in language between S.F. 549, § 4, and S.F. 549, § 15(1), the fee assessed in cases of simple and nonindictable misdemeanors is the same, i.e., eight dollars.

In sum, eight dollars is the total amount of costs that may be recovered from a defendant in the case of a scheduled violation. These costs are the same regardless of whether the defendant admits guilt. In all other simple misdemeanor cases, apart from overtime parking cases, the initial fee for filing the complaint or information is eight dollars; additional costs would be assessed pursuant to S.F. 549, §§ 2(b) and 14(b).

6.

Your sixth question is:

> What court costs should be assessed in contested simple misdemeanor cases?

The answer to this question is the same as the answer to your fifth question, above. There is no difference in costs for contested and non-contested simple misdemeanor cases.

7.

Your seventh question is:

> What are the court costs for an indictable misdemeanor or felony?

The costs for all simple misdemeanors are discussed in our answer to your fifth question, above. Also, as previously discussed, absent an express statutory provision governing costs in a particular matter, costs in all other criminal cases are to be assessed as in civil cases. § 331.705(1)(aa); S.F. 495, § 9105(1)(aa). We have found no specific provisions addressing costs in felony cases, and therefore the general rule applies.

We do note that nothing in the amendments of S.F. 495 and S.F. 549 affect our conclusion in Op.Att'yGen. #81-10-15(L) that an indictment or information is not a petition, appeal, or writ of error as those terms were used in Iowa Code § 331.705(1)(a) (1983), the section which preceded S.F. 549, §§ 2(a) and 14(a). Therefore, we concluded in that opinion that the filing fee provided for in § 331.705(1)(a) did not apply in criminal cases, despite the provision that fees in criminal cases be assessed as in civil cases. See § 331.705(1)(aa); S.F. 495, § 9105(1)(a). While separate statutory provisions exist for assessing costs for filing of a complaint or information in simple misdemeanor cases, S.F. 549, § 15, there is no similar provision for costs for filing an indictment or information in all other cases.

Therefore, based on Op.Att'yGen. #81-10-15(L), we conclude that costs may not be assessed pursuant to S.F. 549, §§ 2(a) and 14(a), in criminal cases other than simple misdemeanors. In the latter cases, S.F. 549, § 15, governs.

8.

Your eighth question is:

> Does the twenty-five dollar service fee preclude the assessment of court costs not repealed in section 331.705, The Code (e.g. jury fee, §625.8, $10.00; witness fee, §625.2; postage, §625.7; and court reporter fee, §605.12, $15 per day.)?

It is our opinion that the fee provided for in S.F. 549, § 2(b) does not preclude the clerk from assessing other costs expressly provided for in other statutes.

The twenty-five dollar advance filing fee provided for in S.F. 549, § 2(b) amends former § 331.705(1), which listed the fees for various services rendered by the clerk of court. As you note in your question, other court costs are provided for by statute, e.g., §§ 625.2, 7, and 8 (witness fees, postage fees, and jury fees, respectively), and are unaffected by the amendments of S.F. 549. Further, § 331.705(1)(af) authorizes the clerk to collect "other fees provided by law." This provision was also unaffected by S.F. 549. Therefore, we conclude that nothing in S.F. 549, § 2, precludes the assessment of court costs expressly provided for in other statutes.

9.

Finally, you ask:

> After June 30, 1983, should parties requesting an execution, order, writ, or other process on a civil or criminal case filed before July 1, 1983, be assessed court costs under the old law [Iowa Code § 331.705 (1983)], under the new law [S.F. 549, 1983 Acts], or neither?

It is our opinion that in cases filed before July 1, 1983, the clerk should follow the fee schedule of Iowa Code § 331.705(1) (1983) as that statute existed prior to its amendment by S.F. 549, and that S.F. 549 applies only to those cases filed on or after July 1, 1983.

The general rule is that absent a savings clause, repeal of a statute renders the rescinded act as if it never existed. Women Aware v. Michael Reagen, 331 N.W.2d 88, 91 (Iowa 1983) (and cases cited therein). An exception to this rule exists when a savings clause or general savings statute limits the effect of the repeal. Id. In the present case, we believe a provision in § 4.13, the general savings clause, applies. That section provides that:

> The reenactment, revision, amendment, or repeal of a statute does not affect:
>
> * * *
>
> 4. Any investigation, proceeding, or remedy in respect of any privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.
>
> * * *

It is our opinion that this provision requires district court clerks to apply the fee provisions of § 331.705(1) as they existed prior to the amendments of S.F. 549 to proceedings which were instituted before July 1, 1983. The new fee provisions would then apply only to cases filed on or after July 1, 1983. We believe this conclusion is a practical one as well, given the fact that S.F. 549, §§ 2(b) and 14(b) require payment "in advance of various services and docketing procedures." If this new act were to apply to cases which had been filed prior to July 1, 1983, there would be no provision for collecting costs in those cases, a result we do not believe the legislature intended.

In conclusion, it is our opinion that: (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.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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 17, 1983

Mr. Denver Dillard
Linn County Attorney
Linn County Courthouse
Cedar Rapids, Iowa 52401

Dear Mr. Dillard:

You have requested an opinion of the Attorney General concerning payment of longevity pay to elected county officials and their deputies and assistants. Specifically, you ask:

> 1. May the County Board of Supervisors provide "longevity pay" to themselves and other elected county officials?
>
> 2. May the Board of Supervisors provide "longevity pay" to appointed deputies or other assistants?
>
> 3. If the ability of the Board of Supervisors to provide longevity pay is dependent upon the actions of the County Compensation Board, then is the issue of longevity pay properly a consideration for the Compensation Board?

We shall address each question in turn.

1. Longevity Pay for Elected County Officials.

It is our opinion that the board of supervisors may not provide longevity pay to themselves or other elected county officials. Our reasons are as follows.

Iowa Code Sections 331.905 through 331.907 (1983) establish the method for determining the compensation of all elected county officials. These provisions create a county compensation board composed of representatives of the cities, school boards, and general public of the county. § 331.905. The compensation board meets annually and submits salary recommendations to the board of supervisors. § 331.907(1) and (2). The supervisors then review these recommendations, and may act only to either accept the recommendations as submitted or to reduce the recommendations by an equal percentage. § 331.907(2). The only other provision relating to compensation in this statutory scheme is found in § 331.907(3), which authorizes elected county officials to be reimbursed for the actual and necessary expenses they incur in performing their official duties.

We have previously noted that while these provisions appear to establish an exclusive statutory scheme for determining compensation of elected county officials, these same provisions fail to provide a definition of the term "compensation." Op.Att'yGen. #81-6-7. In that opinion, a copy of which is enclosed, we reviewed the statutory provisions governing the compensation board and concluded that the term "compensation" as used in those provisions encompassed remuneration in the form of salary or wages. We further noted that compensation has been defined as "'remuneration or wages given to an employee or especially, to an officer. Salary, pay, or emolument.' Black's Law Dictionary (Rev. 4th Ed. 1968, p. 354.)" Applying these definitions, we held that the legislature intended to give the compensation board jurisdiction over compensation, i.e., salary and wages, and not fringe benefits. The question then becomes whether a particular item should be categorized as part of "salary and wages" or as a "fringe benefit."

In Op.Att'yGen. #81-6-7 we concluded that group insurance constitutes a fringe benefit, and therefore the supervisors are authorized pursuant to their home rule authority to provide such a benefit to themselves and other county elected officials. Later, in Op.Att'yGen. #81-8-28(L), a copy of which is also enclosed, we concluded that cost of living adjustments to salary are in the nature of salary or wages because they are essentially a scheduled or deferred

increase in salary or wages and not akin to group insurance or paid vacation. Therefore, we concluded that the compensation board had sole authority to consider and recommend cost of living adjustments to any or all county officers' salaries. Implicitly we concluded that such salary adjustments would not be within the scope of the supervisors' authority. Finally, in Op.Att'yGen. #81-10-9(L), we held that the board of supervisors has the authority to establish a sick leave policy for elected officials which would permit payment for accrued sick leave, as well as to establish a policy providing hospitalization and major-medical insurance coverage for elected officials.

Accordingly, in the present case the question becomes whether longevity pay for elected county officials constitutes a fringe benefit, which the supervisors would be authorized to provide to themselves and other elected county officials, or whether longevity pay is instead an aspect of salary and wages and therefore within the exclusive jurisdiction of the compensation board. It is our opinion that longevity pay is more properly categorized as a part of salary or wages than as a fringe benefit.

First, we refer back to the definitions of compensation discussed in Op.Att'yGen. #81-6-7. We further note that the Iowa Supreme Court stated in Smith v. Board of Trustees, 25 N.W.2d 858, 859 (Iowa 1947), that the common meaning of the term salary as defined in Webster's New International Dictionary is "recompense or consideration paid, or stipulated to be paid, to a person at regular intervals . . .; fixed compensation regularly paid, as by the year, quarter, month, or week." Review of these definitions leads us to conclude that longevity pay, unlike other items routinely categorized as fringe benefits, is simply a direct monetary payment that is regularly paid after completion of a designated period of employment. Longevity pay, unlike vacation or sick leave, has no other purpose but direct monetary award to the employee. The practical effect of longevity pay is that employees can expect a raise in pay as a routine matter after completing a certain number of years of employment. Therefore, we conclude that longevity pay is a form of salary or wages rather than a fringe benefit.

Accordingly, based on the rationale of our prior opinions, we conclude that the board of supervisors is not authorized to determine whether elected county officials should receive longevity pay. Instead, we believe the compensation board alone has the authority to determine whether elected officials should receive additional compensation for length of service.

2. Longevity Pay for Deputies and Other Assistants of Elected County Officials.

It is our opinion that elected county officers have authority to determine whether to grant their deputies longevity pay, while the board of supervisors has the authority to determine whether other county employees should be granted this benefit. Our reasons are as follows.

Iowa Code Section 331.904 (1983) governs salaries for deputies, assistants, and clerks of elected county officials. In particular, § 331.904(1) provides as follows:

> The annual salary of the first and second deputy officer of the office of auditor, treasurer, recorder, and clerk and the deputy in charge of the motor vehicle registration and title division shall each be an amount not to exceed eighty percent of the annual salary of the deputy's principal officer as determined by the principal officer. In offices where more than two deputies are required, each additional deputy shall be paid an amount not to exceed seventy-five percent of the principal officer's salary. The amount of the annual salary of each deputy shall be certified by the principal officer to the board and, if a deputy's salary does not exceed the limitations specified in this subsection, the board shall certify the salary to the auditor. The board shall not certify a deputy's salary which exceeds the limitations of this subsection.

Thus, first and second deputies of most county officers, as well as the deputy in charge of the motor vehicle registration and title division, are to receive salaries set by the principal officer in an amount not to exceed eighty percent of the principal officer's salary. In an office where there are more than two deputies, each additional deputy's salary is not to exceed seventy-five percent of the principal's salary. The supervisors are then required to certify the salaries set by the principal officers unless they exceed these statutory maximums.

Special statutory provisions govern deputies in the county sheriff's office. Section 331.904(2) provides that:

> Each deputy sheriff shall receive an annual base salary as determined by the

> board. Upon certification by the sheriff, the board shall review, and may modify, the annual base salary of each deputy before certifying it to the auditor. The annual base salary of a first or second deputy sheriff shall not exceed eighty-five percent of the annual base salary of the sheriff. The annual base salary of any other deputy sheriff shall not exceed the annual base salary of the first or second deputy sheriff except that in counties over two hundred fifty thousand population, the annual base salary of any additional deputies shall not exceed seventy-five percent of the annual base salary of the sheriff. The total annual compensation including the annual base salary, overtime pay, longevity pay, shift differential pay, or other forms of supplemental pay and fringe benefits received by a deputy sheriff shall be less than the total annual compensation including fringe benefits received by the sheriff. As used in this subsection, "base salary" means the basic compensation excluding overtime pay, longevity pay, shift differential pay, or other supplemental pay and fringe benefits.

This provision differs from § 331.904(1) in that, while certain maximum salary levels are established, this section grants the supervisors more discretion in setting deputies' salaries. In addition, unlike subsection (1), subsection (2) provides a comprehensive definition of compensation, which includes longevity pay. This statute further provides that longevity pay and other types of supplemental pay are not to be counted towards the statutory maximum base salary, and that the total amount of a deputy's compensation cannot exceed that of the sheriff.

Next, § 331.904(3) governs salaries for assistants in the county attorney's office, and provides that:

> The annual salary of each assistant county attorney shall be determined by the county attorney within the budget set for the county attorney's office by the board. The salary of an assistant county attorney shall not exceed eighty-five percent of the maximum salary of a full-time county attorney. The county attorney shall inform the board of

> the full-time or part-time status of each assistant county attorney. In the case of a part-time assistant county attorney, the county attorney shall inform the board of the approximate number of hours per week the assistant county attorney shall devote to official duties.

This subsection differs from subsections (1) and (2) primarily in that the board is not required to certify assistant county attorney salaries. Instead, assistants' salaries are set by the county attorney, the only requirements being that the salaries be within the county attorney's budget and that the salaries not exceed the statutory maximum.

Finally, § 331.904(4) governs salaries for other employees in elected county officials' offices. This section provides that:

> The board shall determine the compensation of extra help and clerks appointed by the principal county officers.

Thus, while § 331.903 authorizes elected county officials to appoint deputies, subject to the board's approval, and to terminate those deputies as well as their assistants and clerks, § 331.904(4) authorizes the supervisors to set the salaries of those employees of elected officers who are not otherwise covered by the provisions of §§ 331.904(1), (2), and (3). A similar provision is found in § 331.324(1)(o), which states the board of supervisors shall:

> Fix the compensation for services of county and township officers and employees if not otherwise fixed by state law.

The Iowa Supreme Court interpreted these provisions in McMurry v. Board of Supervisors of Lee County, 261 N.W.2d 688 (Iowa 1978). In that case the board of supervisors adopted several ordinances, one of which established a vacation and sick leave policy for all county employees. The board's authority to adopt these ordinances was challenged, and in that portion of the opinion relevant to the question before us, the Court found that the board exceeded its authority to enact such an ordinance with regard to deputies. The Court further found the ordinance was valid as to personnel in county offices other than the principal and deputies. Id. at 691.

In reaching this conclusion, the Court first stated that the Iowa system of county government is one of autonomous county offices, each under an elected head, rather than a system of central management with subsidiary departments. Id. at 690. The Court then concluded that authority over personnel matters relating to deputies resides with the elected principals unless a statute expressly gives authority to the supervisors. Id. at 691. Referring to former Iowa Code Sections 332.3(10) and 340.4 (1981), the provisions which predated §§ 331.324(1)(o) and 331.904(1), respectively, the Court found that former § 340.4 vested the elected county officials listed there with the authority to establish compensation and related employment policies for deputies in their respective offices. However, because the supervisors were authorized by former § 340.4 to fix the compensation for all other "extra help and clerks," in sum, all employees other than deputies hired by county officers, the supervisors were also authorized to set sick leave, vacation, and other employment policies for these employees. In effect, the Court concluded that the county official designated by statute to set a county employee's salary is also authorized to determine the fringe benefits that employee is entitled to.[1]

Thus, we conclude that, consistent with the McMurry decision, all elected county officers may exercise their discretion in deciding whether to grant their deputies longevity pay. However, because of our conclusion in Part 1, above, that longevity pay is a part of wages and salary rather than a fringe benefit, longevity pay for most deputies must be considered along with other wages or salary in determining the maximum salary allowed by statute. However, an exception exists with regard to deputy sheriffs' salaries, as § 331.904(2) expressly requires that longevity pay be excluded from consideration as a part of a deputy sheriff's salary subject to the statutory maximum.[2] However,

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[1] As a part of the rationale supporting its decision, the Court referred to the principle of law that a county board of supervisors has only those powers that are expressly conferred on it by statute. McMurry, 261 N.W.2d at 690, 691. While this principle is no longer applicable due to the adoption of the County Home Rule Amendment, Iowa Const., Art. III, § 39A, we believe the Court's further reliance on statutory provisions that are substantially the same as existing provisions is sufficient to support the Court's ultimate conclusion.

[2] Had the legislature intended that longevity pay not be included in determining the maximum allowable salary for deputies pursuant to §§ 331.904(1) and (3), it would have included an express provision similar to that of § 331.904(2). Absent such a provision, we are reluctant to imply one.

longevity pay must be included along with other forms of pay in determining the total annual compensation of a deputy sheriff, and that compensation cannot exceed the county sheriff's salary. § 331.904(2).

We further conclude, again consistent with the McMurry decision, that the board of supervisors has authority pursuant to § 331.324(1)(o) to determine whether all other county employees should receive longevity pay. McMurry, supra. We note that there are no statutory provisions setting maximum allowable salaries for county employees.

These conclusions are contrary to portions of previous opinions of this office, which have held that elected county officers have sole authority to determine fringe benefit policies for county employees. 1978 Op.Att'yGen. 494; 1970 Op.Att'yGen. 462; 1964 Op.Att'yGen. 118. To the extent these opinions are inconsistent with our conclusions in this opinion, they are hereby overruled.[3]

3.

We find it necessary to consider your third question in light of our conclusion to your first question, which was that the compensation board and not the board of supervisors has exclusive authority to determine whether longevity pay should be awarded to elected county officials. We conclude that the compensation board may properly consider the length of an elected county official's service in office in determining that official's compensation.

The only statutory provisions relating to the factors the compensation board may consider in determining compensation for elected officials are found in § 331.907(1). That section requires the board to review the compensation paid to comparable officials in other counties of the state, in other states, in private business, and in the federal government. However, we have previously concluded that the

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[3] In 1978 Op.Att'yGen. 494 and 1964 Op.Att'yGen. 118 we held that "each county officer has sole determination of vacation, sick leave, and working hours of employees under his jurisdiction." We now believe this opinion is correct with regard to deputies, but incorrect with regard to other employees.

In 1970 Op.Att'yGen. 462 we held that the supervisors have authority to provide vacation and sick leave for county employees, which is consistent with our current opinion. However, this opinion does not distinguish between deputies and employees, and therefore should be read to apply only to employees.

compensation board may consider any other factors, in addition to those required by statute, which the board believes are relevant to setting appropriate salaries for elected county officials. Op.Att'yGen. #82-2-12(L). Therefore, we conclude that it would be proper for the compensation board, if it so chooses, to consider an elected official's length of service in county government in recommending compensation for that official.

In conclusion, it is our opinion that: (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.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

Enclosures

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 16, 1983

Mr. J. Patrick White
Johnson County Attorney
328 S. Clinton Street
Iowa City, Iowa 52240

Dear Mr. White:

You have requested an opinion of this office concerning the effect of the repeal of Iowa Code Section 596.7 (1981) by 1982 Iowa Acts, ch. 1152, § 3. That section was contained in Ch. 596, which required a medical examination for syphillis prior to obtaining a marriage license, and provided that:

> Marriage licenses issued under the provisions of this chapter shall become void and of no effect unless the marriage be solemnized within twenty days following the issuance thereof.

In view of the repeal of this section, you question whether there is any time limit for solemnizing a marriage after a marriage license has been issued.

It is our opinion that there is no longer any such time limit. The express repeal of this chapter in itself evidences the legislature's intent that the twenty day time limit be abolished. In addition, we note that this requirement was contained within a chapter requiring an examination for syphillis prior to obtaining a marriage license. Accordingly, we believe the twenty-day requirement was in large part designed to prevent solemnization of marriages after a certain period of time following the test results and presumably promoted the overall purpose of Ch. 596, i.e., detection of syphillis before marriage. As the syphillis testing requirement was found by the legislature to be unnecessary, so was the twenty-day time limit for solemnization.

In conclusion, 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. When the license is returned to the clerk's office after solemnization, pursuant to § 595.13, the clerk need no longer be concerned about whether solemnization occurred within the twenty days but need only ensure that the returned license satisfies the requirements of § 595.15.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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

The Honorable Vic Stueland
State Representative
R.R. 2
Grand Mound, Iowa 52751

Dear Representative Stueland:

You have requested an opinion from this office concerning the interpretation of Iowa Code Section 93A.4 (1983) relating to compilation of county land use inventories by county land preservation and use commissions.

First, you ask whether a county commission could submit a comprehensive zoning plan that the commission believed satisfied the requirements of the inventory. Sections 93A.4(1), (2), and (3) set forth the items which are required to be included in a land use inventory. While these requirements do not limit the county commission from including in the inventory other items it believes are relevant, the requirements of subsections (1), (2), and (3) are mandatory. Thus, if a county comprehensive plan contains the items detailed in subsections (1), (2), and (3), and the commission concludes that plan satisfies the inventory requirement, that plan could be submitted as the county inventory.

Second, you ask who is responsible for determining what constitutes "adequate data" as that phrase is used in § 93A.4(1). That section states in relevant part that the "county inventories shall where adequate data is available contain at least the following . . ." (emphasis added). The county land use and preservation commission is the public body authorized by § 93A.4(1) to compile the county land use inventory. We believe that in § 93A.4 the legislature provided land use commissions with guidelines to follow in compiling land use inventories, but intended by the "adequate data" provision to allow for situations where insufficient data precluded strict adherence to those guidelines by the

commissions. Accordingly, it is our opinion that the commission is the party responsible for making the initial determination as to whether "adequate data" has been considered.

Once the county inventory is compiled, it is to be used by the commission in creating a county land use plan, which is to be submitted to the supervisors for approval. § 93A.5(1). Alternatively, the commission may submit the inventory together with written findings. Id. The supervisors may upon receipt of the plan either refer the plan back to the commission for modifications, reject the plan, or adopt the plan as originally submitted or as modified. § 93A.5(3). Thus, while the commission initially has the authority to determine whether "adequate data" has been considered in compiling the county inventory, the supervisors have secondary authority to make a similar determination when deciding whether to approve or reject the county land use plan submitted by the commission.

In conclusion, 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.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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 6, 1983

Senator Ray Taylor
Steamboat Rock, IA 50672

Dear Senator Taylor:

You have requested the opinion of the Attorney General on the questions of whether Iowa Code Chapter 551A (1983) unlawfully guarantees a profit on the sale of cigarettes, and if that chapter is lawful, whether a similar profit could be guaranteed for other retail areas, since the Iowa General Assembly repealed Iowa's fair trade laws in 1975.

Iowa's fair trade laws allowed a manufacturer, under certain conditions, to dictate the price at which its products would be resold by retailers. Fair trade laws, such as Iowa's, were specifically exempt from the federal antitrust law by the Miller-Tydings Act (50 Stat 693), which itself was repealed by Congress, effective March 26, 1976. Since that time, it has been a violation of the antitrust laws for a manufacturer to dictate to an independent retailer the price at which that retailer must resell the manufacturer's products.

Chapter 551A, however, is not a fair trade law because it does not allow a cigarette manufacturer to dictate the retail price at which its cigarettes will be resold. Rather, Chapter 551A, itself, dictates the price at which cigarettes will be resold in the state. For that reason, the questions you have raised concerning Chapter 551A must be analyzed under what has become known as the "state action exemption" of the antitrust laws.

The United States Supreme Court first held in Parker v. Brown, 317 U.S. 341 (1943), that states may limit competition without conflicting with the federal antitrust laws. A succession of United States Supreme Court cases have refined that doctrine into a test which was most recently articulated by the Court in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). Under that test the anticompetitive activity, such as that decreed by Chapter 551A, must be the result of a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation or monopoly service and must also be "actively supervised" by the state. If the statute does not satisfy this test, then it is not exempt from the application of the antitrust laws.

It is the opinion of this office that Chapter 551A does satisfy the Midcal test and is thus a lawful regulation of the price of cigarettes by the state.

The first prong of the Midcal test requires that the statute express a state policy to displace competition. In order to satisfy this part of the test, however, it is not necessary that the statute actually state that its purpose is to displace competition. It is sufficient if the anticompetitive conduct would have been reasonably contemplated by the General Assembly as a result of the conduct it authorized. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Gold Cross Ambulance v. City of Kansas City, No. 82-1913 (8th Cir. 4/26/83); Town of Hallie v. City of Eau Claire, 1983-1 Trade Cases ¶ 65,227 (7th Cir. 1983).

In this case the only purpose of the statute is to prevent the below cost sale of cigarettes. Thus, the General Assembly must have contemplated the displacement of competition by Chapter 551A.

In order to satisfy the second part of the Midcal test there must be active supervision by the state where the anticompetitive conduct is undertaken by private individuals.

Several recent cases on similar statutes in other states have dealt with this question.

In George W. Cochran Co., Inc. v. Comptroller of the Treasury, Alcohol and Tobacco Tax Division, 437 A.2d 194 (MD. 1981), the Maryland Court of Appeals upheld the validity of Maryland's statute prohibiting the below cost sale of

cigarettes. After finding a specific statement by the Maryland legislature that the purpose of the statute was to displace competition, the court went on to hold that the provisions for enforcement of the statute by the comptroller amounted to active supervision by the state.

In accord with this holding are the holdings in Serlin Wine & Spirits Merchants, Inc. v. Healy, 512 F.Supp. 936 (D. Conn. 1981), (a Connecticut statute mandating minimum mark ups on liquor and beer sold by wholesalers and retailers) and Walker v. Bruno's, Inc., 1983-1 Trade Cases ¶ 65,341 (Tenn. Supreme Court, May 9, 1983), (a Tennessee statute prohibiting below cost sales of milk), both of which statutes were held to be within the state action exemption. Chapter 551A is enforced by the Department of Revenue. Provisions are made for injunctive actions and criminal penalties for violations. These enforcement procedures are similar to those provided for in the state statutes just cited. Thus, the state actively supervises the anticompetitive activity.

Chapter 551A is likewise exempt from the Iowa Competition Law (Iowa Code Chapter 553 (1983)). In Neyens v. Roth, 326 N.W.2d 294 (1982), the Iowa Supreme Court adopted the state action exemption tests of the United States Supreme Court for reviewing whether anticompetitive activity is exempt pursuant to § 553.6(4) (activities regulated by the state or federal government are exempt).

It should be noted that the Iowa Supreme Court upheld the constitutionality of Chapter 551A in May's Drug Stores v. State Tax Commission, 242 Iowa 319, 45 N.W.2d 245 (1950). While the Court came to the correct conclusion, because it was decided before the United States Supreme Court pronouncements which have resulted in the Midcal test, it did not address the question addressed by this opinion of whether the statute violated federal or state antitrust laws.

Turning to your second question of whether a similar statute for other retail areas could be lawfully enacted, it is our opinion that such a statute could be so enacted.

Three of the cases just cited show that other states have enacted similar laws for milk and alcoholic beverages, as well as for cigarettes.

In the 1930's, many states enacted statutes which prohibited the below cost sales of all items. See generally, 118 A.L.R. 506, supplemented 128 A.L.R. 1126. The validity of such a statute

in Arizona was recently upheld by the Arizona Court of Appeals in Baseline Liquors v. Circle K Corp., 630 P.2d 38 (Arizona 1981), cert. denied sub nom. Skaggs Drug Center, Inc. v. Baseline Liquors, 102 S.Ct. 515 (1981). That statute prohibited below cost sales of all goods, and defined cost, as does our Chapter 551A, as the actual cost of the item, plus a presumed markup of a certain percentage. The purpose of the statute was to prevent loss leaders. If a similar statute were enacted in Iowa it would likely be upheld.

Sincerely yours,

JOHN R. PERKINS
Assistant Attorney General

JRP/mar

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

Mr. David E. Richter
Pottawattamie County Attorney
227 South Sixth Street
Council Bluffs, Iowa 51501

Dear Mr. Richter:

You have requested an opinion on whether Carter Lake, Iowa, Ordinances § 5.08.190(H)(1)[1] is void pursuant to Iowa Code

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[1]Carter Lake, Iowa, Ordinances § 5.08.190(H)(1) provides that no person or club holding a liquor license shall:

> [p]ermit or allow any live person to appear in any licensed premises in a state of nudity, as herein defined, to provide entertainment, to provide service, to act as hostess, manager or owner, or to service as an employee in any capacity; or to permit or allow any live person to remain in or upon any licensed premises in a state of nudity . . . .

See Iowa Code § 728.5(4) (1983).

section 728.11 (1983).[2] It is our opinion that Iowa Code section 728.11 (1983) does not take precedence over or preempt Carter Lake's ordinance banning nudity in clubs or establishments holding a liquor license.

Section 728.11 deals only with "obscene material." Live performances are not included in the definition of "obscene material" under Iowa Code section 728.1(1) and (2).

As the Carter Lake ordinance prohibits only live performances, section 728.11 is not applicable. See 4 J. Yeager & R. Carlson, Iowa Practice § 640, at 159 (1979); Iowa Code § 123.39 (1983).

Sincerely,

Richard L. Cleland

RICHARD L. CLELAND
Assistant Attorney General

RLC:djs

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[2]Iowa Code section 728.11 provides in relevant part:

> In order to provide for the uniform application of the provisions of this chapter relating to obscene material applicable to minors within this State, it is intended that the sole and only regulation of obscene material shall be under the provisions of this chapter, and no municipality, county, or other governmental unit within this State shall make any law, ordinance or regulation relating to the availability of obscene materials. All such laws, ordinances or regulations shall be or become void, unenforceable and of no effect on January 1, 1978.

(Emphasis added.)

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 2, 1983

Honorable Forrest Schwengels
State Senator
State Capitol
L O C A L

Dear Senator Schwengels:

You have requested an opinion of the Attorney General concerning whether a county board of supervisors may bind a successor board to an employment contract with the county engineer that under certain circumstances requires a unanimous vote by the full board in order to terminate the engineer. It is our opinion that such contract provisions are not binding on a successor board. Our reasons are as follows.

First, the general rule of law as set forth by the Iowa Supreme Court is that, absent an express statutory provision to the contrary, a local governmental body such as a county board of supervisors may not bind its successors in matters that are essentially legislative or governmental, as opposed to business or proprietary, in nature. Sampson v. City of Cedar Falls, 231 N.W.2d 609 (Iowa 1975) (and cases cited therein); City of Des Moines v. City of West Des Moines, 239 Iowa 1, 30 N.W.2d 500 (1948); Iowa Municipal Light and Power Co. v. City of Villisca, 220 Iowa 238, 261 N.W. 423 (1935); Hahn v. Clayton County, 218 Iowa 543, 255 N.W. 695 (1934). See also McQuillen, Municipal Corporations, § 29.101 at 468-469; 56 Am.Jur.2d Municipal Corporations, § 154 at 207-209; 63 C.J.S. Municipal Corporations, § 987 at 549. Thus, absent an express statutory provision, routine employment contracts for county employees are generally considered to be business or proprietary in nature (for example, employment of an architect to design and supervise an ongoing building project), and therefore may extend beyond the term of the contracting board. McQuillen at 468-469. However, if an employment contract is entered into with a public official, as opposed to a mere employee, over whom the

governing board exercises supervisory control and power of removal, that employment constitutes the exercise of a governmental function and therefore such a contract cannot extend beyond the life of the contracting board. Id. In sum, a governmental body may generally not employ a public official by contract for a term extending beyond that of its own members and thereby impair the right of future boards to remove and reappoint other officials. 56 Am.Jur.2d § 154 at 208.

In order to apply these principles of law in the present case, we look to the applicable statutes. Iowa Code Section 331.321(1)(k) (1983) states, "The board shall appoint . . . [o]ne or more county engineers in accordance with sections 309.17 to 309.19." Iowa Code Section 309.17 (1983) authorizes the supervisors to employ a county engineer for a term "which shall not exceed three years." Furthermore, this provision states that the county engineer's tenure of office "may be terminated at any time by the board." Section 309.17. Thus, while the legislature has authorized a board to employ a county engineer for up to three years, the legislature has also expressly stated that the board may terminate the engineer's employment at any time.[1] Section 331.212(2)(h) further provides that an affirmative vote of a majority of the board is necessary to remove an officer from office.

In addition, §§ 309.17-309.21 establish that the position of county engineer is a public office by virtue of the fact that, inter alia, the position is created by statute and requires performance of designated statutory duties. See McKinley v. Clarke County, 228 Iowa 1185, 293 N.W. 449 (1940) (for purposes of worker's compensation, county engineer is a public official and not merely a county employee because, inter alia, engineer is required to take oath of office and perform statutory duties). Further, the supervisors exercise supervisory control over the county engineer and retain the authority to terminate the engineer's employment at any time. §§ 309.17-309.18.

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[1] We note that the exercise of the supervisor's discretion in terminating the county engineer would be subject to the requirements of Iowa Code § 331.321(4) (1983). These provisions require, inter alia, that the removal of a person appointed to a county office shall be by a written order which contains the reasons for the removal, and that such a person be allowed the opportunity for a public hearing before the supervisors on all issues connected with the removal.

Accordingly, applying the legal principles set forth above, we believe the employment of a county engineer constitutes an exercise of a governmental and not a business function. While such an employment agreement would generally not bind a successor board, § 309.17 overrules this general rule by expressly authorizing the board to appoint a county engineer for a period of up to three years. In sum, one board may bind another board to an employment contract with a county engineer for up to three years. Hahn v. Clayton County, supra, 255 N.W. at 698 (board of supervisors has statutory authority to fix term of employment of county engineer for as long as three years).

However, § 309.17 does not go so far as to authorize a contracting board to restrict the authority of a successor board to terminate the county engineer. Under § 309.17, a county board of supervisors always retains the authority to terminate the county engineer at any time. Hahn v. Clayton County, supra, at 699. Therefore, because the restriction contained in paragraph 13(A) of the contract here in question does restrict the board's authority to exercise the discretion granted by § 309.17 to terminate the engineer at any time, that restriction cannot be binding on a successor board.

In conclusion, it is our opinion that a county board of supervisors may, pursuant to § 309.17, enter into an employment contract with the county engineer for a period not to exceed three years. Section 309.17 further authorizes the board to terminate the county engineer at any time. Accordingly, an appointing board 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.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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)

Mary E. Richards
Story County Attorney
Story County Courthouse
Nevada, Iowa 50201

June 2, 1983

Dear Ms. Richards:

You have requested an Attorney General's Opinion concerning the proper procedure to be used by county treasurers in the State of Iowa when issuing a new certificate of title for a motor vehicle sold pursuant to an Internal Revenue Service tax levy. Specifically, you requested an opinion as to whether junior liens should be listed on the new certificate of title issued after a tax sale.

The Internal Revenue Service (I.R.S.) has the power to levy upon all property and rights to property belonging to a delinquent taxpayer. 26 U.S.C. § 6331(a). The power to "levy" gives the I.R.S. the authority to seize and sell such property. 26 U.S.C. § 6331(b). The procedure for the sale of such property is provided in 26 U.S.C. § 6335. After the sale of such property, the I.R.S. issues a certificate of sale to the buyer. 26 U.S.C. § 6335. The certificate of sale is authority for any public official charged with the registration of motor vehicles to transfer title to such vehicle in the same manner as if the vehicle were transferred by the original owner. 26 U.S.C. § 6339(a)(5).

Under federal law, junior liens are extinguished by operation of law under 26 U.S.C. § 6339(c), which states:

> A certificate of sale of personal property given or a deed to real property executed pursuant to section 6338 shall discharge such property from all liens, encumbrances, and titles over which the lien of the United States with respect to which the levy was made had priority.

It is clear that the certificate of sale extinguishes all interests over which the federal tax lien had priority by operation of law. This provision of federal law would supercede contrary provisions in state law.

The issue here is not, however, whether junior liens are discharged by operation of this federal law. It is instead whether the county treasurer must determine the priority of liens and delete from the certificate of title those found to be junior to the federal tax lien under which the vehicle was sold.

Iowa Code § 321.47 provides Iowa statutory authority for county treasurers to issue new certificates of title for transfers by operation of law. That section states in part:

> If, from the records in the office of the county treasurer, there appear to be any lien or liens on such vehicle, such certificate of title shall contain a statement of such liens unless the application is accompanied by proper evidence of their satisfaction or extinction. Evidence of extinction may consist of but is not limited to, an affidavit of the applicant stating that a security interest was foreclosed as provided in Uniform Commercial Code, chapter 554, Article 9, Part 5.

While the I.R.S. certificate of sale will provide proper evidence of the extinction of liens of lesser priority than the federal tax lien, it will not itself determine which liens have lesser priority. The I.R.S. makes no determination of priority, provides no notice to lienholders, and sells the motor vehicle with no guarantees of ownership. See 26 U.S.C. § 6335(a), 6339; National Bank & Trust Co. of South Bend v. United States, 589 F.2d 1298 (7 Cir. 1978). The effect of the certificate of sale is twofold: it conveys whatever interest the debtor had, § 6339(a)(5), and it discharges inferior liens, § 6339(c). However, additional information would be necessary to determine what liens are inferior to the federal tax lien which resulted in the sale.

The general federal rule for determining the priority of federal tax liens versus other liens is simply "first in time is the first in right." United States v. Pioneer American Insurance Co., 374 U.S. at 87, 10 L.Ed.2d at 774; George W. Ultch Lumber Co. v. Hall Plastering, Inc., 477 F.Supp. 1060, 1071 (W.D. Mo. W.D. 1979). Generally, a federal tax lien arises at the time the assessment for unpaid taxes is made. 26 U.S.C. § 6323; Sgro v. United States, 609 F.2d 1259, 1261 (7th Cir. 1979). Among the exceptions to this general rule is § 6323(a), which provides that any purchaser, holder of a security interest, mechanic's lienor, and judgment lien creditor will prevail if their lien attaches before the I.R.S. files appropriate notice under § 6323(f). Sgro v. United States, 609 F.2d at 1261; George W. Ultch Lumber Co. v. Hall Plastering, Inc., 477 F.Supp. at 1071. Under the "first in time is the first in right" principle, the priority of each lien depends upon whether it attaches to the property and becomes choate before the federal tax lien arises. United States v. Pioneer American Insurance Co., 374 U.S. at 88, 10 L.Ed.2d at 744; Rice Investment Co. v. United States, 625 F.2d 565, 568 (5th Cir. 1980). State created choate liens take priority over later federal tax liens, while inchoate state liens do not take priority over later federal tax liens. United States v. Pioneer American Insurance Co., 374 U.S. at 88, 10 L.Ed.2d at 774, Rice Investment Co. v. United States, 625 F.2d at 568. In order to be choate, a state created lien must, in addition to being prior in time, be "perfected in the sense that there is nothing more to be done to have a choate lien when the identity of the lienor, the property subject to this lien, and the amount of the lien are established." United States v. Pioneer American Insurance Co., Sgro v. United States, 609 F.2d at 1261. Priority of security interests will be determined by the timing of "perfection." 26 U.S.C. § 6323(a),(h)(1).

However, there are exceptions to the rule of "first in time, first in right." For example, a properly perfected purchase money security interest in the motor vehicle has priority over an earlier federal tax lien under 26 U.S.C. §§ 6323(c)(1), 6323(h)(1). Slodov v. United States, 436 U.S. 238, 258 n. 23, 56 L.Ed.2d 251, 268, 98 S.Ct. 1778 (1978). (To have priority over earlier liens, the purchase money security interest must be perfected within twenty [20] days after the debtor obtains possession of the collateral. Iowa Code § 554.9312(4).) Other situations

could conceivably arise where priority would be difficult to determine, as in the case of vehicles subject to a security interest on inventory or vehicles from a foreign jurisdiction. See Iowa Code §§ 321.50(1), 554.9103.

Because determination of priority is not always a simple ministerial task, the county treasurer should exercise his or her judgment in determining whether the certificate of sale, the prior certificate of title, and other evidence provides "proper evidence" of the extinction of these liens so as to delete a statement of these liens. § 321.47.

We would note the I.R.S.'s concern that inclusion of these liens on the certificate clouds the buyer's title and reduces the proceeds obtainable at tax sales. Nonetheless, it is federal law which provides no procedure for determination of priorities so as to guarantee clear title. We would also note that in one reported case where a certificate of title was issued without notation of a valid security interest with priority over the federal tax lien, the federal government successfully argued that it was not the federal government's failure to give notice to the secured party which impaired that party's security interest but was instead the action of the state in issuing a clear certificate of title. National Bank & Trust Co. of South Bend v. United States, 589 F.2d 1298, 1301 (7 Cir. 1978). Thus it appears that the federal government wants the county treasurers to do what it refuses to do -- i.e., determine the rights of secured parties. The county and not the United States would then assume any potential liability for wrongful deprivation of a security interest.

While we believe county treasurers have authority to delete junior liens upon receipt of an I.R.S. certificate of sale under § 321.47 and 26 U.S.C. § 6339(c) and of proper evidence that the liens are junior to the federal tax lien, we do not believe that they are required to treat the I.R.S. certificate of sale as in and of itself proper evidence of extinguishment of the liens.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

Michael C. Fitzgerald emo

MICHAEL C. FITZGERALD
Assistant Attorney General

SCHOOLS: 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 self-contained 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

The Honorable Richard Groth
House of Representatives
Statehouse
L O C A L

Dear Representative Groth:

You have asked for our opinion on the following question:

> Is a teacher who holds a valid certificate exempt from the new reading requirement pursuant to the provisions of Section 294.2 of the Code?

Your question requires us to construe a Board of Public Instruction rule adopted pursuant to power granted to the board by Iowa Code § 257.10(11) (1983) and the procedures prescribed by Iowa Code §§ 17A.4 - 8 (1983) in relation to a particular statute. Thus, we must examine the language of the rule and the statute in the light of relevant rules of statutory construction. We note that an agency rule is presumed to be valid. Davenport Community School District v. Iowa Civil Rights Com'n., 277 N.W.2d 907, 909 (Iowa 1979); Schmitt v. Iowa Department of Social Services, 263 N.W.2d 739, 745 (Iowa 1978).

We conclude that a teacher who holds a valid certificate on April 6, 1983, the effective date of the new rules, is exempt from the new requirements.

Two rules were adopted by the state board. The first was an amendment to IAC - 670 - 16.4 entitled Approval for Elementary Teachers and is as follows:

> In order to teach reading outside of the self-contained classroom in kindergarten and grades one through eight for fifty percent or more of the school day, the applicant shall have completed twenty semester hours in the area of reading; however, persons certificated on or before September 1, 1986 shall be exempt from presenting eight semester hours in reading-related courses, but shall present twelve semester hours specifically in reading courses. Persons in this circumstance shall have until September 1, 1990 to complete twelve semester hours in reading courses.
>
> Persons certificated after September 1, 1986 shall have to complete the twenty semester hours in the area of reading.
>
> This approval must be listed on the certificate.
>
> This rule is intended to implement Iowa Code Section 257.10(11). (emphasis added)

The second was an amendment to IAC 670 - 16.5, second para. et. seq. (Approval for secondary teachers, i.e. teaching reading in seventh and eighth grades for fifty percent or more of the school day.) The effective date of the amendments was April 6, 1983. We will discuss the two rules as though they were one because the language is essentially the same in both.

Iowa Code § 294.2 (1983) is as follows:

> Authorization for teaching recognized. No rules by the state board of public instruction with reference to the qualifications of teachers, requiring the completion of certain college courses or teachers training courses, are retroactive to apply to a teacher who has received endorsement and approval to teach a specific subject or subjects if the certificate of the teacher is valid. However, this section does not limit the duties or powers of a school board in the selection or discharge of teachers or in the termination of teachers' contracts. (emphasis supplied)

Before considering the impact of the new rule, it is necessary to place it in the context of the structure that regulates the qualifications of Iowa teachers. Teacher qualification requirements are of three types: certification, endorsement, and approval. There are five classes of certificates available to

Iowa school personnel. They are: permanent professional, professional, preprofessional, substitute, and temporary. See IAC 670 - ch. 14 for rules which prescribe the requirements for obtaining a certificate in each class. An endorsement "is an authorization to perform a specific type of service (teach, administer, supervise, school personnel) at a particular grade level(s)." IAC 670 - 15.1. The rules prescribing conditions for the specific endorsements are contained in IAC 670 - ch. 15. Approval rules govern the "specific subject(s) and services to which teachers may be assigned." IAC 670 - 16.1.

The first paragraph of IAC 670-16.4, both before and after the amendment set out above, is as follows:

> Approval for elementary teachers. Any applicant completing an approved four-year elementary teacher education program, including supervised student teaching at the elementary level and a bachelor's degree from a recognized institution, will be approved to teach any and all subjects in a self-contained classroom in kindergarten and grades one through eight. The applicant will also have approval to teach all subjects outside of the self-contained classroom in kindergarten and grades one through eight with the exception of ~~art~~, music, industrial arts, physical education and special education. In order to teach art, music, industrial arts, physical education and special education, outside of the self-contained classroom in kindergarten and grades one through eight, and any subject in grade nine, the applicant must have the specific approval area listed on the certificate.

In our view, the amendment creates, in effect, a teacher-of-reading specialty defined as a teacher who is assigned by a school district to teach reading for fifty percent or more of the school day. The amendment creates a specific approval for a specific subject: reading. But it is required if, and only if, a teacher is assigned to teach reading more than fifty percent of the school day. We need not tarry over the fact that reading is one of the subjects that any elementary teacher has taught within the self-contained classroom prior to the effective date of the amendment. Such a teacher also was certified, endorsed and approved to teach reading outside of the self-contained classroom without regard to the portion of the school day that was devoted to the teaching of the specific subject of reading. Inasmuch as the language of Iowa Code § 294.2 (1983) set out above refers to an endorsement and approval to teach a "specific subject or subjects" the new rule cannot be applied to a teacher who held a

valid certificate prior to April 6, 1983 because such a teacher had the endorsement and approval to teach reading. In other words a teacher who held a valid elementary certificate cannot be required to take the courses which are required for obtaining the newly created approval to teach reading outside the self-contained classroom for fifty percent or more of the school day.

But the fact that Iowa Code § 294.2 (1983), in effect, exempts a teacher who held a valid certificate before April 6, 1983 from taking additional classes is not the end of the matter. Under the clear language of the last sentence of § 294.2, the powers and duties of a school board to select teachers are not affected by the limits placed on the state board to enact rules with a retroactive effect. In our view, a school board could choose to assign teachers who do hold the specific approval to teach reading for more than fifty percent of the school day even though an elementary teacher who held a valid certificate prior to April 6, 1983, is also eligible for such an assignment.

Iowa Code § 294.2 (1983) prevents the state board from imposing new requirements with respect to "a teacher who has received endorsement and approval to teach a specific subject or subjects." It does not prevent the state board from creating new approvals. We believe a "rational" agency, see Davenport School Dist. v Iowa Civil Rights Com'n., 277 N.W.2d at 910, can adopt a rule to create an approval that is required of teachers who are assigned to teach a subject more than fifty percent of the school day even though certain teachers are exempt from the new requirements, e.g. eligible for selection to teach reading fifty percent or more of the school day. Moreover, in our opinion the state board could create a new approval that would apply to teachers who hold a valid certificate if it pertained to a new subject in the curriculum, e.g. computer science.

We note that the effect of what we have said means that persons who are certificated after April 6, 1983 and before September 1, 1986, have until September 1, 1990 to complete twelve semester hours in reading courses in order to teach reading for fifty percent or more of the school day. Thus, the four-year period for obtaining the necessary twelve credits applies to teachers who obtain the basic elementary certificate between April 6, 1983 and September 1, 1986 and wish to obtain the reading specialty approval. Of course, a teacher who is exempt from the requirement by the operation of § 294.2 could also obtain the new approval by presenting twelve semester hours in reading by September 1, 1990.

In sum, an elementary teacher who held a valid certificate on or before April 6, 1983 is eligible for assignment to teach reading outside the self-contained 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.

Sincerely,

Merle W. Fleming

MERLE W. FLEMING
Assistant Attorney General

MWF/jkp

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)

July 20, 1983

Mr. Randy Hughes
State Representative
1200 North Lincoln
Creston, Iowa 50801

Dear Mr. Hughes:

You have requested an opinion from this office concerning the second paragraph of Iowa Code Section 321.189(1) (1983) requiring persons under the age of eighteen applying for a license valid for the operation of a motorcycle to successfully complete an approved motorcycle education course. Specifically, your question was whether the state may impose such a requirement only on persons under the age of eighteen.

The Iowa Code provides specific requirements for the issuance of a motor vehicle operator's license valid for motorcycle operation to persons under the age of eighteen. Under §321.177(1) a person under the age of eighteen may obtain a valid motor vehicle operator's license only by completing an approved driver education course. Under §321.189(1) a person under the age of eighteen who has successfully completed driver education could then have his or her operator's license validated for motorcycle operation by successful completion of an approved motorcycle education course. The purpose of these educational requirements is to ensure that operators under the age of eighteen possess a minimal level of skill and knowledge.

In response to your question, §321.189(1), second paragraph, does not violate any constitutional provision by limiting its application only to persons under the age of eighteen. The relevant constitutional provisions are contained in Art. I, §6 of the Iowa Constitution and Amendment XIV, §1 of the Constitution of the United States.[1] Art. I, §6 provides:

> 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.

Amendment XIV, §1 provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

For the purposes of equal protection analysis, the Iowa Supreme Court has generally interpreted the state and federal constitutional provisions under the same standards of review articulated by the United States Supreme Court. But See Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980).

The traditional equal protection analysis is one of rationality: a legislative classification must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest. Lunday v. Vogelmann, 213 N.W.2d 904, 907 (Iowa 1973). Equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520, 524 (1976); Hawkins v. Preisser, 264 N.W.2d 726, 729 (Iowa 1978).

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[1]This statute would be excluded from the coverage of the Federal Age Discrimination Act, 42 U.S.C. §6101, et. seq., even if applicable to this program. See, 45 C.F.R. 90.3(6). The statute, therefore, does not violate the supremacy clause of the United State Constitution.

Section 321.189 does not require a strict scrutiny analysis because the statute does not involve a fundamental right or a suspect classification. Both of these arguments were made and rejected in Berberian v. Petit, 374 A.2d 791, 793-94 (R.I. 1977). Berberian involved a constitutional challenge to a Rhode Island statute which established sixteen as the minimum age eligibility for a motor vehicle license. First, the Court rejected the plaintiff's argument that the right to operate a motor vehicle is a fundamental right. The Court found that the right to operate a motor vehicle is "wholly a creation of state law" and is not a fundamental right guaranteed either explicitly or implicitly by the United States Constitution. Berberian, 374 A.2d at 793-94. Second, the Rhode Island Court also found that potential motor vehicle operators under the age of sixteen did not constitute a suspect class. The Court found that persons under the age of sixteen were not a suspect class because they lacked a "history of unequal treatment" and they were not "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." Berberian, 374 A.2d at 793-94.

After concluding that strict scrutiny analysis was inapplicable, the Rhode Island Supreme Court found that the statute was constitutional under the rational basis test. The Court held that the establishment of a minimum age requirement for the operator of a motor vehicle rationally furthered the purpose of promoting highway safety. Berberian, 374 A.2d at 794. In support of that conclusion the Court stated: "It is our judgment, as it was the trial justice's, that the state has a legitimate interest in preventing the operation of motor vehicles by those unable to exercise mature judgment, that individual testing for maturity in this context is a practical impossibility and that in the interest of highway safety a line had to be drawn somewhere." Berberian, 374 A.2d at 794. The same reasoning is applicable to the analysis of §321.189. The purpose of the education requirements of §321.189 is to ensure that operators under the age of eighteen possess an adequate level of skill and knowledge. The statute reflects the legislative judgment that persons under the age of eighteen require additional instruction to become safe motorcycle operators. Thus, the classification of §321.189 is rationally related to the legitimate purpose of promoting highway safety.

While the holding of the Rhode Island Court is not controlling upon Iowa courts, the analysis and reasoning of that Court is applicable. The issue presented in Berberian, the constitutionality of age limits for the issuance of a motor vehicle operator's license, is analagous to the question

presented by this opinion. Further, the Rhode Island Court also follows the federal law in its equal protection analysis of the issues. Therefore, although not binding, the Berberian case is persuasive authority on the constitutionality of §321.189(1).

In summary, §321.189 does not violate any constitutional provision by limiting its application to persons under the age of eighteen. The statute does not violate the equal protection clause of the United States Constitution or the Iowa Constitution as it is rationally related to the legitimate purpose of promoting highway safety.

Respectfully submitted,

Michael C. Fitzgerald (ad)

MICHAEL C. FITZGERALD
Assistant Attorney General

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

Mr. Richard Johnson
Auditor of State
State Capitol
L O C A L

Dear Mr. Johnson:

You have requested an opinion of the Attorney General concerning the use of credit cards by governmental officials or employees to defray travel expenses. You point out that in a prior opinion of this office we determined a county board of supervisors, acting under home rule, has the authority to issue credit cards to a sheriff or a deputy sheriff prior to the time the travel expense is actually incurred. You further point out that the concept of home rule is inapplicable to either merged area schools organized under Chapter 279 or area vocational schools and community colleges organized under Chapter 280A. The expenditure of funds by these entities, moreover, is subject to an audit and allowance requirement imposed under §§ 279.29, 279.30, and 280A.42. In view of these factors, you pose the following question:

> May an entity subject to the provisions of Section 279.29, 279.30 or 280A.42 of the Code issue credit cards for use of officials or employees of the entity?

In our opinion 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.

Initially, we consider merged area schools, vocational schools, and community colleges to have legal power to issue credit cards. These entities, like other Iowa school districts, are limited to the exercise of those powers expressly granted or necessarily implied in their governing statutes. See McFarland v. Board of Education, 277 N.W.2d 901, 906 (Iowa 1979); Barnett

v. Durant Community School District, 249 N.W.2d 626, 627 (Iowa 1977). Chapter 279, however, specifically provides that "[a]ctual and necessary expenses, including travel, incurred by the board or individual members thereof in the performance of official duties may be paid or reimbursed." Iowa Code § 279.32 (1983). This same power is conferred upon vocational schools and community colleges. Iowa Code § 280A.23(3) (1983).

We consider the statutory authorization for payment of actual and necessary travel expenses to necessarily imply the power to issue credit cards on the basis of a two-step analysis. First, the statutory provision for expenses to be either "paid" or "reimbursed" clearly indicates that a method of payment exists in addition to reimbursement. Reimburse is defined as "to pay back (an equivalent for something taken, lost, or expended) to someone." Webster's New International Dictionary 1914 (1976). The term "paid," by contrast, is defined as "marked by the reception of pay esp. in an advance lump sum." Id. at 1620. By definition, therefore, the term "paid" denotes an advance payment alternative to reimbursement.

Principles of statutory construction support this definitional dichotomy. A statute should be construed to avoid rendering any part superfluous. Rohret v. State Farm Mutual Automobile Ins. Co., 276 N.W.2d 418, 420 (Iowa 1979). Accordingly, both "paid" and "reimbursed" must have separate meanings. If the term paid denoted only reimbursement to the individual upon presentation of receipts, the term would be redundant and superfluous.

Second, authorization for expenses to be paid, as opposed to reimbursed, is sufficiently broad to encompass the issuance of credit cards. The Iowa Supreme Court has liberally construed the scope of necessarily implied powers which stem from a general delegation of authority. See Barnett v. Durant Community School District, 249 N.W.2d at 627-630 (school district's power to contract on "such other matters as may be agreed upon" necessarily implies power to contract to reimburse teachers for tuition expenses incurred in undertaking approved graduate studies). It is reasonable to conclude, moreover, that the legislature intended § 279.32 to authorize issuance of credit cards. Statutes should be given a construction which is practical and workable. State v. Monroe, 236 N.W.2d 24, 36 (Iowa 1975). The specific language in issue was enacted in 1969 when credit cards were commonly used. 1969 Session, 63rd G.A. ch. 187, § 2. Section 279.32, furthermore, specifically applies to travel expenses. While payment for some travel expenses, including transportation tickets and hotel accommodations, could be arranged by direct billing to the school district by the vendor, payment for other travel expenses, including gasoline, is not

commonly and may not feasibly be arranged by direct billing to the school district by the vendor. The precedent of Barnett coupled with these practical factors lead us to conclude that § 279.32 should be construed to authorize the issuance of credit cards by merged area schools and, through incorporation under § 280A.23, by vocational schools and community colleges.

We separately consider whether the audit and allowance requirement, which you point out is imposed on these schools under §§ 279.29 and 280A.42, bars utilization of credit cards. Section 279.29 which governs merged area schools provides that the board "shall audit and allow all just claims" and "no order shall be drawn upon the treasury until the claim therefore has been audited and allowed." Iowa Code § 279.29 (1983). Substantially similar language is found in § 280A.42 which governs vocational schools and community colleges. Iowa Code § 280A.42 (1983).

In a previous opinion we determined that this audit and allowance requirement barred merged area schools from making travel advances. 1980 Op.Att'yGen. 282, 283 n.1. We reasoned that the purpose of this requirement is to prohibit payment until the board has taken final action on the claim, that no final action can be taken until all the specifics have been examined and verified, and that examination and verification[1] cannot be done until after the expenditure is made. Id.

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[1] This principle is applicable to vocational schools and community colleges with the following limitation. Exceptions to the audit and allowance requirement are provided in § 279.30 and specifically include payment of "freight, drayage, express postage, printing, water, light and telephone rents." Iowa Code § 279.30 (1983). We have observed, however, that none of these exceptions encompass travel advances. 1980 Op.Att'yGen. at 283 n.1. Exceptions to the audit and allowance requirement are also provided in § 280A.42. These exceptions, however, are broader than the exceptions enumerated in § 279.30. Section 280A.42 excepts expenses for "freight; drayage; express; postage; printing; utilities including electricity, water, waste collection, heating, air conditioning, telephone and telegraph charges' but further excepts "expenses involving auxiliary, agency, and scholarship and loan accounts; and refunds to students for tuition and fees." Iowa Code § 280A.42 (1983). The former category of exceptions is substantially similar to the exceptions listed in § 279.30 and does not encompass travel advances. If the board of directors reasonably concluded that authorized travel were an expense "involving" the latter category of exceptions, however, the travel payment would be excepted from the prior audit and allowance requirement. Ultimately the determination of whether a travel expense "involves" a qualified exception must be made on a case-by-case basis.

In our view this reasoning is not applicable to the use of credit cards. The use of credit cards differs from the use of advance payment in that payment is not actually made until after the expenses are incurred. Thus verification of the expense can be made prior to payment by the governmental employer of a credit card billing. If the employer does not allow the expenses, the employer could recover expenses charged to the employer by the official or employee who made the trip. See 1980 Op.Att'yGen. at 289. See, generally, Iowa Code § 91A.5(1)(b) (1983).

This position is consistent with our prior determination that the state and the counties may issue credit cards to employees for travel expenses. We determined that statutes requiring claims to be "approved" and, in some instances, "verified" by receipts, were not inconsistent with utilization of credit cards. We opined that approval and verification could be conducted with respect to credit card billings. If the expenses were not subsequently approved, the governing body could recover charged expenses from the individual who had been issued the credit card. 1980 Op.Att'yGen. at 288-89. We do not consider an audit and allowance requirement to be materially different from the approval and verification requirements discussed in our prior opinion.

Accordingly, based on the foregoing analysis, we conclude that 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.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP/jkp

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), 331.301(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 6, 1983

Mr. John E. Schroeder
Keokuk County Attorney
Suite 2 Professional Building
Sigourney, Iowa 52591

Dear Mr. Schroeder:

This is in response to your letter concerning the authority of a County Board of Supervisors to enter upon private property to remove obstructions to the natural flow of water which have caused water to collect and flood county roads. According to your letter there are within Keokuk County several (perhaps 100) levees which have been erected upon private property. Unfortunately these private levees have obstructed the natural flow of water and resulted in the flooding of county roads. Your letter notes that all of these levees are constructed on private property and that Keokuk County has no levee or drainage districts. Based upon these facts you have asked whether Iowa Code Section 314.7 (1983) gives the Keokuk County Board of Supervisors the authority to enter upon the private property to remove the obstructions (levees), and if so, what notice and procedure must accompany that removal. You have asked further, whether the various remedies available to drainage districts under Iowa Code Chapter 455 (1983) to deal with obstructions to drainage levees would also be available to Keokuk County here to remove the private levees causing the damage to county roads. Since your questions concern the county's authority to remove these levees we will focus on that issue rather than any liability which may attach to the private landowner for the

damages which the levees cause to other property owners. For a discussion of the rules pertinent to the latter see, Hunt v. Smith, 238 Iowa 543, 28 N.W.2d 213 (1947); Rosendahl Levy v. Iowa State Highway Commission, 171 N.W.2d 530 (Iowa 1969); Ditch v. Hess, 212 N.W.2d 442 (Iowa 1973); Oakleaf County Club v. Wilson, 257 N.W.2d 739 (Iowa 1977).

Before turning specifically to your question as to the authority of the county to utilize Iowa Code Section 314.7 to enter private property and remove the levees, we must examine the applicability of other statutes which may well bear on the situation in Keokuk County. Iowa Code Chapter 455B (1983) vests in the Iowa Department of Water, Air and Waste Management jurisdiction to regulate the erection, use or maintenance of structures within the floodway or floodplains of the state's rivers and streams.[1] The central provision in this regard is Iowa Code section 455B.275(1) (1983) which states:

> A person shall not erect, use or maintain a structure, deposit, or excavation in or on a floodway or flood plains, which will adversely affect the efficiency of or unduly restrict the capacity of the floodway, adversely affect the control, development, protection, allocation, or utilization of the water resources of the state, and the same are declared to be public nuisances. However, this subsection does not apply to dams constructed and operated under the authority of chapter 469.

Iowa Code Section 455B.275(2) authorizes the abatement of the nuisances described in Iowa Code Section 455B.275(1) and any other nuisance which adversely affects flood control. See Easter Lake Estates, Inc. v. Iowa Natural Resources Council, 328 N.W.2d 906 (Iowa 1982); and Martin v. Iowa Natural Resources Council, 330 N.W.2d 790 (Iowa 1983). Iowa Code Sections 455B.275(3) and (4) concern the procedure through which a permit may be obtained to construct these edifices, and the latter provision gives the department authority to enjoin and abate structures erected without that permit. In addition to the restrictions within

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[1] 1982 Iowa Acts Chapter 1199, effective July 1, 1983, repealed Chapter 455A and transferred the authority of the Natural Resources Council to the newly created Department of Water, Air and Waste Management. Those provisions formerly within Chapter 455A regulating structures within floodways are now found in Iowa Code Sections 455B.261 through 455B.280 (1983).

§ 455B.275(1), Iowa Code Section 455B.277 (1983) also states in part that:

> A person shall not construct or install works of any nature for flood control unless and until the proposed works and the plans and specifications for the works are approved by the Council.

To enforce these provisions, the department's executive director is authorized to conduct investigations to determine whether the statute has been violated. Iowa Code section 455B.103(8) (1983).

Although we have noted the department's general authority over construction projects such as levees located within floodplains, we cannot determine on the basis of your letter whether either construction or destruction of any of the private levees erected in Keokuk County requires the department's approval. The factual determination of whether these levees required a permit is beyond the scope of this opinion. We also cannot decide whether the county itself must obtain a permit to destroy the levees. The department's rules in 900 I.A.C. § 70.2 defines "Agricultural levees or dikes" as:

> ". . . levees or dikes constructed to provide limited flood protection to land use primarily for agricultural purposes."

The rules provide that approval for the construction of levees or dikes in rural areas must be obtained only for those levees or dikes: ". . . located on the floodplain or floodway of any stream or river draining more than ten square miles." 900 I.A.C. § 71.4(1). Again the determination whether the levees in Keokuk County fall within these definitions must be made by the department, and cannot be decided here. We can note that should the department find that any or all of the levees constitute a nuisance it has the statutory authority to seek abatement. § 455B.275(2). We note also that the abatement of these levees as a nuisance would not constitute an illegal taking of property without compensation in contravention of Iowa Const. art. I, § 18. Iowa Natural Resources Council v. Van Zee, 261 Iowa 1287, 1294-97, 158 N.W.2d 111 (1968). See also, Easter Lake, 328 N.W.2d at 910.

Given the possible jurisdiction of the department over these levees, the county should first bring the situation to the department's attention. However, since the extent, if any, of the department's jurisdiction here cannot be determined in this opinion, we will discuss what options the county may have regarding those levees outside the ambit of the department's authority.

As your letter notes the Iowa statute governing organized levee and drainage districts, Iowa Code Chapter 455 (1983), contains various remedies for situations arguably analogous to the one now facing Keokuk County. Your letter asks whether these remedies are available to the Keokuk County engineer to take action against the private levees causing the obstructions. A drainage or levee district organized under Iowa Code Chapter 455 is a distinct political subdivision of the county in which it is located. Voogd v. Joint Drain. Dist. Kossuth and Winnebago Cos., 188 N.W.2d 387, 393 (Iowa 1971). Iowa Code Sections 455.1 and 462.1 (1983) place the management and control of drainage districts in the county board of supervisors, or a panel of three trustees from the district. Under Iowa Code Section 457.12 (1983) intercounty drainage districts are managed by a joint drainage board drawn from each county. The Iowa Supreme Court has held that when a board of supervisors manages a drainage district, it acts as a special tribunal in an official or governmental capacity and that when acting in this capacity it does not in any way represent the county itself. Mitchell County v. Odden, 219 Iowa 793, 804, 259 N.W. 774 (1935). Thus, for example, drainage bonds issued for the improvement of a drainage district are not obligations which bind the county. Odden, 219 Iowa at 804. It seems consistent with the principle that these districts are distinct political entities to conclude that the remedies designed to protect drainage lines belong only to the districts themselves and not the counties in which they are located. Given that Keokuk County has no drainage districts, we conclude that the statutory powers granted such districts cannot be exercised by the county engineer.[2]

Section 314.7 is one of several provisions within the Code which concern the responsibilities of state and county government towards the roads under their respective jurisdictions. Therefore, before turning to an examination of the language of § 314.7 and its specific applicability to the facts described in your letter, it would be useful to review other statutes which may bear on this case. Counties are granted, in Iowa Code Section 331.362(2) (1983), jurisdiction over secondary roads, and the board of supervisors is authorized to exercise that jurisdiction in accordance with chapters 306, 309, 310, 314 and other applicable laws. Iowa Code Section 309.67 (1983) charges county

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[2] Although the county may not exercise the powers of a drainage district under Chapter 455, it may proceed under Iowa Code Chapter 460 (1983) to organize a highway drainage district to "drain any part of a public highway under its jurisdiction". Under Iowa Code Section 460.2 (1983), such districts have the full range powers granted to drainage and levee districts.

boards of supervisors with the duty of establishing policies and providing adequate funding to properly maintain the county's secondary road system. Similarly, the county engineer under Iowa Code Section 309.21 (1983) is made responsible for the efficient economical and good faith performance of all construction and maintenance work on the secondary roads. Given that Keokuk County may exercise authority over its roads under provisions other than § 314.7, it follows that these statutes should be examined to determine if they may aid the county in this situation.

For example, Iowa Code Section 306.27 (1983) deals with changing, upgrading or widening roads. This statute provides:

> The state department of transportation as to primary roads and the boards of supervisors as to secondary roads on their own motion may change the course of any part of any road or stream, watercourse or dry run and may pond water in order to avoid the construction and maintenance of bridges, or to avoid grades, or railroad crossings, or to straighten any road, or to cut off dangerous corners, turns or intersections on the highway, or to widen any road above statutory width, or for the purpose of preventing the encroachment of a stream, watercourse or dry run upon such highway. The department shall conduct its proceedings to accomplish the above in the manner and form prescribed in chapter 472, and the board of supervisors shall use the form prescribed in sections 306.28 to 306.37. All such changes shall be subject to the provisions of chapter 455A.

Iowa Code Sections 306.28 through 306.37 specify the procedures for notice and hearing which the county must follow to utilize this statute. However, § 306.27 does not include the entry upon private property to remove obstructions injuring county roads as a circumstance under which these procedures may be invoked. We would conclude accordingly that this provision would not be available to the county in this case.

Iowa Code Chapter 319 (1983) does contain provisions which seem more closely related to the situation within Keokuk County. Iowa Code Section 319.1 (1983) requires county boards of supervisors to remove all obstructions in highways under their jurisdiction. This responsibility is specifically delineated in Iowa Code Section 319.7 (1983) which states:

> It shall be the duty of all officers responsible for the care of public highways, outside cities,

> to remove from the traveled portion and shoulders of the highways within their several jurisdictions, all open ditches, water breaks, and like obstructions, and to employ labor for this purpose in the same manner as for the repair of highways.

These obstructions are deemed to be a public nuisance under Iowa Code Section 319.8 (1983), and the board of supervisors pursuant to Iowa Code Section 319.9 (1983) is authorized to restrain these obstructions. Iowa Code Section 319.13 (1983) specifies that if certain obstructions placed upon the right of way of a public highway constitute an immediate and dangerous hazard they may be removed without notice or liability in damages. All of these provisions for the removal of obstructions, however, are expressly applicable only to obstructions located in the traveled portion and shoulders of the highways. The procedures within Iowa Code Chapter 319 are not therefore applicable to obstructions located upon private property. This chapter is inapposite to the factual situation in Keokuk County.

Section 314.7, the central provision to which your letter alludes, imposes certain duties upon county officials in the performance of their duties towards roads within their jurisdiction. The provision states in full:

> Officers, employees, and contractors in charge of improvements or maintenance work on any highway shall not cut down or injure any tree growing by the wayside which does not materially obstruct the highway, or the drains, or interfere with the improvement or maintenance of the road, and which stands in front of any city lot, farmyard, orchard or feedlot, or any ground reserved for public use. Nor shall they destroy or injure reasonable ingress or egress to any property, or turn the natural drainage of the surface water to the injury of adjoining owners. It shall be their duty to use strict diligence in draining the surface water from the public road in its natural channel. To this end they may enter upon the adjoining lands for the purpose of removing from such natural channel obstructions that impede the flow of such water.

Your letter asks whether the statute's last two sentences would be available to Keokuk County to remove the private levees causing the obstruction of county roads.

Beyond the stated obligations which the county must follow in performing maintenance work on its roads, the statute

impliedly speaks of an authority to prevent surface water from damaging county roads. The "duty to use strict diligence in draining the surface water from the public road in its natural channel" implies an authority to remove surface water from those roads. Moreover, this provision must be construed and if possible harmonized with those other provisions within the Code dealing with the maintenance of secondary roads. See, Egan v. Naylor, 208 N.W.2d 915, 918 (Iowa 1973). Consequently, § 314.7 should be construed in light of § 309.67 which imposes the general duty upon county officials to maintain secondary roads. It should be considered also with the provisions of Chapter 319 concerning the removal of obstructions from the traveled portions of roads. Read together, these provisions indicate that county officials have a duty to drain surface water from county roads which may obstruct or damage those roads. Indeed, a failure to properly drain the water from these roads so as to prevent injury could, in some circumstances, expose the county to liability to users of the roads. See Harryman v. Hayles, 257 N.W.2d 631, 638 (Iowa 1977); Conrad v. Board of Supervisors of Lee County, 199 N.W.2d 139, 143 (Iowa 1972).

Given the county's obligation to drain surface water for county roads as a part of its duty to keep those roads in good repair, the issue is whether § 314.7 authorizes entry upon private property to remove obstructions which cause the surface water to flood the roads. The concluding sentence in this provision which speaks to the entry upon private property to remove channel obstruction should be read in connection with the county's general on-going duty of maintenance. The first sentence of the provision for example refers to "Officer, employees, and contractors in charge of improvements or maintenance work" implying that the remainder of the statute concerns maintenance activities. It follows that the entry upon private property to remove obstructions is a part of maintenance work. It must follow also, that if the county must drain surface water to maintain its roads, and that surface water results from a private obstruction, the county as a part of its maintenance responsibility, may enter private property to remove the obstruction. We cannot conclude that the legislature would impose an obligation to drain surface water without providing a mechanism to fulfill that obligation. Construing the last sentence of § 314.7 with the statute as a whole and those other statutes dealing with the county's obligations towards its roads, we believe that this language authorizes counties to enter private property to remove obstructions causing surface water to collect on county roads. Accordingly, Keokuk County may utilize this provision to remove those levees damaging its secondary roads.

Your letter asks what notice, process or procedures must be followed by the county before it may utilize the statute to

remove the levees. However, before we can determine what procedures the county must follow, it is first necessary to decide whether the county's exercise of its authority under the statute must be preceded by notice and hearing.

Police power is the exercise of a governmental body's right to regulate the use of property to prevent any use which would be harmful to the public interest. Iowa Natural Resources Council v. Van Zee, 261 Iowa 1287, 1294, 158 N.W.2d 111 (1968). The removal of those levees in Keokuk County causing damage to the county's roads falls within the county's inherent police power to regulate private property. The police power includes the power to seek abatement of a nuisance, such as private levees causing water to flood and consequently damage county roads.[3] Droegmiller v. Olson, 241 Iowa 456, 467, 40 N.W.2d 292 (1950). However, governmental police power is limited by distinct restraints found in both the United States and Iowa Constitutions. For example, private property may not be taken for a public use without providing just compensation to the property owner under U.S. Const. amend. V and Iowa Const. art. I, § 18. To determine whether the exercise of governmental police power amounts to a taking requires a case-by-case analysis weighing the public benefits resulting from the governmental action against the restraints imposed upon the affected landowner. Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276, 279 (Iowa 1979). Under U.S. Const. amend. V and Iowa Const. art. I § 9, private property may not be taken without according the property owner due process of law. Thus summary abatement of a nuisance, that is acting against it without notice and hearing, is permissible only when based upon an emergency. Walker v. Johnson County, 209 N.W.2d 137, 139 (Iowa 1973). The county's exercise of its authority under § 314.7 is subject to these constitutional safeguards.

Your question as to the appropriate notice and procedures which the county must follow in exercising its § 314.7 authority implicates due process considerations. When a governmental body proposes to appropriate a constitutionally protected property interest, due process requires at some stage of the proceeding, notice and opportunity to be heard. Auxier v. Woodward State Hosp.-School, 266 N.W.2d 139, 142 (Iowa 1978). We cannot decide, in this opinion, the extent of the landowner's property interest

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[3] As your letter notes, the county retains the option to seek abatement of the levees as a nuisance in a civil action under Iowa Code Chapter 657 (1983), regardless of the availability of § 314.7.

in these levees. However, even if it is determined that due process applies, there is flexibility in determining what procedural protections are required in a particular situation. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Thus, what process is due turns upon the nature of the governmental function and individual interest involved. State v. Grimme, 274 N.W.2d 331, 336 (Iowa 1979). Given the degree of flexibility which due process affords the county, we believe it could in this situation proceed by simply obtaining the consent of the landowner. Moreover, if the flooding created a hazard on the county's roads so as to constitute an emergency, the county could proceed summarily to remove the levees as a nuisance. See, Walker, 209 N.W.2d at 139.

Section 314.7 does not provide procedures which the county could follow before acting to remove the levees. Given that some notice and opportunity to be heard may be constitutionally required, we would suggest that the county adopt procedures to govern its exercise of this authority. See Citizens Etc. v. Pottawattamie County Board of Adjustment, 277 N.W.2d 921, 924 (Iowa 1979), in which the Iowa Supreme Court, in dicta, stressed the desirability for even governmental bodies not covered by Iowa Code Chapter 17A (1983) to adopt procedural rules. Iowa Code Section 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. If a procedure is not established by state law, a county may determine its own procedure for exercising the power.

This statute specifically authorizes the county to adopt procedures for exercising its powers in the absence of a state-established procedure. Since § 314.7 does not by its own terms provide a procedure under which the county could act in removing channel obstructions, the county is empowered to adopt such procedures in accordance with § 331.301(5). In adopting these procedures, the county could turn to and adopt by analogy the mechanisms for notice found in Iowa Code Section 314.9 (1983), dealing with entry upon private property for survey, appraisal and related purposes, or the procedures found in §§ 306.27 through 306.37 for the straightening and widening of roads.

In summary, the levees involved here may fall within the regulatory authority of the newly created Department of Water, Air and Waste management, formerly the Iowa Natural Resources Council. The situation should be brought to their attention for a determination as to whether that agency may take action. The remedies given to organized drainage districts under Chapter 455

are not available to the county. Keokuk County may utilize § 314.7 to remove levees upon private property causing water to obstruct county roads, but should adopt procedural guidelines governing the exercise of that authority.

Sincerely,

Timothy D. Benton

TIMOTHY D. BENTON
Assistant Attorney General

TDB/jkp

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

Mr. Larry J. Wilson, Director
State Conservation Commission
Wallace State Office Building
L O C A L

Dear Mr. Wilson:

You have requested an opinion from the Attorney General as to whether 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) at the end of the fiscal year are properly reverted to the general fund by the state comptroller.

Iowa Code Section 107.17 (1983) provides that the financial resources of the Iowa State Conservation Commission shall consist of three (3) funds:

1. A state fish and game protection fund,
2. A state conservation fund, and
3. An administration fund.

The fish and game protection fund consists of all moneys accruing from license fees and all other sources of revenue arising under the division of fish and game. It is authorized by statute to be credited with interest or earnings on investments or time deposits. All refunds and reimbursements relating to its activities are credited back to this fund, and all moneys accruing to it, except for administrative costs, must be expended solely in carrying on the activities embraced in the division of fish and game and as authorized by the general assembly. Iowa Code § 107.19 provides that any unexpended balance in the fish and game protection fund shall revert to that fund at the end of the fiscal term.

The conservation fund consists of all other moneys accruing to the conservation commission and is financed by appropriations from the general fund of the state.

The administration fund consists of an equitable portion of the gross amount of the two aforesaid funds, determined by the commission and approved by the legislature, sufficient to pay the expenses of administration.

You state that the text of the appropriation from the general fund to the conservation fund differs markedly from the language employed by the legislature in appropriating funds to other agencies. While it is true that 1981 Iowa Acts, ch. 12, § 3, does appropriate funds from the general fund of the state to the commission for deposit in the state conservation fund for use by the division of lands and waters, no statutory requirement for reversion of any unexpended balance to the conservation fund at the end of the fiscal term appears in § 107.19 or elsewhere in that chapter.

Given that reversion of conservation fund monies to the general fund has been the long-standing practice, we do not believe that the legislature intended the language in the appropriation acts appropriating money "for deposit in the state conservation fund" to prevent reversion to the general fund under sections 8.33 and 8.34. Even though many appropriation Acts direct that moneys from the general fund be appropriated to the various governmental agencies rather than to a specific fund, the language of 1981 Iowa Acts, ch. 12, § 3, appropriating moneys from the general fund to the commission for deposit in the conservation fund is not unique. Chapter 2 of the 1981 Iowa Acts, § 2, appropriates money from the general fund to the state mental health fund. Chapter 6, § 4, appropriates from the general fund to the county government assistance fund. Section 5 of that same chapter appropriates from the general fund to the municipal assistance fund. Chapter 1260 of the 1982 Iowa Acts, § 13, appropriates from the general fund to the state community mental health and mental services retardation fund.

Summarizing the conclusions reached in this opinion, 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.

Very truly yours,

MICHAEL McGRANE
Assistant Attorney General

MM:rcp

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

Patrick C. McCormick
Woodbury County Attorney
Woodbury County Courthouse
Sioux City, IA 51101

Dear Mr. McCormick:

You have asked for an opinion of this office relating to the use of photographs of juveniles for photo line-up purposes. Specifically, you question:

> May photographs taken of a child pursuant to Section 232.148, assuming compliance with paragraph 2 thereof, be contained within a photo lineup by the police department and shown to either victims or witnesses to a crime for the purpose of establishing the perpetrator thereof without juvenile court authorization showing that inspection is necessary in the public interest.

As you correctly point out, the use of fingerprints and photographs of juveniles in delinquency proceedings, as opposed to other law enforcement records or juvenile court records, is specifically regulated by statute. Iowa Code Section 232.148 (1983). Subsection one of the provision states:

> 1. Except as provided in this section, a child shall not be fingerprinted or

> photographed by a criminal justice agency after the child is taken into custody.

Further, the provision places restrictions on the use of photographs and fingerprints. First, the juvenile who has been taken into custody must be at least fourteen years of age. Secondly, the public offense being investigated must be one constituting a felony. Iowa Code Section 232.148(2) (1983). You have assumed compliance with these restrictions in your inquiry. We further assume compliance with subsections four and six relating to retention of juvenile photographs and conditions of retention of juvenile photographs.

The crux of your question, as you note, is provided by subsection five:

> 5. Fingerprint and photograph files of children may be inspected by peace officers when necessary for the discharge of their official duties. The juvenile court may authorize other inspections of such files in individual cases upon a showing that inspection is necessary in the public interest.

Iowa Code Section 232.148(5) (1983). This subsection divides access to the juvenile photographs into two classes: first, peace officers when necessary to discharge of official duties, and secondly, all "other inspections". It further provides that photograph files of children may be inspected by peace officers without a court order. "Other inspections," however, require a court order based upon a showing that it is "necessary in the public interest".

The short answer to your inquiry is yes. Iowa Code Section 232.148(5) allows a juvenile's photograph, assuming compliance with subsections two, four and six, to be used in a photo line-up by showing the same to victims or witnesses for identification purposes. As that purpose is necessary in the discharge of law enforcement official duties, a court order is not required.

Sincerely,

Brent D. Hege

Brent D. Hege
Assistant Attorney General

BDH/kap10

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)

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

GARY L. HAYWARD
ASSISTANT ATTORNEY GENERAL

ADDRESS REPLY TO:
3RD FLOOR
WALLACE STATE OFFICE BUILDING
DES MOINES, IOWA 50319
PHONE: 515/281-5261

The Honorable William H. Harbor
State Representative
Henderson, Iowa 51541

August 24, 1983

Dear Representative Harbor:

You have asked this office for an opinion on three questions concerning Iowa's new pari-mutuel betting law. Acts of the 70th General Assembly, 1983 Session, Senate File 92, (Hereafter referred to as Senate File 92.) In particular, you have asked:

1. What is the meaning of the phrase "prime farm land" in Senate File 92, §9(1),
2. What is the meaning and purpose of the language regarding the licensing of corporations with ten percent of their stock "subject to contract or option to purchase" during the term of the license in Senate File 92, §9(3)(e), and
3. How is the sixteen percent deduction from gross wagers required by Senate File 92, §11(5), related to the six percent tax imposed on gross wagers imposed by Senate File 92, §15?

1. The meaning of "prime farm land".

Senate File 92, §9(1), states in pertinent part:

> The [racing] commission shall not approve a license application if any part of the race track is to be constructed on prime farm land

> outside the city limits of an incorporated city.

The phrase "prime farm land" is not given a specific definition in Senate File 92. The determination of its meaning in the act must be made in accordance with Iowa Code §4.1(2), which states:

> Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.

The phrase "prime farm land" is not a technical word or phrase which has a specific meaning in any particular discipline. The word prime is generally accepted, in this context, to mean "first in quality; of the highest excellence, first-rate." Webster's New World Dictionary 1129 (2d ed. 1972). Given its meaning in common usage and in the context of the act it means that land in Iowa which due to soil composition, drainage, slope and other factors is especially well suited for the growing of crops. The precise standards by which the Iowa Racing Commission is to differentiate between that land which is "prime farm land" and that land which is less well suited for agriculture is left to the discretion of that agency. It may define "prime farm land" by rule. Senate File 92, §7, states in pertinent part:

> The commission shall have the following powers and shall adopt rules pursuant to chapter 17A to implement this chapter:
>
> 1. To investigate applicants and determine the eligibility of applicants for a license.
>
> . . .
>
> * * * *

Senate File 92, §9(1), states in pertinent part:

> If the commission is satisfied that its rules and sections 99D.7 through 99D.22 applicable to licensees have been or will be complied with, it may issue a license for a period of not more than one year.

This office cannot determine the meaning of "prime farm land" for the new racing commission. We would, however, point out that the legislature has defined that phrase for purposes of regulating mining in this state. Iowa Code §83.2(10) (1983). Pursuant to that chapter, the Iowa Department of Soil Conservation has conducted an extensive survey cataloging those soil types and conditions which combine to create "prime farmland" for the purpose of mine regulation. The Iowa Racing Commission may wish to consult with the Iowa Department of Soil Conservation to determine whether the latter agency's survey could be appropriately adopted for use in the regulation of racetrack location.

2. The effect of undisclosed contracts or options to purchase stock in a race track licensee.

Senate File 92, §9(3), states in pertinent part:

> A license shall not be granted to a nonprofit corporation if there is substantial evidence that the applicant for a license:
>
> * * * *
>
> e. Is a corporation and ten percent of the stock of the corporation is subject to a contract or option to purchase at any time during the period for which the license is issued unless the contract or option was disclosed to the commission and the commission approved the sale or transfer during the period of the license.
>
> * * * *

This provision should be read along with Senate File 92, §§9 (4) and 9(7). Subsection 9(4) states:

> A license shall not be granted to a nonprofit corporation if there is substantial evidence that the stockholders or officers of the nonprofit corporation are not of good repute and moral character.

Subsection 9(7) states:

> Upon a violation of any of the conditions listed in this section, the commission shall immediately revoke the license.

The clear intent of the legislature is that only reputable persons of unquestioned character are to be issued licenses to operate a race track in this state. If persons lacking the requisite reputation and character could own an interest in a racetrack by setting up a straw man applicant to obtain the license, the intent of the legislature would be frustrated.

Therefore, if a nonprofit corporation which is applying for a license to operate a racetrack has ten percent or more of its stock subject to a contract for sale or an option to purchase the stock, it must report the terms of the contract or option to the racing commission when applying for the license. That way the commission can evaluate not only the current owners, but probable or potential owners as well. Failure to report such contracts or options will subject the license to revocation.

3. Deductions from and taxes on gross wagers.

In your third question you asked how the sixteen percent deduction in §11(5) is related to the six percent tax imposed in §15. Subsection 11(5) states:

> As each race is run the licensee shall deduct sixteen percent from the total sum wagered on all horses or dogs as first winners. The balance, after deducting breakage, shall be paid to the holders of certificates on the winning horse or dog in the proportion that the amount wagered by each certificate holder bears to the total amount wagered on all horses or dogs in the race as first winners.

Subsection 11(6) states:

> The licensee shall likewise receive wagers on horses or dogs selected to run, second, third, or both, or in combinations as the commission

> may authorize. The method, procedure, and the authority and right of the licensee, as well as the deduction allowed to the licensee, shall be as specified with respect to wagers on horses or dogs selected to run first.

(Emphasis added.)

Rather than a tax on wagers, this sixteen percent deduction sets the amount of money received as wagers which the licensee may withhold to meet the expenses of operating the racetrack. One of those expenses is the six percent tax on gross wagers imposed by Senate File 92, §15. The tax is therefore paid out of the moneys deducted under §11(5).

4. Summary.

The phrase "prime farm land" in Senate File 92, §9(1), refers to land which due to soil composition, drainage, slope and other factors is especially well suited for raising crops. The precise meaning of this phrase is left to the racing commission to define through the rulemaking process.

Senate File 92, §9(3), requires any applicant for a racetrack license which is a nonprofit corporation to report any enforceable agreement which will or may result in a change of ownership of ten percent or more of the stock of the applicant corporation. This is so the racing commission can make sure that only persons meeting its minimum standards of character and reputation have an interest in the operation of the track.

Senate File 92, §§11(5) and 11(6), require a licensee to deduct sixteen percent from the gross wagers for operating expenses. One such expense is the six percent tax on gross wagers imposed by Senate File 92, §15.

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:dkl

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)

Honorable Norman Rodgers
State Senator
R.R. 2
Adel, Iowa 50003

Dear Senator Rodgers:

You requested an opinion whether the bottle bill, Iowa Code Chapter 455C, allows a beverage distributor to enter into an agreement with a retailer ("dealer") which relieves the distributor from its duty to pick up empty containers and reimburse the dealer for the containers. You also ask if such an agreement would relieve the distributor of all statutory obligation to redeem the empty containers and reimburse the value and handling charge to redemption centers. We think a distributor could enter into the agreement you describe with a dealer, but it would not relieve the distributor of any duty to accept and pick up empty cans and bottles from redemption centers as required by Chapter 455C, and to reimburse them as required by that statute.

You describe a situation where a distributor of beer or soft drinks agrees with a retail chain store dealer to sell the dealer's private label or house brand beverages, and further enters an agreement with the dealer that the dealer will not present the empty containers back to the distributor for reimbursement of six cents per container. You ask whether Chapter 455C precludes such an agreement between distributor and dealer.

Under the bottle bill a "distributor" is any person who sells beverages in containers to a dealer. Iowa Code § 455C.1(5) (1983). A "dealer" is any person who sells beverages in containers to consumers. Iowa Code § 455C.1(4) (1983). A distributor is required to accept and pick up from a dealer served by it or from a redemption center for a dealer served by the

distributor any empty can or bottle of the kind, size and brand sold by the distributor. Iowa Code § 455C.3(2) (1983). The distributor must pay to the dealer or redemption center the five-cent refund value of the container plus a one-cent handling fee. Iowa Code §§ 455C.2, 455C.3 (1983).

In construing a statute, the goal is to determine legislative intent considering the language of the statute, the objects sought to be accomplished and the ends sought to be remedied, and to place a reasonable construction on the statute which best effectuates those purposes. The requirements to pick up empty containers and reimburse dealers appear to be mandatory. However, another provision of Chapter 455C allows distributors to enter into agreements with "any other distributor, manufacturer or person for the purpose of collecting or paying the refund value on, or disposing of, beverage containers as provided in this chapter." Iowa Code § 455C.13 (1983). Under this provision it appears the dealer could agree to dispose of empty beverage containers for the distributor. We also think it is reasonable to conclude that a dealer could forego its right to be reimbursed for empty containers.

This construction is consistent with one of the primary purposes of the bottle bill, which is to encourage cleanup of cans and bottles littering the parks and highways of the state. See In the Matter of Chuck Wittenberg Distributors, Inc., Iowa Department of Environmental Quality Declaratory Ruling No. 80-DR-02 (1980); In the Matter of the Petition of Progress Industries, IDEQ Declaratory Ruling No. 83-DR-01 (1983). Under the scenario you describe, the dealer would be redeeming cans and bottles from consumers which would accomplish the legislative goal of reducing litter. Moreover the requirement that distributors pick up empty containers from dealers and reimburse the refund value plus a handling fee appears designed to benefit dealers. If dealers voluntarily agree to relieve distributors of these statutory duties we see no conflict with the pickup and reimbursement scheme set forth in Chapter 455C.

Your second question asks whether such an agreement between dealer and distributor would relieve a distributor from all duty to pick up and provide reimbursement for empty containers. As stated earlier, section 455C.3(2) requires a distributor to accept and pick up "from a dealer served by the distributor or a redemption center for a dealer served by the distributor" any empty container of the kind, size and brand sold by the distributor. The section also requires the distributor to pay the dealer or redemption center the refund value plus an additional one cent per container. The distributor cannot, by entering an agreement with a dealer, relieve itself of its statutory obligation to a redemption center for a dealer served by the distributor. (There

has been some dispute between distributors and redemption centers whether this includes both state-approved and unapproved redemption centers. See Iowa Code §§ 455C.6 and 455C.7 (1983). Since this question is not presented in your letter we do not address it here.)

In summary, it does not violate Chapter 455C for a distributor to agree with a dealer that the dealer will dispose of empty house brand beverage containers and that the dealer will not be paid the refund value and handling fee on the containers. However, such an agreement does not relieve the distributor from its duty to accept and pick up empty containers from redemption centers for dealers served by the distributor and to reimburse them as required by Chapter 455C.

Sincerely,

ELIZA OVROM
Assistant Attorney General

EO:rcp

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 15, 1983

Mr. Michael P. Short
Lee County Attorney
609 Blondeau Street
Keokuk, Iowa 52632

Dear Mr. Short:

You have requested the opinion of the Attorney General with respect to sale by the Lee County Treasurer at a regular tax sale of certain property within the corporate limits of the City of Houghton in Lee County.

At the time of the sale there were two years delinquent taxes on the property and a sewer service charge appropriately filed as a lien pursuant to Iowa Code Section 384.84 (1983). At the tax sale, the purchaser paid the amount of the delinquent taxes, penalty and interest together with the sewer charge and an appropriate certificate of purchase at tax sale was issued reflecting the entire amount paid by the purchaser.

The property was also subject to a mortgage and the mortgagee has tendered payment of the amount of taxes, penalty and interest on the property for redemption, not including any tender of payment on the delinquent sewer service charges.

On these facts, you present specific questions as follows:

1. Was the Treasurer's Office correct in issuing one tax sale certificate for the sale of the parcel of land showing the amount paid as the amount equal to taxes, penalty, interest and the sewer service charge as existed on the date of the tax sale?

2. Could the Treasurer have sold a parcel of property at tax sale to a person bidding

the amount of taxes only, and not bidding or offering to pay any portion of the sewer service lien?

3. Should the redemption of the whole parcel of real estate by the mortgagee be allowed where the mortgagee purposes (sic) to pay taxes, penalty and interest but declines to pay a statutory lien which is junior to his mortgage?

4. If the answer to question three is in the affirmative, is the purchaser at annual tax sale entitled to the issuance of new tax sale certificate showing payment of the sewer service lien only?

Relevant to these questions are §§ 384.84(1), 446.7, 446.9, 446.29 and 447.1, as they appeared in the Code at the time of the tax sale.

Section 446.7 required the treasurer to annually offer for sale all real property on which taxes of any description for the preceding fiscal year or years were delinquent and required that such sale be made for the total amount of taxes, interest and costs due thereon. Section 384.84(1) created a lien for unpaid sewer service charges and provided for their collection "in the same manner as taxes." Section 446.9 required that all of the delinquent tax existing against the property for the year in which the tax sale was held be listed as a single sum in the published notice of sale and § 446.29 required the treasurer to deliver to the purchaser "a certificate of purchase." Section 447.1 permitted redemption of the property thus sold by payment to the treasurer of "the amount for which the real estate was sold."

Code Chapters 446 and 447 were in place with the procedures for the collection of taxes set out therein when § 384.84(1) was amended in 1975 to read as it appears in the 1983 Code, authorizing the collection of delinquent sewer charges "in the same manner as taxes." See 1975 Iowa Acts, ch. 203, § 38.

In Mississippi Valley Savings and Loan Association v. L.A.D., Inc. et al., 316 N.W.2d 673 (Iowa 1982), an action brought to determine priority of liens, the court held that Iowa Code § 384.84(1) (1983) did not make a city's claim for delinquent sewer service charges a first lien superior to existing mortgages. More relevant to this problem, the court also held that the authority granted to collect delinquent sewer charges

"in the same manner as taxes" referred to procedure and meant the method by which collection was to be accomplished.

At the next session of the legislature § 384.84(1) was amended to expressly provide that liens for delinquent sewer service charges have equal precedence with ordinary taxes and are not divested by judicial sales. (1983 Iowa Acts, H.F. 377, effective July 1, 1983).

Whatever this amendment and its timing might indicate as to legislative intent in the original enactment, the right to redeem from tax sale is dependent on, and is governed by, law in force when the sale was made (Lockie v. Hammerstrom, 222 Iowa 451, 269 N.W. 507 (1936)) and a mortgagee or other lien holder is entitled to pay the taxes or to redeem from a tax sale in order to protect his interest in the property (Koch v. Kiron State Bank, 230 Iowa 206, 297 N.W. 450 (1941); Bates v. Pabst, 223 Iowa 534, 273 N.W. 151 (1934)).

Here the property was sold at tax sale and the mortgagee is seeking to exercise the right to redeem under the statute for an amount less than the amount required by that statute. The redemptioner must pay all amounts due, including the delinquent taxes and sewer service charges.

In Cone v. Wood, 108 Iowa 260, 79 N.W. 86 (1899), three lots were sold at tax sale. The court held that the mortgagee on one of the lots could protect that interest from a tax title, even though to do so it was necessary to redeem for the total amount for which sold and thereby give similar protection to the other two lots included in the sale.

In Lane v. Wright, 121 Iowa 376, 96 N.W. 902 (1903), the court denied the right of one lien holder to obtain a tax title to the disadvantage of other lienholders, treating the purchase of the tax certificate as a redemption and giving the redemptioner a preferred lien to the extent of his disbursement for that purpose.

We conclude, therefore, that the procedures for collecting delinquent sewer service charges are to be found in the tax sale statutes. Thus the procedures mandated for the collection of taxes require the Treasurer to conduct an annual tax sale, with the notice thereof listing all of the delinquent tax as a single sum, and to deliver to the purchaser a certificate of purchase. One having the right to redeem by payment to the county treasurer must pay the entire amount for which the real estate was sold, including delinquent taxes and sewer charges.

In light of the above and in response to your specific questions, we advise as follows:

1. The Treasurer was correct in issuing one certificate showing the total amount paid.

2. The Treasurer could sell at regular tax sale only for the total amount due.

3. Property sold at regular tax sale may be redeemed only by payment to the Treasurer of the amount for which sold, plus costs, penalty, etc.

Very truly yours,

Clifford E. Peterson

CLIFFORD E. PETERSON
Assistant Attorney General

CEP:rcp

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

The Honorable Roger A. Halvorson
State Representative
Box 627
Monona, Iowa 52159

September 12, 1983

Dear Representative Halvorson:

We have received your request for an Attorney General's opinion asking whether registered watchmakers are legally entitled to a proportional refund of the fee paid for two-year certificates of registration prior to repeal of Iowa Code Chapter 120 (1983). Senate File 530, section 11, repealed Chapter 120, which required watchmakers to obtain two-year certificates of registration; the repeal was effective July 1, 1983. See Iowa Code §§ 3.7 and 3.12 (1983). The act repeading Chapter 120 did not provide for refunds.

In our opinion watchmakers who received a two-year certificate of registration prior to repeal of the statute are not entitled to a refund of a portion of the fee.[1] The fees provided by Chapter 120 were designed to cover administrative costs of registration. The legislature required the Board of Watchmaking Examiners to set renewal fees "in an amount determined by the board based upon the cost of renewing the certificate . . ." § 120.8(4). See also § 120.8(2)(non-resident certificates). Because the fees were intended to pay the cost of renewal of registration, we know of no basis on which a watchmaker could assert entitlement to a portion of the fee based upon the fact that registration is no longer required.

---

[1]We would note that any claim for a license refund should be filed with the State Appeal Board pursuant to § 25.2.

The administrative fee for issuance of this regulatory license is not in the nature of a user fee calculated according to use as are, for example, the registration fees for motor vehicles (fee applies only to vehicles operated upon public highways and cost based in large part on weight of vehicle). See §§ 321.105-.132. The legislature has there specifically provided for computing the amount of fees for a fractional part of the year, § 321.106, and for refund of a portion of the fees where a vehicle is destroyed or removed from the state, § 321.126. See Op.Att'yGen. 6-30-61 (Snell to Pesch) ($5.00 registration fee for mobile homes, whether or not used on highways, not within refund provision of § 321.126).

Nothing in Senate File 530 or other statutes indicate any legislative intent to refund a portion of these license fees which are based on administrative costs.

In conclusion, watchmakers who paid $50.00 to obtain a two-year certificate of registration prior to abolition of the registration requirement are not entitled as a matter of law to a refund for the portion of the two-year period following repeal of Chapter 120 absent any legislative provision for a refund.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENABUGH
Deputy Attorney General

EMO:ab

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

Mr. Charles Neighbor
Jasper County Attorney
301 Courthouse Building
Newton, Iowa 50208

Dear Mr. Neighbor:

You have requested an opinion of the Attorney General on several questions concerning a township's authority over certain cemeteries within the township. You describe the circumstances as follows:

> There are several "family" cemeteries in the county that were established in the 1800's by deeds of reservation, i.e., after the original title holder established the cemetery future conveyances of adjacent property either excluded the cemetery tract or the adjacent property was sold subject to the cemetery. In any event, it does not appear that the cemetery tracts were ever deeded to the county or the township.
>
> The general public can purchase lots in these private cemeteries for burial. The township trustees assess taxes for the care and maintenance of these cemeteries. The fund is used to mow the grounds, maintain the stones, etc. The trustees sell lots and give deeds to the lots purchased. There are a few cemeteries, however, that are no longer maintained or used.

Given these facts, you pose several questions, which we shall address in turn.

1.

Your first question is as follows:

> Do the township trustees have the legal authority to levy and expend taxes for the care and maintenance of the private cemeteries within their jurisdictions?

We believe the answer to this question is found in Iowa Code Ch. 359 (1983), which sets forth provisions relating to township government. In particular, § 359.33 provides that:

> [The township] may levy a tax not to exceed six and three-fourths cents per thousand dollars of assessed value of taxable property to improve and maintain any cemetery not owned by the township, provided the same is devoted to general public use.

Accordingly, the township is authorized to levy and expend taxes for the care and maintenance of private cemeteries in the township, provided that these cemeteries are open for use by the general public. This conclusion is consistent with prior opinions of this office. 1942 Op.Att'yGen. 156; 1940 Op.Att'yGen. 503; 1940 Op.Att'yGen. 365; 1922 Op.Att'yGen. 132; 1909 Op.Att'yGen. 251.

However, under the facts presented in your opinion request we believe the cemeteries in question may in fact actually be township cemeteries under the doctrine of implied dedication. In order to establish a dedication, two essential conditions must be met: first, there must be an intent on the part of the landowner to dedicate the land, and second, there must be an acceptance by the public. Sioux City v. Tott, 244 Iowa 1285, 60 N.W.2d 510, 515-516, 517 (1953); Dugan v. Zurmuehlen, 203 Iowa 1114, 211 N.W. 986, 988 (1927); Christopherson v. Forest City, 178 Iowa 893, 160 N.W. 691, 693 (1916). See also 11 McQuillin, Municipal Corporations (3d ed. 1983), §§ 33.01-33.02.

Dedications may be express or implied. An implied dedication may arise by operation of law when an intent to dedicate and an acceptance are established by the conduct of the owner and the public and the facts and circumstances of each case. Dugan, supra, 211 N.W. at 988; Wensel v. Chicago, M. and St. P.Ry. Co., 185 Iowa 680, 170 N.W. 409, 413 (1919). See also McQuillin, supra, at § 33.03. Intent to dedicate may be implied

from the actions of the owner of the land claimed to have been dedicated: where the public has used land for a public purpose for a period of time, with the knowledge and acquiescence of the owner, and under circumstances that give rise to the presumption that the owner intended a dedication, an intent to dedicate will generally be presumed. Tott, supra, 60 N.W.2d at 515-516; Ackley v. Central States Electric Co., 206 Iowa 533, 220 N.W. 315, 317 (1928); Dugan, supra, 211 N.W. at 988-989. See also McQuillin, supra, at §§ 33.30-33.33. Acceptance may also be implied from the acts of the municipality and the public. Christopherson, supra, 160 N.W. at 693; Keokuk v. Cosgrove, 116 Iowa 189, 89 N.W. 983, 984 (1902). Acceptance may be established by such factors as general use of the property by the public for a period of time, Wolfe v. Kemler, 228 Iowa 733, 293 N.W. 322, 324 (1940), assumption of jurisdiction and control of the property by the municipality, Bowsersox v. Board of Supervisors of Johnson County, 183 Iowa 645, 167 N.W. 582, 583 (1918), Louden v. Starr, 171 Iowa 527, 154 N.W. 331, 333 (1915), improvement of the property, Gable v. Cedar Rapids, 150 Iowa 108, 129 N.W. 737, 739 (1911), Parriott v. Hampton, 134 Iowa 157, 111 N.W. 440, 441 (1907), and similar actions. See McQuillin, supra, at §§ 33.43-33.55.

The determination in the present case of whether there has been an implied dedication of these cemeteries to the township depends on all of the factual circumstances surrounding this question. These facts are not before us. In any event, such a determination is essentially a factual one, and therefore outside the scope of an Attorney General's opinion. However, the above discussion will hopefully provide you with a framework from which to both determine whether implied dedication is an issue in this case and decide how the issue should be resolved. In the event the cemeteries in question are no longer private cemeteries but township cemeteries, the township would obviously have authority to levy and expend taxes for the care and maintenance of these cemeteries pursuant to § 359.30 rather than pursuant to § 359.33.

2.

Your second question is:

> Do the township trustees have the legal authority to issue deeds for lots in these cemeteries?

We believe that control over issuance of lots in a private cemetery remains with the owner of that cemetery, regardless of the fact that the township may levy and expend taxes to support private cemeteries pursuant to § 359.33, as that section in no way purports to condition that support on vesting the township

with actual control over such cemeteries. This conclusion was assumed in 1940 Op.Att'yGen. 365. In that opinion, we concluded that the township trustees have discretion in deciding whether a private cemetery should receive tax money levied pursuant to the statute which preceded, but was almost identical to, § 359.33. In reaching that conclusion, we discussed the fact that the private cemetery there in question refused to sell a lot to a person who wished to have Masonic rites at the gravesite:

> This statute contemplates tax help for a private cemetery so the existence of by-laws or regulations governing the use of all private cemeteries was no doubt within the contemplation of the legislature. The use of the cemetery could still be a public use if any member of the community could be buried therein in conformity with reasonable rules and regulations previously adopted by the private cemetery.

1940 Op.Att'yGen. 365, 366. This opinion thus concluded that a private cemetery receiving support from a township levy would continue to function according to its own rules and regulations, which the township could consider in deciding whether to allow township support. We believe this opinion supports our current conclusion that a township does not assume control over sale of lots in a private cemetery in the event of assistance pursuant to § 359.33. While the township could consider a cemetery's sales policies in deciding whether to award support, the township does not assume control over these policies. However, as noted in our earlier opinion, the private cemetery must be open to public use as a condition of § 359.33 assistance.

In addition, we note that the township would have authority to issue deeds for cemetery lots pursuant to § 359.32 in the event that it is found that the cemeteries in question are township cemeteries under the doctrine of implied dedication. See Part 1, supra.

3.

Your third question is as follows:

> Are the trustees required by law to maintain all of the private cemeteries within their township?

Section 359.33 is the only provision in Ch. 359 which discusses in any manner the relationship between the township and private cemeteries within the township. While this section authorizes

the township to provide financial support to private cemeteries from a township levy, this section is permissive, not mandatory. § 359.33. See also 1940 Op.Att'yGen. 365. Accordingly, we believe that a township is not required to maintain private cemeteries in the township.

Again, we note that in the event the cemeteries in question are township cemeteries pursuant to the implied dedication doctrine, the township would be required to maintain these cemeteries pursuant to §§ 359.30, 359.31, and 359.37.

4.

Your fourth and final question asks:

> What are the trustees authorized by law to do with respect to abandoned cemeteries that people were buried in that:
>
> (a) must the trustees continue to maintain the lots used for burial?
>
> (b) can the lots used for burial be conveyed to a third party for other use such as farming?
>
> (c) can the remains within the lots used for burial be moved and, if so, how?

(a) First, the question whether the trustees must continue to maintain cemetery lots in an abandoned cemetery depends on whether that cemetery is a private or a township cemetery. As set forth above, the only responsibility the township has for maintenance of private cemeteries is permissive. See § 359.33; Part 3, above. Therefore, the township may, but is not required to, maintain lots in an abandoned private cemetery. If the abandoned cemetery in question is a township cemetery, we believe the township does have responsibility for maintaining those lots pursuant to its general responsibility for township cemeteries in §§ 359.28-359.41. The township may of course cover these maintenance costs from the § 359.30 tax levy.

We note that in the case of an abandoned cemetery[1] in which land was originally dedicated to the township, § 359.37 autho-

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[1] We assume that your reference to "abandoned" cemeteries is to an entire cemetery or portions thereof in which burials are no longer being made. The question of abandonment of individual cemetery lots is governed by §§ 566.20-566.27.

rizes the township[2] to sell land which is no longer being used for cemetery purposes. However, this section contains the following proviso:

> . . . provided that any portion of said cemetery in which burials have been made shall be kept and maintained by said trustees . . . .

(emphasis added) We believe this section evidences the legislature's intent that the township has an ongoing duty to maintain at least those portions of township cemeteries which were dedicated for cemetery purposes and in which burials have been made. As for cemetery land which the township has purchased or otherwise holds legal title for, we believe the township has responsibility for maintaining any portion of the cemetery in which burials have been made unless those remains are moved to another cemetery. See §§ 359.30, 359.31, and 359.37.

(b) Second, we believe that the township cannot convey township cemetery property that has been used for burials to a third party for another use, such as farming. Strong public policy concerns militate against using land in which human remains have been buried for farming or related activities. See King v. Frame, 204 Iowa 1074, 216 N.W. 630, 632-633 (1927); Anderson v. Acheson, 132 Iowa 744, 110 N.W. 335, 341 (1907) (except in cases of necessity or for laudable purposes, the sanctity of the grave should be maintained); 1920 Op.Att'yGen. 529 (". . . the policy of the law is that the sanctity of the grave shall be maintained and that a body once suitably buried shall remain undisturbed").[3]

(c) Third, we believe the township's authority regarding removal of the remains within a township cemetery is governed by § 144.34, which provides:

> Disinterment of a dead body or fetus shall be allowed for the purpose of autopsy or reburial only, and then only if accomplished

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[2] In Op.Att'yGen. #83-9-5 (L) (a copy of which is enclosed), we noted there may be some question as to the constitutionality of that portion of § 359.37 which authorizes the township to sell land which was dedicated for cemetery purposes but is no longer being used for that purpose.

[3] The question of the township's authority to disinter and rebury bodies is discussed below.

> by a funeral director. A permit for such disinterment and, thereafter, reinterment shall be issued by the state registrar according to rules adopted pursuant to chapter 17A or when ordered by the district court of the county in which such body is buried. The state registrar, without a court order, shall not issue a permit without the consent of the surviving spouse or in case of such spouse's absence, death, or incapacity, the next of kin. Disinterment for the purpose of reburial may be allowed by court order only upon a showing of substantial benefit to the public. Disinterment for the purpose of autopsy or reburial by court order shall be allowed only when reasonable cause is shown that someone is criminally or civilly responsible for such death, after hearing, upon reasonable notice prescribed by the court to the surviving spouse or in his or her absence, death, or incapacity, the next of kin. Due consideration shall be given to the public health, the dead, and the feelings of relatives.

Accordingly, the township may remove bodies from township cemeteries only if these statutory requirements are satisfied. See also 470 I.A.C. § 146.4 (administrative rules governing disinterment). See generally McQuillin, supra, § 24.276 at 127-128.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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 12, 1983

Mr. H. Dale Huffman
Pocahontas County Attorney
15 N.W. 3rd Ave.
P.O. Box 35
Pocahontas, Iowa 50574

Dear Mr. Huffman:

You have requested an opinion of the Attorney General as to whether township trustees are authorized to farm land in a township cemetery which was dedicated to the township for cemetery purposes. You state in your request that portions of the cemetery have been used for burials while other portions have not, and that no future burials in this cemetery are contemplated. Your second question asks whether the income derived from such a farming operation may be used for other township expenses, such as fire protection. It is our opinion that the township is not authorized to farm land which was deeded to the township for cemetery purposes. Our reasons are as follows.

The general rule is that land dedicated by private persons to the public may be used only for a purpose which is consistent with the purpose for which the land was originally dedicated. See Leverton v. Laird, 190 N.W.2d 427, 433-434 (Iowa 1971); Carson v. State, 240 Iowa 1178, 1184, 38 N.W.2d 168, 172 (1949). See also, II McQuillin, Municipal Corporations (3d ed. 1983), § 33.65, pp. 804-805; § 33.68, p. 807; and § 33.74, pp. 820-822.[1]

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[1] See also Iowa Code § 565.6 (1983), which provides in relevant part that:

> Civil townships wholly outside of any city, . . . 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

We assume for the purpose of this opinion request that the land here in question was dedicated to the township for cemetery purposes. We believe that in most cases farming dedicated cemetery land is prohibited on the ground that it is a use inconsistent with the purpose for which this land was originally dedicated. However, we are unwilling to hold farming is always an inconsistent use of dedicated cemetery land as there may be situations in which farming of land in anticipation of future cemetery use would not be inconsistent with the terms of the dedication.

Our review of relevant statutory provisions leads us to the same conclusion. Review of relevant statutory provisions leads to the same conclusion. Iowa Code Ch. 359 (1983) governs townships; in particular, §§ 359.28 through 359.41 set forth the township's authority with regard to cemeteries. These sections authorize the township to receive money or property for establishing or maintaining a cemetery (§ 359.29), condemn land for cemetery purposes (§ 359.28), levy taxes and expend those monies for maintaining the cemetery (§§ 359.30, 359.33, 359.34, and 359.35), and exercise supervisory control over the cemetery (§§ 359.31, 359.32, 359.36, and 359.38-359.41). However, § 359.37 sets forth the most specific language concerning the township's authority with regard to the property which has been dedicated to the township cemetery. That section provides:

> The trustees, board of directors, or other officers having the custody and control of any cemetery in this state, shall have power, subject to the bylaws and regulations of such cemetery, to enclose, improve, and adorn the ground of such cemetery; to construct avenues in the same; to erect proper buildings for the use of said cemetery; to prescribe rules for the improving or adorning the lots therein, or for the erection of monuments or other memorials of the dead upon such lots; and to prohibit any use, division, improvement or adornment of a lot which they may deem improper.

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[1] (cont'd)

> the terms of the bequest. . . . Conditions attached to the gifts or bequests become binding upon the . . . township upon acceptance.

(emphasis added.)

> The trustees, after such land has been advertised for sealed bids by the trustees, shall have authority to sell and dispose of any lands or parcels of lands heretofore dedicated for cemetery purposes and which are no longer necessary for such purposes, for the reason that no burials are being made in such cemetery, provided that any portion of said cemetery in which burials have been made shall be kept and maintained by said trustees. The proceeds from such sales shall be deposited in the tax fund established in accordance with section 359.30, to be used for the purposes of that fund.

(emphasis added)

While Ch. 359 authorizes the township to own and manage cemeteries and exercise other related powers, there is no express statutory authority for the township to use land dedicated for township cemetery purposes for any other purpose. More specifically, the provisions of § 359.37 emphasized above authorize the township to sell and dispose of any cemetery property that is no longer necessary for cemetery purposes, but do not authorize the township to use this property for any other purpose such as farming.[2] [3]

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[2] Section 359.37 authorizes the township to dispose of cemetery land which is no longer needed for cemetery purposes, i.e., "for the reason that no burials are being made in such cemetery, provided that any portion of said cemetery in which burials have been made shall be kept and maintained by said trustees." We believe this language makes clear that the legislature authorized the township to sell only that cemetery land in which no burials had been made. Indeed, the township is expressly directed by § 359.37 to keep and maintain cemetery land in which burials have been made.

[3] We note that there is some question as to the constitutionality of § 359.37 to the extent it authorizes sale of dedicated land. The general rule is that in the event of a common law dedication, the fee remains in the owner, and that land reverts to the owner in the event it can no longer be used for the purpose for which it was dedicated. Kenwood Park, supra, 158 N.W. at 658; DeGastello v. Cedar Rapids, 171 Iowa 18, 153 N.W. 353, 355 (1915). See also McQuillin, supra, at § 33.65, p. 804, and § 33.68, p. 807. McQuillin states that dedicated property cannot be sold by a municipality when that property can

In view of our conclusion to your first question, we do not find it necessary to reach your second question.

In conclusion, it is our opinion that in most situations the township is not authorized to farm land dedicated to the township for cemetery purposes because that use is generally inconsistent with the dedication. However, we recognize that there may be situations where the township can establish that a farming operation is consistent with cemetery purposes.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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[3] (cont'd) no longer be used for the purpose for which it was dedicated, § 33.75, p. 830, and that the legislature has no authority to authorize such a sale, § 33.76, p. 831. In 1867, the Iowa Supreme Court found that a statute authorizing cities and towns to sell land dedicated for public purposes was unconstitutional on the ground that it impaired the obligation of the contract between the dedicator and the public. Warren v. Lyons City, 22 Iowa 351, 356 (1867). Finally, there may be a question as to whether a statute which authorizes sale of dedicated land constitutes an unconstitutional taking of private property without just compensation. See City of Zumbrota v. Strafford Western Em. Co., 290 N.W.2d 621, 623 (Minn. 1980) (statute violates state constitutional provision against taking private property without just compensation when it authorized sale of dedicated land which could no longer be used for purpose for which dedicated).

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

Mary Jane Odell
Secretary of State
State Capital
Des Moines, Iowa 50319
L O C A L

Dear Ms. Odell:

You have requested the opinion of the attorney general on two questions. First, whether pursuant to Iowa Code § 496A.89 (1983), a corporation is obligated to pay delinquent license fees and file delinquent annual reports as a condition to dissolution. Second, if a corporation is obligated to pay such fees and file such reports, whether a corporation which has had its certificate of incorporation cancelled must become reinstated pursuant to Iowa Code § 496A.130 (1983), before it may satisfy such obligations.

Iowa Code § 496A.122 (1983) requires corporations to deliver annual reports to the Secretary of State for filing. Iowa Code § 496A.123(3) (1983) charges the Secretary of State with the duty to charge and collect license fees. Iowa Code § 496A.126 (1983) provides that each domestic corporation will pay an annual license fee at the time of filing its annual report. Iowa Code § 496A.128 charges the Secretary of State with the duty to collect all annual license fees and penalties imposed or

assessed. Section 496A.128 also provides that if a corporation fails to pay these annual license fees and penalties, then the attorney general, upon certification of non-payment by the Secretary of State, may sue for their recovery. The Code thus places legal duties upon corporations to file annual reports and pay annual license fees and penalties, and provides a mechanism for suit and recovery of fees and penalties. Therefore, once fees and penalties have accrued, they become clear liabilities or obligations of a corporation.

Iowa Code § 496A.89 provides in pertinent part:

> [W]hen all debts, liabilities and obligations of the corporation have been paid or otherwise discharged, or adequate provision has been made therefor. . . articles of dissolution shall be executed by the corporation. (Emphasis supplied.)

Since payment or discharge of all debts, liabilities and obligations is a condition to executing articles of dissolution, then all annual license fees and penalties must be paid and all delinquent annual reports must be filed prior to dissolution.

Since a corporation is obligated to pay annual license fees and penalties and file annual reports prior to dissolution, then your second question as to whether a corporation which has had its certificate of incorporation cancelled must reinstate before it may satisfy these obligations must be answered. Section 496A.130 provides in pertinent part:

> If any portion of the annual license fee determined to be payable in accordance with the provisions of this chapter, shall not have been paid on or before the thirty-first day of March, the same shall be deemed to be delinquent. . .
>
> The Secretary of State may cancel the certificate of incorporation of any corporation that fails or refuses to file its annual report for any year prior to the first day of October of the year in which it is due or fails to pay prior to the first day of October any fees or penalties prescribed by this chapter. . .
>
> Upon the issuance of the certificate of cancellation, the corporate existence of the corporation shall terminate, subject to right of reinstatement as herein provided, and the corporation shall cease to carry on its business, except

> insofar as may be necessary for the winding up thereof or for securing reinstatement. . .
>
> Unless the corporation is reinstated, the corporation, upon the issuance of the certificate of cancellation shall proceed to liquidate its business and affairs. . .
>
> If the certificate of incorporation of a corporation has been cancelled by the secretary of state as provided in this section for failure to file an annual report, or failure to pay fees or penalties, such corporation shall be reinstated by the secretary of state at any time within five years following the date of the issuance by the secretary of state of the certificate of cancellation upon:. . .
>
> 2. The filing with the secretary of state by the corporation of all annual reports then due and theretofore becoming due;
> 3. The payment to the secretary of state by the corporation of all annual license fees and penalties then due and theretofore becoming due and an additional penalty of two hundred dollars. (Emphasis supplied.)

It appears clear from an analysis of the provisions of § 496A.130 that a corporation does not have to reinstate in order to pay all penalties and fees and file all necessary reports. First, § 496A.130 requires the Secretary of State to reinstate a corporation when its certificate has been cancelled for failure to file an annual report or to pay fees or penalties "upon . . . the filing . . . of all annual reports . . . [and] the payment . . . of all annual license fees and penalties." Such language indicates that payment of fees and penalties and filing of reports are conditions precedent to reinstatement, and not vice versa. Second, § 496A.130 provides that once the corporation's certificate is cancelled, the corporate existence terminates "except insofar as may be necessary for the winding up thereof or for securing reinstatement." (Emphasis supplied.) Winding up the business of a corporation would logically include payment and fulfillment of legal or other obligations. Also, the use of the disjunctive "or" in this sentence suggests that reinstatement and winding up are mutually exclusive. It does not follow that a corporation must reinstate in order to pay fees and penalties and file reports in order to wind up and dissolve. Third, § 496A.130 states, "unless the corporation is reinstated, the corpora- tion. . . shall proceed to liquidate." (Emphasis supplied.) This language also indicates that reinstatement and liquidation

are mutually exclusive. Fourth, § 496.130 refers to reinstatement as a "right," and not as obligatory in order to dissolve after certificate cancellation.

For the foregoing reasons, we are of the opinion that while a corporation is obligated to file annual reports and pay license fees in order to dissolve, it need not reinstate in order to do so.

Sincerely,

William T Nassif

WILLIAM T. NASSIF
Assistant Attorney General

WTN/cjc

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

Rolland A. Gallagher, Director
Iowa Beer and Liquor Control Department
L O C A L

Dear Mr. Gallagher:

You have requested an opinion concerning the use of barter-exchange trade credits as payment for alcohol beverages and beer. Specifically, our office has been asked:

1. (a) Can retail beer permittees (holders of class "B" and "C" beer permits) and retail liquor licensees (holders of class "A", "B", "C", and "D" liquor licenses) tender beer wholesalers (holders of class "A" beer permits) barter-exchange trade credits as payment for beer they buy from beer wholesalers?, or (b) Are they prohibited from doing this by section 123.45, Iowa Code, or any other section of Chapter 123, Iowa Code?

2. (a) Can the general public, as retail customers, tender retail beer permittees (holders of class "B" and "C" beer permits) and retail liquor licensees (holders of class "A", "B", "C", and "D" liquor licenses) barter-exchange trade credits as payment for beer and alcoholic beverages they buy from the retailers?, or (b) Are they

> prohibited from doing this by section 123.49(2)(c), Iowa Code, or any other section of Chapter 123, Iowa Code?

The opinion request, we are informed, is in response to a petition for a declaratory ruling by Tradex, Inc., a barter-exchange organization. An explanation of the functioning of a barter-exchange organization is found in paragraph 2 of Tradex Inc.'s petition. According to that paragraph:

> Through this organization the distributor would barter or exchange his goods, i.e. beer, to other licensed retailers who are also members of the organization, for trade credits. These trade credits can then be used in barter with other member retailers for goods or services needed by the distributor. No cash exchanges hands nor sales on credit occur yet both parties ultimately receive the goods or services they need. [Emphasis added]

The pertinent statutes, as you have correctly noted, are Iowa Code §§ 123.45 and 123.49(2)(c) (1983). Section 123.45 prohibits, in part, the extention of credit for alcoholic beverages or beer, directly or indirectly, by a wholesaler of alcoholic beverages or beer to a licensee or permittee authorized under the provisions of Iowa Code Chapter 123. Further, the sale of alcoholic beverages or beer to any person on credit by a liquor licensee or beer permittee, with limited exception, is forbidden by Section 123.49(2)(c). Thus, both statutes prohibit the extention of credit for alcoholic beverages or beer. The focus of your two inquiries, therefore, can be narrowed to the single issue of whether barter-exchange trade credits constitute "credit" as used in Iowa Code Chapter 123.

A definition of "credit" is not contained in Iowa Code Chapter 123. In a prior opinion of our office interpreting Iowa Code § 123.49(2)(c), reference was made to the definition of "credit" used in the Consumer Credit Code. 1976 Op. Att'y Gen. 527. According to Iowa Code § 537.1301(15)(1983), credit is defined as "the right granted by a person extending credit to a person to defer payment of debt, to incur debt and defer its payment, or to purchase property or services and defer payment thereof." Thus, the significant and identifiable feature of credit is the deferment of payment.

Accordingly, it is our opinion that barter-exchange trade credits, to the extent that they defer payment, cannot be used as payment for alcoholic beverages or beer. That conclusion is applicable whether credit is being extended by a wholesaler of alcoholic beverages or beer or a liquor licensee or beer permittee.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:sh

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 7, 1983

Mr. Charles C. Neighbor
Jasper County Attorney
301 Courthouse Building
Newton, Iowa 50208

Dear Mr. Neighbor:

You have requested an opinion from this office concerning the rate of interest applicable to drainage district warrants which, for want of funds, are not paid when presented for payment. Your letter requires that we construe, as a matter of first impression, the provisions of Iowa Code Chapter 74A (1983).

Generally, a warrant is a written order, drawn by someone with authority, issued to some officer having the possession and control of funds, authorizing the officer to pay out to the named party the amount specified in the warrant. Missouri Gravel Co. v. Federal Sur. Co., 212 Iowa 1322, 1329, 23 N.W. 635, 639 (1931). Drainage district warrants are drawn from the district's funds to pay the costs of establishing the district, as well as repairs, improvements and other expenses associated with the district's operation. See, for example, Iowa Code Section 455.110 (1983). As your letter notes, Iowa Code Section 455.198 (1983) provides that Chapter 74 shall be applicable to all warrants legally drawn as drainage district funds and which are not paid for want of funds.

Iowa Code Chapter 74 (1983) deals generally with the procedure applicable to public obligations which cannot be initially paid because of a lack of funds. Under Iowa Code Section 74.1(1) (1983), the procedures of the chapter apply to all warrants

legally drawn on a public treasury. Iowa Code Section 74.2 (1983) states in full that:

> If a warrant other than an anticipatory warrant is presented for payment, and is not paid for want of funds, or is only partially paid, the treasurer shall endorse the fact thereon, with the date of presentation, and sign the endorsement, and thereafter the warrant or the balance due thereon, shall bear interest at the rate specified in Section 74A.2.
>
> An anticipatory warrant issued under the authority of Section 74.1, subsection 1 shall bear interest at a rate determined by the issuing governmental body, but not exceeding that permitted by chapter 74A.

This provision draws a distinction between the rate of interest on anticipatory warrants and other warrants not paid for want of funds. Anticipatory warrants bear interest at a rate determined by the issuing governmental body. Under the first paragraph of § 74.2 however, unpaid warrants draw interest at a rate specified in Iowa Code Section 74A.2 (1983). Your letter asks in part whether drainage district warrants not paid for want of funds are included in the first paragraph of § 74.2 or the second paragraph of § 74.2 as anticipatory warrants.

Anticipatory warrants are generally payable only out of a particular fund or levy assigned to the payment of such warrants and their purpose is to borrow money. 64 Am.Jur.2d Public Securities and Obligations, § 24 p. 53 (1972). They do not constitute obligations of the taxing body except that the governmental body must apply the taxes when collected to the payment of the anticipatory warrant. 64 Am.Jur.2d Public Securities and Obligations, § 24 p. 54 (1972). For example, Iowa Code Section 454.19 (1983) empowers the state treasurer, with executive council approval, to issue anticipatory warrants to raise funds for the state's sinking fund when that fund contains insufficient funds to pay claims. Similarly, county boards of supervisors are empowered in Iowa Code Section 202.6 (1983) to issue anticipatory warrants to finance the acquisition of limestone quarries with the warrants secured by a special assessment tax.

Iowa Code Section 455.213 (1983) gives drainage districts the authority to issue anticipatory warrants to pay those costs which the federal government will not assume after the district's managing board accepts a federal plan for improvements or repair of the district. However, this is the only provision within Chapter 455 which empowers drainage districts to issue

anticipatory warrants to pay for the costs associated with the district's management such as repair or improvement. Accordingly, we would conclude that general warrants when presented for payment and unpaid for want of funds are not anticipatory warrants and the interest rate for such warrants does not apply, unless the warrants are specifically issued by the district as anticipatory warrants.

The first paragraph in § 74.2 provides that warrants other than anticipatory warrants bear interest at the rate specified in Section 74A.2. Iowa Code Section 74A.2 (1983) provides:

> A warrant not paid upon presentation for want of funds bears interest on unpaid balances at the rate in effect at the time the warrant is first presented for payment, as established by rule pursuant to Section 74A.6, subsection 2. This section does not apply to an obligation which by law bears interest from the time it is issued.

As your letter notes, since drainage district warrants bear interest from the date they are presented and not paid for want of funds rather than the date of issuance, the second sentence in this statute does not apply. Accordingly, we can then, under § 74A.2, turn to the requirements of Iowa Code Section 74A.6(2) (1983) which states:

> The committee shall establish the maximum interest rate to be applicable to obligations referred to in Section 74A.2, and this rate shall apply unless the parties agree to a lesser interest rate. The committee shall establish the maximum interest rate to be applicable to obligations referred to in Section 74A.4.

The committee to which this provision refers is established pursuant to Iowa Code Section 74A.6(1) (1983) and is composed of the state treasurer, auditor and superintendent of banking. The second sentence of § 74A.6(2) provides that the committee shall also establish the maximum interest rates on obligations referred to in section 74A.4. Iowa Code Section 74A.4 (1983) provides:

> Except as otherwise provided by law, the rate of interest payable on unpaid balances of special assessments levied against benefited properties shall not exceed the maximum rate in effect at the time of adoption of the final assessment schedule, as established by rule pursuant to Section 74A.6, subsection 2.

Your letter asks whether the first or second sentence within § 74A.6(2) applies to unpaid drainage warrants.

An unpaid drainage district warrant should be governed by the first sentence of § 74A.6(2). The obligations in § 74A.4 to which the second sentence refers are "unpaid balances of special assessments levied against benefited properties." These obligations would refer to unpaid assessments on property within the district levied to pay for construction or repair and not the warrants themselves. Thus, for example, if a property owner elected to pay his assessment in installments pursuant to Iowa Code Section 455.64(2), § 74A.4 would govern the interest on the remaining balance of his payments. However, this obligation is distinguishable from an unpaid warrant which is in effect an obligation of the district and not the property owner. Accordingly, the first sentence of § 74A.6(2) applies and the maximum interest rate on unpaid drainage district warrants is that set by the statutory committee.

In conclusion, the interest rate set on anticipatory warrants does not apply to unpaid drainage district warrants unless they were issued specifically as anticipatory warrants. The maximum interest rate on unpaid drainage warrants is that set by the statutory committee pursuant to the first sentence of § 74A.6(2).

Sincerely,

Timothy D. Benton

TIMOTHY D. BENTON
Assistant Attorney General

TDB/jkp

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 1, 1983

The Honorable John W. Jensen
State Senator
Rural Route 1, Box 103
Plainfield, Iowa 50666

Dear Senator Jensen:

You have asked for our opinion on two issues:

1. Whether a school district is required to maintain in their school activity account the monies raised by school or student support groups, including but not limited to a Music Boosters organization.

2. Whether incorporation of the support group would alter the response to the first question.

We have examined the Iowa Code with care and find no requirement that a school district maintain the money raised by such groups in the school activity account. The only reference to funds that belong to an "activity group connected with the school" is in Iowa Code § 279.8 (1983). That section merely requires that school employees who have custody of school corporation funds or activity group funds must be bonded.

We do not wish to be understood as saying that the absence of a statute that requires such funds to be placed in the school activity account prevents a school district from requiring it. Iowa Code § 279.8 grants the district board broad power to 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, ..."

Moreover, a school district board is required to establish and maintain adequate "policies on extracurricular activities." Iowa Code § 280.14 (1983). A school board clearly holds power to regulate the use of funds raised during school hours and school sponsored activities and to regulate the fund-raising activity. Moreover the district board may fix the "terms and conditions" for use of any schoolhouse and its grounds by outside groups. Iowa Code § 297.9 (1983). We are aware that the specific arrangements and the specific activities vary in Iowa school districts. We understand that it has been the long-standing position of the Department of Public Instruction and the Auditor that moneys generated as a result of school-related activities, especially those using school students, staff, and facilities, should be placed under the control of the school board. Although this appears to be a reasonable administrative policy, it has not been promulgated as a rule by the State Board.

We note that Iowa Code § 279.42 (1983) grants power to the board of directors of a school district to utilize funds received through "gifts, devises and bequests." That Code section provides that boards of directors may be "limited by the terms of the grant" in utilizing such gifts. Thus, if an activity group such as a music boosters organization raises money outside of school functions and gives those funds to the school district for a specific purpose, the board would be bound by the terms of the gift.

There is nothing in the Iowa school laws that would cause us to give a different response if such a group were incorporated under one of the Iowa corporation chapters. Nothing we have said should be understood to relate to the state or federal tax status of such groups.

In summary, Iowa law does not require school districts to maintain funds raised by outside organizations in the school activity account. A school district may regulate fund-raising activity during school and school sponsored events and it may regulate the use of funds derived from those sources.

Sincerely,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

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)

The Honorable William H. Harbor
State Representative
Henderson, Iowa 51541

October 25, 1983

Dear Representative Harbor:

You have asked this office for an opinion regarding two aspects of Iowa's new pari-mutuel betting law. Iowa Acts, 70th General Assembly, 1983 Session, Senate File 92. (Hereinafter referred to Senate File 92.) In particular, you have asked:

> 1. Does the phrase "pari-mutuel system" used in Senate File 92, §9(2)(b) encompass only the wagering system at a racetrack, or is it so broad that it encompasses other aspects of the operation such as concessions, parking, stable or kennel rental or programs?
>
> 2. Is Senate File 92, §28, prohibiting the use of industrial revenue bonds for the financing of racetracks, superceded by any other provision of state or federal law?

I.

Senate File 92, §9(2), states in pertinent part:

> A license shall only be granted to a non-profit corporation or association upon the express condition that:
>
> * * * *
>
> b. The nonprofit corporation shall not in any manner permit a person other than the licensee to have a share, percentage, or

> proportion of the money received for admissions to the race or race meeting or from the operation of the pari-mutuel system.

(Emphasis added.) Your question is whether the phrase "pari-mutuel system" in that provision refers only to the wagering system or to the operation of the racetrack generally.

The phrase "pari-mutuel system" is not defined in Senate File 92, but in §2(5) of that act the phrase "pari-mutuel wagering" is defined as "the system of wagering described in Section 99D.10." (Emphasis added.) This would seem to indicate that the legislature equates "pari-mutuel system" and "pari-mutuel wagering." Also note Senate File 92, §9(2)(a), which refers to "the pari-mutuel system of wagering." (Emphasis added.) Also, unless otherwise defined, words and phrases used in statutes are to be given the meaning generally approved in common usage. Iowa Code §4.1(2) (1983). The word "pari-mutuel" means "a system of betting on races in which those backing the winners divide, in proportion to their wagers, the total amount bet, minus a percentage for the track operators, taxes, etc." Webster's New World Dictionary, 1033 (2d ed. 1972). Cf. Senate File 92, §11.

Thus it would appear that the phrase "pari-mutuel" system in Senate File 92, §9(2)(b), refers only to the wagering system. That provision does not, therefore, prohibit arrangements involving allocations of money received from other aspects of the operation of the track.

We are asked to define this statutory term as a matter of statutory construction, absent any administrative interpretation by the Racing Commission concerning this question. Our analysis is limited to the question asked and does not concern the authority of the Racing Commission to restrict the sharing of profits from other aspects of track operations.

II.

Senate File 92, §28, states:

> Industrial revenue bonds shall not be used to construct, maintain, or repair a racetrack or racing facility in the state where pari-mutuel wagering is licensed.

You have asked whether any provision of Iowa or federal law would supercede this restriction on the use of industrial revenue bonds. Iowa Code §419.2 (1983) gives local governments broad statutory authority to issue revenue bonds for "projects". Senate File 92, §28, appears to place a limitation on that authority.

There are statutory rules of construction available for the resolution of such questions. Iowa Code §4.7 (1983) states:

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

Also, Iowa Code §4.8 (1983) states in pertinent 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.

Thus to the extent Senate File 92, §28, limits authority of local governments to issue industrial revenue bonds under Iowa Code Ch. 419 (1983), it is controlling. Senate File 92, §28, is both more specific, in that it refers only to one sort of potential project, and the more current enactment.

We are aware of no federal constitutional or statutory provision which would prevent the Iowa legislature from prohibiting the use of industrial revenue bonds for the financing of race tracks in Iowa.

Respectfully yours,

Gary Hayward

GARY L. HAYWARD
Assistant Attorney General

GLH:dkl

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 19, 1983

Mr. Patrick C. McCormick
Woodbury County Attorney
Woodbury County Courthouse
3rd Floor
Sioux City, Iowa 51101

Dear Mr. McCormick:

On August 9, 1983, you requested an opinion of the Attorney General on several questions concerning Iowa Code Ch. 341A (1983) and its provisions relating to county civil service commissions. We shall address each question in turn.

First, you ask whether the county civil service commission is required to consider all eligible deputy sheriffs for certification on a promotional list, even if they have not taken the competitive examination.

Section 341A.8 provides in relevant part that:

> Whenever possible, vacancies shall be filled by promotion. Promotion shall be made from among deputy sheriffs qualified by competitive examination, training and experience to fill the vacancies and whose length of service entitles them to consideration. The commission shall for the purpose of certifying to the sheriff the list of deputy sheriffs eligible for promotion, rate the qualified deputy sheriffs on the basis of their service record, experience in the work, seniority, and military service ratings. Seniority shall be controlling only when other factors are equal. The names of

> not more than the ten highest on the list of ratings shall be certified. The certified eligible list for promotion shall hold preference for promotion until the beginning of a new examination, but in no case shall such preference continue longer than two years following the date of certification, after which said list shall be canceled and no promotion to such grade shall be made until a new list has been certified eligible for promotion. The sheriff shall appoint one of the ten certified persons.

(emphasis added) This section sets forth the requirements that must be satisfied in order for a deputy sheriff to be considered for a promotion. As emphasized above, a deputy becomes qualified for promotion by taking the competitive examination and meeting the training, experience, and length of service requirement. Section 341A.8 then requires the commission to rate the deputies so qualified on the basis of service record, experience, seniority, and military service ratings. Accordingly, the commission may not consider a deputy sheriff for promotion unless that deputy has qualified by taking the competitive examination and meeting other preliminary requirements specified in § 341A.8. We have reached the same result in prior opinions. 1978 Op.Att'yGen. 130; 1974 Op.Att'yGen. 193, 194-195.

Your second question is whether the certified eligible list for promotions referred to in § 341A.8 must contain the names of ten deputies even if there are fewer than ten who have taken the competitive examination.

As you note in your opinion request, § 341A.8 provides that the names of "not more than" the ten highest on the list of ratings are to be certified for inclusion on the promotional list. However, you also note that the last sentence of § 341A.8 provides that the sheriff shall appoint "one of the ten certified persons" for that promotion, and that later § 341A.13 requires the commission to certify the names "of the ten candidates standing highest on the eligibility list for the class or grade for the position to be filled."

First, it is our opinion that the language of § 341A.8 is clear. The qualifying "not more than ten" language can only mean the number of names on this list of ratings cannot exceed ten, but does not require the number must equal ten. This language obviously contemplated the possibility that fewer than ten deputies may have qualified, or even applied, for a promotion.

We further believe the requirement in the last sentence in § 341A.8 that the sheriff appoint one of the ten certified person was meant to be read subject to the "not more than ten" language immediately preceding. Finally, we believe the "list of ten" requirement in § 341A.13[1] would implicitly be subject to the qualification that the list could include fewer names in the event there were not ten persons qualifying, or even applying, for the position available. In sum, we do not believe the commission is required to certify ten names if there are not ten qualified candidates, as such a requirement would simply be impossible to meet.

Your final question is, if there are fewer than ten deputies who are eligible for promotion, must all the eligible deputies be placed on the certified eligible list for promotion? You also ask in what circumstances the certified eligible list may contain fewer than ten names.

To reiterate, § 341A.8 requires deputies who are seeking to fill a vacancy by promotion to first qualify for the position by taking an examination and meeting training, experience, and length of service requirements. These requirements have presumably been established by the commission pursuant to its rulemaking authority in § 341A.6(1). Once qualified, the commission then rates the deputies, in accordance with § 341A.8, on the basis of their service record, experience, seniority, and military service ratings. A list of not more than ten deputies who received the highest ratings is then certified to the sheriff for his or her final appointment. Thus, a deputy must first become qualified pursuant to § 341A.8 before he or she may be rated and have the opportunity to be placed with the top ten on the eligible list. If there are fewer than ten deputies applying for the promotion but all those deputies are qualified pursuant to § 341A.8, then we believe all their names should be placed on the eligible list. It is our opinion, as set forth above, that the limitation of "not more than ten" is applicable only when there are more than ten qualified deputies. Accordingly, the only circumstances in which the certified eligible list in § 341A.8 may contain fewer than ten names are when there are fewer than ten applicants for a vacancy to be filled by promotion

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[1] In any event, we believe § 341A.13 is applicable only when the commission is attempting to fill a vacancy that will not be filled by promotion. Section 341A.8 provides the exclusive means for filling a civil service position by promotion. As § 341A.13 does not apply to filling a vacancy by promotion, and your opinion request is concerned only with requirements for promotions, the "list of ten" language of § 341A.13 is irrelevant.

or when there are fewer than ten of those applicants who qualify by meeting the requirements of § 341A.8.

In conclusion, it is our opinion that: (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.

Sincerely,

Theresa O. Weg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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 10, 1983

The Honorable Robert C. Landess
Industrial Commissioner
LOCAL

Dear Commissioner Landess:

You have requested the opinion of our office as to whether a form filed pursuant to §5 of 1983 Iowa Acts, S.F. 51, is of any force and effect prior to January 1, 1984. It is our opinion that it is not.

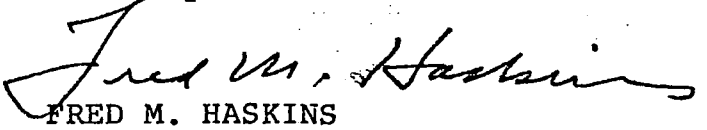
The background of S.F. 51 was discussed in a previous opinion, Op. Att'y Gen. #85-5-9(L), and will not be repeated here. In essence, S.F. 51 repeals Iowa Code section 85.61(3)(d) (1983) to create a new procedure for obtaining a corporate officers' exemption from Iowa Code ch. 85 (workers' compensation) and its correlative insurance requirement (contained in Iowa Code section 87.21 (1983) as amended by 1983 Iowa Acts, S.F. 51, §4). Basically, the exemption is accomplished under Iowa Code section 85.61(3)(d) (1983) by the filing with the industrial commissioner on behalf of the officer of an "acceptance of exemption." Under §5 of S.F. 51, the procedure for obtaining an exemption is changed somewhat. Filing with the industrial commissioner is of a "written rejection" form whose format is somewhat different from the "acceptance of exemption" form. If the corporate officer's corporation has workers' compensation insurance, then the "written rejection" form is attached to the insurance policy in lieu of filing with the industrial commissioner. The consequences of making a "written rejection" are, it should be noted, broader than filing an "acceptance of

exemption". With the former, exemption is obtained from Iowa Code ch. 85A (occupational disease) and Iowa Code ch. 85B (occupational hearing loss) as well as from Iowa Code ch. 85. And the officer or his or her corporation can use the "written rejection" form to accept or reject employers' liability insurance coverage. The new procedure is, however, expressly not placed into effect until January 1, 1984. See 1983 Iowa Acts, S.F. 51, §8. Thus, the new form for obtaining the exemption set out in §5 of S.F. 51 is of no force and effect until that time. The procedure contained in Iowa Code section 85.61(3)(d) (1983) remains in effect until then, except that, by virtue of §7 of S.F. 51 (which was effective April 27, 1983), an "acceptance of exemption" need not be filed within sixty days of the officer's commencing employment or within sixty days of January 1, 1983, in the case of an existing officer as of that date.

In sum, 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.

Very truly yours,

THOMAS J. MILLER
Attorney General of Iowa



FRED M. HASKINS
Assistant Attorney General

FMH/pm

MUNICIPALITIES; Police and Fire Retirement System Investments 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 6, 1983

The Honorable James D. O'Kane
State Representative
1815 Rebecca Street
Sioux City, Iowa 51103

Dear Representative O'Kane:

You ask the opinion of our office on the following question: "May police and fire retirement systems established under Chapter 411 invest excess funds in guaranteed-interest group annuity contracts issued by insurance companies organized under Chapter 508 of the Iowa Code?"

Iowa Code ch. 411 (1983) authorizes retirement systems for fire fighters and police officers in cities in which the fire fighters and police officers are under the civil service law. Iowa Code section 411.7(2)(1983) sets forth the power of the systems to invest their funds:

> The city treasurer may invest at the direction of the respective boards of trustees a portion of the funds established in section 411.8 which in the judgment of the respective boards are not needed for current payment of benefits under this chapter in investments authorized in section 97B.7, subsection 2, paragraph "b", for moneys in the Iowa public employees' retirement fund.

As can be seen, investment of retirement system funds under Iowa Code ch. 411 is by reference to Iowa Code section 97B.7(2)(b) (1983), which provides:

> The treasurer of the state of Iowa is hereby made the custodian and trustee of this fund [the Iowa Public Employees' Retirement Fund] and shall administer the same in accordance with the directions of the department. It shall be the duty of the trustee:
>
> a. to hold said trust funds.
>
> b. Invest such portion of said trust funds as in the judgment of the department are not needed for current payment of benefits under this chapter in interest-bearing bonds issued by the state of Iowa, or bonds issued by counties, school districts or general obligations or limited levy bonds issued by municipal corporations in this state as authorized by law, or other investments authorized for life insurance companies in this state. . ..

[Emphasis added]. This section thus allows investment by a retirement system fund under Iowa Code ch. 411 in investments authorized for life insurance companies. Life insurance companies are organized under Iowa Code ch. 508 (1983). That chapter contains no specification of permissible investments for life insurance companies. However, Iowa Code ch. 511 does state what investments are sufficient to meet the "legal reserve" requirement. Under Iowa Code section 511.8 (1983), a life insurance company must deposit with the commissioner of insurance an amount equal to the "legal reserve." See Iowa Code section 511.8(16) (1983). This "legal reserve" is the "net present value of all outstanding policies, and contracts involving life contingencies." Iowa Code section 511.8 (first unnumbered paragraph). The investments set forth in Iowa Code section 511.8 in which the "legal reserve" may be invested are the "investments authorized for

life insurance companies in this state" referred to in Iowa Code section 97B.7(2)(b). See 1974 Op. Att'y Gen. 308 (construing analagous provision in §97A.7(2)(b)).

Iowa Code section 511.8 is extremely lengthy and will not be reproduced here. It appears that the only category in which a guaranteed interest group annuity could fall is that for "corporate obligations". Iowa Code section 511.8(5) (1983) defines that term as follows:

> Subject to the restrictions contained in subsection 8 hereof, bonds or other evidences of indebtedness issued, assumed, or guaranteed by a corporation incorporated under the laws of the United States of America, or of any state, district, insular or territorial possession thereof; or of the Dominion of Canada, or any province thereof; and which meet the following qualifications:
>
> a. . . .fixed interest bearing obligations. . .
>
> b. . . .adjustment, income or other contingent interest obligations. . .

[Emphasis added.] Qualifications for an investment under subsection 5 are set forth in that subsection, and, as indicated from the quoted language, in subsection 8 as well. (The requirement in Iowa Code section 511.8(8)(b) (1983) would not pertain here, it should be noted, because it speaks in terms of limiting investments to certain percentage of the "legal reserve," which has no application to the retirement systems.)

An annuity is a contract to pay the insured, or a named person or persons, a sum or sums periodically or for a certain period. See Anderson, Couch: Cyclopedia of Insurance Law, ¶1:18, at 44 (2nd ed. 1959). The term "evidence of indebtedness" has been broadly defined to include "all contractual obligations to pay

in the future for consideration presently received." United States v. Austin, 462 F.2d 724, 736 (10th Cir. 1972). It is not limited to traditional debt financing arrangements, such as bonds or notes. See Stillwell Enterprises v. Interstate Equip. Co., 266 S.E.2d 812, 817 (N.C. 1980) (lease). Its meaning depends upon the statutory context in which it appears. Id. at 816. In the present context, a "guaranteed-interest group annuity", depending on its terms, would fall under "fixed interest bearing obligations" or, if not, under "adjustment, income or other contingent interest obligations." In 1974 Op. Att'y Gen. 308, we opined that investments in the fixed and variable accounts of a pension investment contract were allowable for a life insurance company and thus for the Iowa Public Employees' Retirement Fund. We follow that opinion here. At the same time, we reiterate the position taken there that nothing in our opinions should be construed as an endorsement of the prudence or soundness of a particular investment.

Accordingly, a police and fire retirement system under Iowa Code ch. 411 may invest in "guaranteed-interest group annuity contracts" so long as the qualifications contained in subsections 5 and 8 of Iowa Code section 511.8 (1983) are met.

Very truly yours,

THOMAS J. MILLER
Attorney General of Iowa

Fred M. Haskins

FRED M. HASKINS
Assistant Attorney General

FMH/pm

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

Mr. Arnold O. Kenyon III
Union County Attorney
100 E. Montgomery
P.O. Box 278
Creston, Iowa 50801

Dear Mr. Kenyon:

You have requested an opinion of the Attorney General concerning whether an annual housing allowance to the sheriff constitutes compensation, which would have to be awarded by the compensation board, or a fringe benefit, which could be awarded by the supervisors. It is our opinion that 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.

Former Iowa Code Section 340.7 (1975) governed compensation for the county sheriff. In particular, § 340.7(13) provided that a county sheriff could be awarded an annual housing allowance. Section 340.7 was amended to simply provide that the annual salary of the sheriff is to be determined by the county compensation board. See § 340.7 (1977). The same requirement is now found in § 331.907(1) (1983).

We recently issued an opinion which discusses the distinction between items which constitute compensation for elected county officials, which must be set by the compensation board pursuant to § 331.907(1), and items which constitute fringe benefits, and therefore can be set by the board of supervisors. Op.Att'yGen. #83-6-9(L) (a copy of which is enclosed). Based on the rationale of that opinion, we believe a housing allowance is a direct monetary award more properly categorized as compensation. Op.Att'yGen. #83-6-9(L). Accordingly, the decision of whether to award the sheriff a housing allowance is left to the sole discretion of the county compensation board.

We believe this conclusion is further supported by the fact that § 340.7(13), the former statutory provision authorizing an annual housing allowance to the sheriff, was just one part of a section which governed the sheriff's salary. That entire section was amended to provide instead that the sheriff's salary was to be determined by the compensation board. We construe inclusion of a housing allowance within the provision governing the sheriff's salary as evidence of the legislature's intent that a housing allowance be considered as part of the sheriff's compensation.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

Enclosure

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

Joseph A. Royce, Staff
Administrative Rules
Review Committee
State Capital
L O C A L

Dear Mr. Royce:

We are in receipt of the administrative rule, promulgated by the Iowa Beer and Liquor Control Department [hereinafter referred to as the Department], which the Administrative Rules Review Committee delayed to request an opinion of the Attorney General as to its validity. On behalf of the Committee you have submitted the following questions:

1. Do §§ 123.21(4) and (5) provide adequate statutory authority to require customers to fill out verification forms?

2. May the Department deny service to an individual who refuses to sign the eligibility form?

3. Are the forms exempt from public inspection under Iowa Code section 68A.8?

4. Do the forms unfairly discriminate against a class of Iowans by creating a group of alcohol purchasers whose names and addresses will be recorded, while most Iowans may purchase liquor anonymously?

5. Does the rule create implied authority for private vendors (i.e., grocery stores and taverns) to create a similar, private recordkeeping system, or do these vendors currently have such authority?

The administrative rule in question, 150 IAC § 4.32, provides:

> Each time an employee of a state liquor store believes it necessary to ask a customer to produce an I.D. because the employee questions whether the customer is of legal age, the employee must also require the customer to fill out a "Verification of Eligibility to Purchase Alcoholic Beverages in Iowa" form even if the customer produces an I.D. which says the customer is of legal age. Liquor stores shall keep the completed forms and make the forms available for public inspection. [Emphasis added]

Thus, the rule requires that a "Verification of Eligibility to Purchase Alcoholic Beverages in Iowa" form [hereinafter referred to as a verification of age form] be completed when a liquor customer is requested to produce evidence that he or she is of legal age. The rule also declares the verification of age form to be a public record.

The first question concerns whether the Department exceeded its statutory authority in promulgating the rule. The statute cited for the Department's authority is Iowa Code § 123.21 (1983). According to that section:

> The director may, with the approval of the council and subject to the provisions of chapter 17A, make such rules as are necessary to carry out the provisions of this chapter. Such authority shall extend to but not be limited to the following:
>
> 4. Prescribing forms or information blanks to be used for the purposes of this chapter. The

department shall prepare, print, and furnish all forms and information blanks required under this chapter.

5. Prescribing the nature and character of evidence which shall be required to establish legal age.

* * * *

The applicable principle governing judicial review of agency action in rulemaking is stated in Iowa Auto Dealers Association v. Iowa Department of Revenue, 301 N.W.2d 760 (Iowa 1981). According to the Iowa Supreme Court: "a rule is within the agency's authority if a rational agency could conclude that the rule is within the statutory mandate." 301 N.W.2d at 762.

The Department is charged with the authority to administer and enforce the Liquor Control Act. Iowa Code § 123.4 (1983). The age of majority in this state is nineteen years of age. Iowa Code § 123.3(33) (1983). No person under the "legal age" may have alcoholic liquor or beer in his or her possession or control. Iowa Code § 123.47 (1983). Any person who attempts to purchase alcoholic liquor in a state store, but appears to be under legal age, is required, upon demand, to display satisfactory evidence of his or her age. Iowa Code § 123.48(1) (1983). It is a simple misdemeanor to provide falsified evidence of age to a liquor store vendor. Iowa Code § 123.48(2) (1983). The Department would thus have a rational basis to implement a rule intended to deter the use of falsified evidence of age. Accordingly, it is our judgment that the director of the Department, with the approval of the liquor council and subject to 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.

It follows that an individual who refuses to sign a verification of age form can be denied a purchase. A contrary ruling would negate the purpose of the administrative rule. An affirmative response is thus provided to the second question.

An examination of the third question commences with a brief overview of Iowa Code Chapter 68A. Every Iowan, pursuant to Iowa Code § 68A.2 (1983), is entitled to examine all public records unless an express provision provides to the contrary. A "public record" is defined to include: "all records and documents of or belonging to this state . . . ." Iowa Code § 68A.1 (1983). A list of confidential records is provided in Iowa Code § 68A.7 (1983). Observing that none of the statutory exceptions to the

public records law would apply to the verification of age form, nor any other provision of the Code appears applicable, it is our opinion that the form would be a public record subject to public inspection.

Nevertheless, Iowa Code § 68A.8 (1983) does provide a district court with the authority to grant an injunction restraining the examination of a specific public record. Judicial exercise of that authority is permissible if "the petition supported by affidavit shows and the court finds that an examination of a public record would clearly not be in the public interest and would substantially and irreparably injure any person or persons." Iowa Code § 68A.8. [Emphasis added] Whether a court would grant an injunction restraining an examination of a verification of age form would have to be on a case-by-case basis and is a determination which cannot be made by our office. Of course, the Iowa Legislature could amend § 68A.7 to include the verification of age form as a confidential record.

At issue in the fourth question is not a matter of fairness but of equal protection under law. A response to that question can be gleaned from a recent opinion of the Attorney General. In Op.Att'yGen. #83-7-5(L), our office opined that the equal protection clauses of the federal and state constitutions were not violated by a statutory requirement 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. The opinion applied the rational basis test, rather than the strict scrutiny analysis, because age is not a suspect classification.

Applying the rational basis test to the administrative rule, it is our judgment that the use of a verification of age form would not constitute an equal protection violation. The analysis applied in response to the first question is equally applicable in responding to this question.

Finally, we know of no legal reason which would prohibit a licensee or permittee from using a verification of age form. The rule does not address use by licensees or permittees. Iowa Code § 123.49(3) (1983) authorizes a licensee or permittee to make a "reasonable inquiry" to determine whether a prospective purchaser is over legal age. Although the use of a verification of age form may not be a valid defense (i.e., where it is physically apparent that the prospective purchaser is under legal age), the form's use would constitute evidence of an inquiry.

In summary then, the director of the 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 permittee could use a verification of age form.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/cjc

REAL PROPERTY; Co-operative Ownership; Requirement for Platting. Iowa Code Chapters 499A and 409 (1983). A development of single-family residences 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 5, 1983

Honorable LaVerne W. Schroeder
State Representative, 98th District
R.R. #1, Box 112
McClelland, Iowa 51548

Dear Representative Schroeder:

You have asked for an opinion from the Attorney General on whether Iowa Code Chapter 499A (1983) encompasses a co-operative ownership arrangement in which the interest of each individual member thereof is evidenced by a certificate of ownership or deed to a single-family residence which is completely separated by yard space from all other single-family residences in the development as opposed to "a particular apartment or room" in an "apartment house or building" as indicated by Section 499A.11, and if so, whether compliance by the developer with the provisions of Chapter 499A would obviate the need to fulfill the requirements of Iowa Code Chapter 409.

Chapter 499A, known and cited as "The Multiple Housing Act of 1947," adopted as 1947 Iowa Acts, Chapter 250, authorized ownership of residential or business property on a co-operative basis. It grants powers to build and construct apartment houses or dwellings, and makes mandatory the issuance of certificates or deeds evidencing membership or ownership of a particular apartment or room therein, with title to the real estate upon which the apartment or other building is constructed conveyed to trustees who hold title for the use and benefit of the owners of such apartments or rooms.

To resolve your first question, it is necessary to determine whether the development you described is co-operative housing as contemplated by the legislature in Chapter 499A.

The facts posed in your opinion request appear to cover a type of housing development not contemplated by the legislature when it adopted Chapter 499A. There is no mention in that chapter of "single-family residences which are completely

separated by yard space from all other single-family residences in the development." Indeed, the only descriptive words used in the chapter to define types of living accommodations are "apartment houses or dwellings" (§ 499A.2(3)); "apartment houses or buildings" (§ 499A.11); "apartment or room therein" (§ 499A.11); "apartment or other buildings" (§ 499A.12); "apartment or rooms in said building" (§ 499A.13); "apartment or room" (§§ 499A.13 and 14); and "individual apartments or rooms" (§ 499A.15).

The repetitive use of the word "apartment" throughout the chapter would appear to indicate that the legislature contemplated multiple-unit dwellings; that is to say, a building (or buildings) in which the rooms are arranged and rented (or sold) as apartments, as distinguished from single-family residences physically separated one from the other.

Section 499A.11 grants the co-operative association the right to purchase real estate for the purpose of erecting apartment houses or apartment buildings. There is no statutory authority mentioned authorizing erection of single-family residences completely separated by yard space from all other such residences.

Chapter 499B, the Horizontal Property Act, is likewise obviously not applicable because none of the general common elements or limited common elements set out in § 499B.4(4) and (5) (except for the land on which the building is erected) are present in your request.

Therefore, it is the opinion of this office that the arrangement described in your request is, in fact, a co-operatively owned subdivision not intended by the legislature to be included within the purview of Chapter 499A.

It follows that such a development must comply with the subdivision platting requirements of Chapter 409, unless it falls within the exceptions specified in § 409.1.

Respectfully submitted,

MICHAEL McGRANE
Assistant Attorney General

MM:ds

JUDGES; JUDICIAL RETIREMENT SYSTEM; Credit for prior judicial service. Ch. 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 3, 1983

William O'Brien
Court Administrator
State Capital
L O C A L

Dear Mr. O'Brien:

You have requested an opinion of the Attorney General concerning credit for past judicial service under the Judicial Retirement System. You point out that district associate judges are members of IPERS but are not eligible to be members of the Judicial Retirement System. See Op.Atty.Gen. #81-11-7. With respect to district associate judges who are subsequently appointed to judgeships which are covered by the Judicial Retirement System, you pose the following question:

> Upon being appointed district judge, court of appeals judge or justice of the supreme court, may a district associate judge included in the Iowa Public Employees' Retirement System buy into the Judicial Retirement System in such a manner as to get credit for prior judicial service?

In our opinion, 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 his or her prior judicial service.

The mechanism by which coverage under the Judicial Retirement System is triggered is set out by statute. Notice must be given in writing within one year after the judge takes the oath of office for a judgeship covered by the system. Iowa Code § 605A.3 (1983). See Op.Atty.Gen. #81-5-17(L). After the notice is filed, contributions to the system are deducted and withheld from the member's salary at a rate of four percent of the basic salary. Iowa Code § 605A.4(1) (1983). In addition, contributions for judicial service preceding the date of the notice are assessed in a sum equal to four percent of the judge's basic salary "for services as such judge for the total period of service as a judge of a municipal, superior, district or supreme court, or the court of appeals, including district associate judges." Id.

In a previous opinion, this office addressed the scope of the lump sum contribution covering judicial service before the date of the notice. This office determined that a judge was entitled to purchase coverage for service as a municipal court judge through the lump sum contribution, although municipal court judges were not covered by the system at the time the service was rendered. 1965 Op.Atty.Gen. 152, 153. Reliance on this prior opinion leads us to conclude that, upon filing the proper notice, a judge covered by the system can purchase coverage for prior service as a district associate judge.

This result is consistent with principles of statutory construction. Chapter 605A, which establishes the Judicial Retirement System, provides for purchase of coverage by lump sum contribution for past service as a judge of a "municipal, superior, district or supreme court, or the court of appeals, including district associate judges." Iowa Code § 605A.4(1) (1983). Under Chapter 602, however, municipal and superior courts were consolidated into the district court system in 1973. Iowa Code § 602.36 (1983). District associate judges were specifically excluded from the Judicial Retirement System. Iowa Code § 602.31 (1983). Chapter 605A, therefore, authorizes the purchase of coverage for service on courts which are no longer in existence and for service in judgeships which are specifically excluded from the system. Principles of statutory construction require that these statutes be harmonized to the extent possible.

See Doe v. Ray, 251 N.W.2d 496, 501 (Iowa 1977). Accordingly, we construe Chapter 605A to authorize purchase of coverage by lump sum contribution for past service on courts now included in the district court system and for past service as a district associate judge.

In conclusion, we advise that 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 his or her prior judicial service.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP/cjc

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)

November 23, 1983

The Honorable Berl E. Priebe
State Senator
RFD 2, Box 145A
Algona, Iowa 50511

Dear Senator Priebe:

We are in receipt of your request for an opinion of the Attorney General regarding liability for injuries occasioned by snow and ice on public sidewalks. Specifically, you have asked whether a statute can impose liability on abutting property owners for injury to pedestrians caused by the negligent failure to remove snow and ice from public sidewalks. You have also inquired as to the validity of mandatory insurance for abutting property owners.

Iowa Code § 364.12(2) (1983) governs liability for snow and ice on public sidewalks. In 1980, the Iowa Supreme Court construed that statute to impose a duty on abutting property owners to remove snow and ice from sidewalks, but did not impose liability on the owners for injury to pedestrians caused by the negligent failure to discharge the duty of removal. Peffers v. City of Des Moines, 299 N.W.2d 675 (Iowa 1980). Reaction to the Peffers case has manifested itself in recent legislative efforts to revise § 364.12(2), to shift liability to abutting property owners. See House File 359 (1983 Session).

The common law imposed no duty upon property owners to keep sidewalks in front of their premises free from natural accumulation of snow and ice. Disbrowe v. Tucker, 211 N.W.2d 318 (Iowa 1973). Iowa statutory law, however, has imposed that duty on abutting property owners. Iowa Code § 364.12(2) (1983). The owner's obligation under that statute runs to the municipality as government, and not to the traversing public. Peffers at 677. The prescribed duty of removal is enforced, when the city is required to perform the abutting owner's duty, by a monetary penalty assessed by taxation. Id.

At common law, property owners were also not liable to pedestrians for failure to remove snow and ice from an abutting public sidewalk. Hovden v. City of Decorah, 261 Iowa 624, 629, 155 N.W.2d 534, 538 (1968). Cases which alter the rule of non-liability to pedestrians do so when artificial conditions cause aggravation of natural hazards. Lattimer v. Frese, 246 N.W.2d 255 (Iowa 1976). It remains to be determined whether the rule of non-liability can be statutorily altered.

I.

In Case v. City of Sioux City, 246 Iowa 654, 69 N.W.2d 27 (1955), the Iowa Supreme Court examined the liability of a lot owner for failure to perform a statutory duty to remove snow and ice from the abutting property. An attempt to imply liability on an abutting property owner, according to the Court, would not be upheld because there would be doubt as to the constitutionality of the statute if it imposed liability for failure to perform that duty. The Court relied, in part, on the Minnesota case of Noonan v. City of Stillwater, 33 Minn. 198, 22 N.W. 444 (1885).

Noonan held unconstitutional a provision in a city charter shifting liability for injuries resulting from the failure to maintain a public sidewalk in safe condition from the city to the abutting property owner. The Court based its holding, in part, on the fact that the duty of the abutting property owners to maintain the sidewalks in safe condition, as an exercise of the power of taxation, was a duty due the city as a governmental body rather than one due the public. A municipality, the Court concluded, cannot shift liability to property owners for its failure to perform a governmental duty.

If viewed as an exercise of the taxing power, a statute imposing liability on abutting property owners for injuries occasioned by the negligent failure to remove snow and ice on public sidewalks would probably be invalid. A private person, according to Noonan, cannot be held liable to the public for the failure to perform a governmental duty.

An alternative view is that the statutory imposition on abutting property owners of liability for snow and ice on public sidewalks is an exercise of the police power. For a statute to be a valid exercise of the police power, there must be a rational basis to do so. See 1980 Op.Att'y.Gen. 533, 539-41. The fact that municipalities lack the necessary resources to assure that abutting property owners satisfy their duty to provide clear passage on public sidewalks may alone be a sufficient reason to statutorily shift the liability. The significant point is that the validity of such a statute is more likely to stand if based on the exercise of the police power, rather than on exercise of the power of taxation. Ultimately, then, 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. There is a rational police power basis to impose liability on adjoining property owners. The legislature could well determine that the health, safety, and welfare of the public traversing the sidewalks is protected by imposing on adjoining property owners the duty to shovel their sidewalks. Liability can logically be imposed concomitant with that duty. However, even with a police power analysis, imposition of liability on the adjoining property owner in lieu of liability by the city is suspect. Liability of the city and adjoining property owners should be concurrent to enhance the probability that legislation such as you describe is constitutional under the police powers of the state.

Regardless of which power is exercised, we note that the Iowa Supreme Court has cautioned that liability will not be imposed in the absence of an express provision. Peffers at 677; Case, 246 Iowa at 658, 69 N.W.2d at 29. A statute must contain language which can reasonably be interpreted as expressly imposing such liability on abutting property owners. Id. It would be expected, therefore, that the legislature would spell out such a departure from the common law rule of non-liability in "very clear language."

H.F. 359, as proposed by the Committee on Local Government in the 1983 Session of the General Assembly, is not clear whether it is based on the police power of the state or the taxation power. Language could be included in H.F. 359 that the abutting property owner must remove snow and ice from sidewalks in order to protect the public from injury and, thus, protect the health, safety, and welfare of citizens traversing the sidewalks. This language would be evidence of legislative intent that the requirement that abutting property owners remove snow from sidewalks is based on the police power, not the power of taxation. This police power interpretation would significantly increase the likelihood that such a statute would be found constitutionally valid.

II.

The second question posed concerns the validity of mandatory insurance for abutting property owners. Mandatory insurance under vehicle financial responsibility laws has been upheld as have statutory requirements that require insurance carriers to insure a share of the higher risk automobile insurance contracts. California Automobile Association v. Maloney, 341 U.S. 105, 95 L.Ed. 788, 71 S.Ct. 601 (1951). This was justified by the great public need for protecting the victims of highway accidents. In Hunten v. Colfax Consolidated Coal Company, 175 Iowa 245, 296-307, 154 N.W. 1037, 1056-60 (1915), the Iowa Supreme Court upheld the mandatory insurance requirements of the workers' compensation statutes as a valid exercise of the police power to insure compensation for injured employees. In effect, a statutory requirement that abutting property owners carry insurance for injuries occasioned by the negligent failure to remove snow and ice on public sidewalks, assuming that liability has been imposed on the property owners, is an attempt to insure that injured members of the public be compensated. Accordingly, mandatory insurance for abutting property owners may be a valid exercise of the police power.

The analysis on the mandatory insurance question is much the same as that in Division I of this opinion concerning imposing liability on adjoining property owners. The question, for both the legislature and the courts, is whether there is a rational basis for requiring that every adjoining landowner be required to have insurance. There may well be a rational basis for this, to wit: assurance of compensation and protection for members of the public. This would follow the police power analysis set out above. If, however, the courts see mandatory insurance as an attempt by municipalities to protect the municipality from secondary liability, then a taxation analysis might well be applied. If so, the statute would, in all likelihood, not withstand constitutional scrutiny.

In summary then, it is our opinion that 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.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/cjc

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 addition 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 14, 1983

Dale L. Nelson
State Registrar of Voters
Voter Registration Commission
Hoover State Office Building
L O C A L

Dear Mr. Nelson:

You have requested an opinion of the Attorney General concerning the addition of residential telephone numbers to the registration records of qualified electors as authorized in Senate File 545. You point out that Senate File 545 contains specific provisions which provide for the addition of residential telephone numbers. In order to accomplish the addition of these telephone numbers in a more efficient and less expensive manner, you propose to utilize the following ten-step procedure:

1. Each county will be offered the opportunity to have its records without phone numbers submitted to a private vendor by the registrar. The county will be required to enter into an agreement with the registrar to pay its share of the vendor charges plus necessary processing costs incurred by the registrar.

2. The registrar will enter into a contract with the vendor for the performance of service under the procurement rules of the Iowa Department of General Services.

3. The registrar will supply the vendor computer-readable records from all counties with which an agreement under #1 (above) has been made.

4. The state will pay the vendor's charges at the contracted rate.

5. The registrar will perform file maintenance to the State's Voter Master file using the vendor-supplied numbers.

6. The registrar will calculate and bill each county its share of the vendor's charges.

7. The registrar will prepare computer-readable files of records to which telephone numbers have been added. These files will be sold at the cost of production to the state political parties pursuant to § 48.5(2) of The Code.

8. The parties will provide the files to the individual county commissioners as "lists of residential telephone numbers of qualified electors" as allowed under Section 10 of SF 545.

9. County commissioners will update their own files.

10. County commissioners will file claims under paragraph 2 of Section 10, SF 545 to recover their costs of file maintenance (item 9) and their costs for vendor services (item 6).

With regard to this proposal, you raise the following questions for our opinion:

1. Does Section 47.7 of The Code confer the authority to the registrar to enter into a contract with a private vendor for voter registration related software services?

2. If the answer to question number 1 is negative, are there other sections or

procedures by which such a contract could be made?

3. Since SF 545 allows counties to file claims for their costs of record maintenance only for those numbers "provided by the state central committees" (Section 10), but also requires counties to capture phone numbers by other methods (Sections 1 and 10, paragraph 3), would records purchased from the registrar by the central committees qualify for the reimbursement provisions?

In our opinion, § 47.7 does not authorize the registrar to enter into a contract with a private vendor to provide residential telephone numbers in the manner which you propose. Senate File 545 provides a specific procedure which precludes the registrar from invoking his general authority under § 47.7 or any other section to contract with a private vendor to supply residential telephone numbers.

The State Registrar of Voters is delegated broad authority over voter registration records. Under Chapter 47 of The Code the State Registrar "shall regulate the preparation, preservation and maintenance of voter registration records, the preparation of precinct election registers for all elections administered by the commissioner of any county, and the preparation of other data on voter registration and participation in elections as shall be requested and purchased at actual cost of preparation and production by a political party or any resident of this state." Iowa Code § 47.7(1) (1983). The counties may use their own data processing facilities for voter registration record keeping or arrange for performance of record keeping functions by the data processing facilities of the State Comptroller's Office at a cost in accordance with standard charges for those services adopted by the registration commission. Iowa Code § 47.7(2)-(3) (1983). See Op.Att'yGen. #80-4-5(L).

The Legislature recently enacted legislation providing for the addition of residential telephone numbers to the voter registration records maintained by the State Registrar and the counties. Under Senate File 545 the county commissioner of registration for each county "shall accept lists of residential telephone numbers of qualified electors provided by the state central committees of political parties." S.F. 545 § 10(1). The county commission of registration "shall enter those residential telephone numbers into its system of registration records for those qualified electors who do not have a residential telephone number listed in the registration records." Id. If differing telephone numbers are submitted by the political parties for a

qualified elector, the commissioner may decline to enter any telephone number. Id. The counties are authorized to file claims with the State Registrar by July 1, 1984, for the costs of entering and submitting these telephone numbers not exceeding fifteen cents per telephone number. S.F. 545 § 10(2).

Senate File 545 provides separate, additional mechanisms for the continual addition of residential telephone numbers. Voter registration forms shall require the residential telephone number to be provided if it is available. S.F. 545 § 3. The residential telephone number was previously provided "at the option of the applicant." Iowa Code § 48.6(12) (1983). Declaration of eligibility forms used in the primary and general elections in 1984 and 1986, moreover, "shall contain" a line for the elector's residential telephone number. After the election, the commissioner of registration "shall review the declarations of eligibility and the registration records and correct or amend the records" to include the residential telephone number provided by the elector. S.F. 545 § 10(3). The residential telephone number was not previously included in the declaration of eligibility form. Iowa Code § 49.77 (1983).

Senate File 545 further provides mechanisms for the transmission of information collected at the county level to the State Registrar. This new legislation specifically provides that residential telephone numbers provided by the state central committees of political parties and entered into the registration records "shall be in a computer readable form specified by the registrar and provided to the registrar." S.F. 545 § 10(1). Residential telephone numbers added or changed in accordance with information supplied in the declaration of eligibility forms "shall be provided to the state registrar in the same manner as if submitted under section 48.6." S.F. 545 § 10(3).

Your ten-step proposal must be analyzed in light of these statutory provisions. In order to determine whether your proposal is authorized under these statutory provisions, we invoke principles of statutory construction. When a general statute is in conflict with a specific statute, the latter prevails whether enacted before or after the general statute. Peters v. Iowa Employment Security Commission, 248 N.W.2d 92, 96 (Iowa 1976). In our view, the general delegation of authority in Chapter 47 presents a conflict with specific provisions of Senate File 545 the resolution of which must be in favor of the specific provisions of Senate File 545.

Section 47.7(1) is a general statute conferring broad authority on the State Registrar to "regulate the preparation, preservation and maintenance of voter registration records." Iowa Code § 47.7(1) (1983). Utilization of this authority to

implement your ten-step proposal, however, conflicts with the provisions of Senate File 545 in significant respects. First, Senate File 545 provides that residential telephone numbers enter the voter registration records at the county level and be transmitted to the State Registrar. Under your proposal, the State Registrar would initiate collection of this data by contracting with a private vendor and would provide the data to the political parties for ultimate submission at the county level. Second, Senate File 545 provides that a county may file a claim for its costs of entering and submitting residential telephone numbers to the registrar. Under your proposal, the counties would file claims for both the cost of entering the data and their pro rata share of the cost of the vendor services. The latter cost, however, reflects the cost of gathering the data for which Senate File 545 does not provide reimbursement to the counties.

Applying the principle that a specific statute prevails in a conflict with a general statute, we must conclude that § 47.7 does not authorize the registrar to enter into a contract with a private vendor to provide residential telephone numbers in the manner which you propose. Senate File 545 provides a specific procedure which precludes the registrar from invoking his general authority under § 47.7 or any other section to contract with a private vendor to supply residential telephone numbers.

We do not suggest that your proposal would not be an efficient and economical means of obtaining residential telephone numbers for voter registration records. Authorization for an alternate procedure, however, should be sought from the Legislature.

Sincerely

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP/cjc

MUNICIPALITIES: Cemeteries. Iowa Const. Art. III § 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 cemetery 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 14/83) #83-11-5(L)

November 14, 1983

The Honorable Don Gettings
State Senator
707 Chester
Ottumwa, Iowa 52501

Dear Senator Gettings:

We are in receipt of your request for an opinion of the Attorney General in the following terms:

> The City of Ottumwa, Iowa, is the owner of two municipal cemeteries which are managed by a Cemetery Board of Trustees under Chapter 11 of the Ottumwa Code of Ordinances. Taxes are levied for the maintenance of these cemeteries by City employees supervised by a superintendent. There is also a sizable private cemetery located in the City. It is a non-profit corporation operated by a Board of Trustees. May the City give funds to the said private cemetery to assist it meet the expenses of its operation? The cemetery is nondenominational and to the City's knowledge has no restrictions on who may be buried there.

Stated otherwise, the issue posed is whether a municipal corporation may contribute public funds to a privately owned, non-profit, nondenominational cemetery.

Under municipal home rule, a city may exercise any power it deems appropriate to the health and welfare of its residents unless inconsistent with state law. Iowa Code §§ 364.1 and .2 (1983). The question posed is whether this power is reasonably related to the health and welfare of the city's residents or whether it would constitute the appropriation of public funds to a private purpose which is prohibited by Article III, § 31 of the Iowa Constitution.[1]

It is our opinion that a municipal corporation may contribute public funds to a privately owned, non-profit, nondenominational cemetery. First, former Iowa Code § 404.10, repealed by 1972 Iowa Acts, Chapter 1088 § 199 (effective July 1, 1975), authorized a municipal corporation to levy an annual tax on all taxable property within the city limits for the care, preservation, and adornment of any cemetery used for the interment of the residents of the community. Thus, prior to the adoption of home rule in Iowa, a city could provide assistance to a private cemetery. The legislative intent, therefore, appears to have been to incorporate former § 404.10 in municipal home rule power. A second basis for our conclusion is Iowa Code § 359.33 (1983). That section authorizes township trustees to levy a tax to improve and maintain any cemetery not owned by the township, provided the benefited cemetery is devoted to general public use. Clearly, the legislative intent, as expressed by that provision, is to permit the use of public funds for private cemeteries. Thus, there is an express legislative judgment that providing burial places for the dead is a public purpose, even though the cemetery is not publicly owned.

The grant of public funds, however, is appropriate only if used to provide a benefit available to all citizens. 1970 Op.Att'yGen. 375. We would recommend that a city provide funds only if there is a declaration of public purpose, a guarantee of non-discrimination, permission for financial reporting, and the privilege of auditing the financial records of the private association. These provisions will assure a public use, the necessity of public assistance, and the sound management of the public contributions.

Of course, an alternative method of securing municipal funds for cemeteries is for a city to simply acquire ownership of a private cemetery. Iowa Code § 384.24(3)(k) (1983) authorizes the acquisition and improvement of real estate, as an essential

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[1] We note that Iowa Code § 364.7(3) (1983) further limits any gift of real property by requiring that the assistance be to a governmental body.

corporate purpose, for cemeteries. In addition, Iowa Code Chapter 566 (1983) authorizes municipal management of cemeteries; in particular, Iowa Code §§ 566.14 through 566.18 (1983). These sections grant a municipality power to accept, receive, and expend money or property for establishing or maintaining a cemetery (§ 566.14), and provides for the payment of interest annually to a perpetual care fund (§ 566.16). Municipal acquisition, it should be noted, need not be of an entire cemetery, but could be limited to certain portions of a cemetery. 1978 Op.Att'yGen. 804, 806.

In summary, a municipal corporation is not prohibited from providing contributions to a privately owned, non-profit, nondenominational cemetery which is open to public use. As an alternative, a city could acquire ownership of a private cemetery, wholly or partially.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/cjc

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 Schröeder, Keokuk County Attorney, 11/4/83) #83-11-4(L)

November 4, 1983

Mr. John E. Schröeder
Keokuk County Attorney
101½ South Jefferson
P.O. Box 231
Sigourney, Iowa 52591

Dear Mr. Schroeder:

You have requested an opinion of the Attorney General concerning the scope of a board of supervisors' authority to participate in disciplinary action against county employees. The circumstances leading to your opinion request are as follows.

Keokuk County has implemented a "Complaint Procedure" applicable to county employees.[1] You enclosed a copy of that procedure with your opinion request. That policy provides that a county employee with a complaint concerning "wages, hours, terms and conditions of employment" is to first discuss this complaint with his or her immediate supervisor. If the employee receives an unsatisfactory response, the employee may present the complaint to his or her department head. The next level of appeal is to a Complaint Review Board. Finally, the employee may appeal the Review Board's decision to the board of supervisors. Your question arises because the county is considering a change in policy that would allow "a supervisor, department head, or member of the Board of Supervisors or anyone designated by any of said positions" to file a disciplinary action against a county employee. In addition to questioning the supervisors' authority to initiate such action, you also ask whether it is appropriate for a supervisor who has filed such disciplinary action to act as a decision-maker when the supervisors sit as the final arbiters of that matter.

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[1] For the purpose of answering your request, we assume but do not decide that implementation of the Complaint Procedure currently in effect in Keokuk County was a lawful exercise of the supervisors' authority.

It is our opinion that the supervisors are not authorized to initiate disciplinary action against county employees, and therefore we find it unnecessary to reach your second question.

We first review the relevant statutes, which govern the relationship between the supervisors, elected county officers, and the deputies, assistants, and clerks of those officers. As an initial matter, the supervisors determine the number of deputies, assistants, and clerks required in each county office. Iowa Code Section 331.903(1). However, this same section authorizes the principal county officers to appoint the specific individuals to fill those positions. These appointments are subject to the supervisors' approval, § 331.903(1), but the scope of the supervisors' approval authority is limited by a "reasonableness" requirement. See McMurry v. Board of Supervisors of Lee County, 261 N.W.2d 688, 691 (Iowa 1978); Smith v. Newell, 254 Iowa 496, 502-503, 117 N.W.2d 883, 887 (1962). These employees are to perform the duties assigned to them by the principal officer, § 331.903(4), and may only be terminated by that officer. § 331.903(2).

With regard to salaries, the principal officers are to set the salaries of designated deputies and assistants, subject to statutory ceilings and subject also to the supervisors' approval; however, the supervisors may only disapprove the salary set by the principal officer if that salary exceeds the statutory maximum. §§ 331.903(1), (2), and (3). The supervisors, however, determine the compensation to be paid to "extra help and clerks," i.e., all other employees, appointed by the principal officer. § 331.903(4).

These same provisions were discussed by the Iowa Supreme Court in the McMurry decision.[2] In that case, the clerk of court challenged the validity of the supervisors' action in adopting several resolutions which:

> 1. Set a two-year employment experience requirement as a prerequisite for deputies, and set ceilings on deputies' salaries which were below those authorized by statute;
>
> 2. Disapproved a county officer's appointment of a deputy for noncompliance with paragraph 1;

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[2] The County Home Rule Act, 1981 Iowa Acts, ch. 117, recodified the statutes relating to deputies, assistants, and clerks which were relied on in the McMurry decision, but substantively those provisions were not changed.

3. Terminated a deputy's appointment; and

4. Established policies concerning county employees' vacations and sick leave, and required those employees' time sheets to be deposited with the auditor each pay period.

After reviewing these resolutions, the court began its analysis by noting:

> The board appears to have proceeded as though our system of county government consisted of central management with subsidiary departments. With few exceptions, however, our statutes establish autonomous county offices, each under an elected head.

The court then concluded that the supervisors had no authority to enact the first resolution because the statutory scheme with regard to county officers' deputies, assistants, and clerks, makes clear that "authority over personnel matters relating to deputies resides with the elected principals unless a statute expressly gives authority to the board." McMurry, supra, 261 N.W.2d at 690-691. The second resolution was found invalid on the ground that it exceeded "the board's approval authority on specific appointments." Id. at 691. The Court found it unnecessary to consider the validity of the third resolution, but did note that the elected principal officer rather than the board is authorized by statute to terminate a deputy's employment. Id. at 691. Finally, the Court concluded that the fourth resolution was invalid with regard to deputies, but valid with regard to other county employees. Id. at 691. In reaching this conclusion the Court noted the board has statutory authority to fix all compensation for extra help and clerks, as opposed to deputies, and held:

> In dealing with vacation, sick leave, and time sheets, as distinguished from the specific tasks the employees are to perform in the respective offices, the board is dealing with the package known as "compensation."

Id.[3] - 4

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[3] In reaching its decision, the McMurry court relied in part on the principle that the supervisors "have only such powers as are expressly conferred by statute or necessarily implied." 261 N.W.2d at 690, 691. This principle was abolished when counties

The effect of the McMurry decision is not only to further clarify the statutory distinctions with regard to employment of county deputies, clerks, and assistants, but to recognize the general autonomy of each county officer's operation of his or her office, particularly in regard to employees in that office. While the McMurry decision does not directly address the question of whether the supervisors may initiate disciplinary action against county employees, we believe its rationale dictates our conclusion that this action is outside the supervisors' scope of authority. First, we believe there is little question that the supervisors have no authority to initiate discipline against deputies, as the supervisors have only nominal authority over the appointment of deputies, § 331.903(1), and the setting of their compensation. §§ 331.904(1) and (2). The supervisors have no authority to terminate a deputy in a county office; that authority is the principal officer's alone. § 331.903(2). There are no other statutory provisions which would authorize the supervisors to exercise any control over deputies in county offices. Indeed, the McMurry court specifically held that authority over personnel matters relating to deputies resides solely with the elected officer, absent express statutory authority to the contrary. 261 N.W.2d at 691. Given the existing statutory provisions and the McMurry decision, including the Court's statements regarding the autonomy of elected county offices, we conclude that supervision of deputies, including initiation of any disciplinary action, is clearly the sole responsibility of the principal officer who appointed that deputy.[5]

We reach the same conclusion with regard to county employees other than deputies, i.e., "extra help and clerks." While the supervisors do have additional authority with regard to this category of employees in that they are authorized to set the

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[3] (cont'd) were granted home rule authority in 1979. See Iowa Const., art. III, § 39A. However, we believe the Court relied even more extensively on statutory and other common law principles that have not changed. Accordingly, we believe the conclusions reached by the McMurry court would not be different under a home rule analysis.

[4] The authority of the supervisors to determine compensation for elected county officers, deputies, and employees, has been the subject of several recent opinions of this office. See Op.Att'yGen. #83-6-9(L); Op.Att'yGen. #81-10-9(L); Op.Att'yGen. #81-8-28(L); Op.Att'yGen. #81-6-7.

[5] This conclusion applies as well to assistants in the county attorney's office. See § 331.903(1) and § 331.904(3).

compensation for these employees, § 331.904(4), this fact is not sufficient to override the overall statutory scheme governing employees in county offices as discussed in McMurry, and which was discussed above. Indeed, the fact that the supervisors are authorized to set the salaries for these employees was noted by the McMurry Court. We believe the Court virtually concluded that the supervisors do not have general supervisory authority over "extra help and clerks" when it stated:

> In dealing with vacation, sick leave, and time sheets, as distinguished from the specific tasks the employees are to perform in the respective offices, the board is dealing with the package known as compensation.

(emphasis added) 261 N.W.2d at 691. We believe the authority to initiate disciplinary action against an employee in a county office is implicit in the authority to designate specific tasks for an employee, which was clearly viewed by the Supreme Court as within the exclusive control of the principal officer. Id.

In conclusion, it is our opinion that the supervisors do not have authority to initiate licensee disciplinary action against a county employee; that authority is vested solely in the elected county officer who appointed that employee. We note that this opinion may not expressly apply to certain county employees in offices not headed by an elected county officer. Such situations should be dealt with on a case-by-case basis, and analyzed in light of the McMurry decision, this opinion, and relevant statutes.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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 1, 1983

Michael V. Reagen, Ph.D.
Commissioner
Iowa Department of Human Services
Hoover State Office Building
Des Moines, Iowa 50319

Dear Commissioner Reagen:

You have requested an opinion of this office relating to the pre-adjudicative transfer of legal custody of a child under the Juvenile Justice Act and whether that transfer of legal custody is sufficient to invoke Iowa Code § 234.35(2) (1983), foster care payment. Specifically, you question:

> Is there provision in Chapter 232 for transfer of 'legal custody' within the meaning of 234.35(2) to the Department of Social Services prior to adjudication and disposition of a petition?

The short answer to your question is yes. Both CHINA proceedings, Division III of Chap. 232, and delinquency proceedings, Division II of Chap. 232, would allow a transfer of custody to the Department of Human Services and that transfer of custody would satisfy Iowa Code § 234.35(2) and render the costs of that care payable by the Department initially.

CHINA PROCEEDINGS

Under Division III of the Juvenile Justice Act, the pre-adjudicative procedure for removal of the child from parental placement is delineated as a temporary removal proceeding. Iowa Code §§ 232.78, .79, .95 (1983). At the conclusion of the temporary removal hearing, the statute provides:

> 2. Upon such hearing, the court may:
> a. Remove the child from home and place the child in a shelter care facility or in the custody of a suitable person or agency pending a final order of disposition if the court finds that removal is necessary to avoid imminent risk to the child's life or health.
> b. Release the child to his or her parent, guardian or custodian pending a final order of disposition.
> c. Authorize a physician or hospital to provide medical or surgical procedures if such procedures are necessary to safeguard the child's life or health.

Iowa Code § 232.95(2) (1983). Subsection (a) allows the court two alternatives: direct placement of the child in a shelter care facility or a transfer of custody to a person or agency. Under the second alternative the Court may transfer legal custody to the Department. That transfer would satisfy the requirements of Iowa Code § 234.35(2) (1983) and the Department would be initially responsible for payment of the placement. The application of this subsection of § 234.35 would not be restricted to the thirty day limit found in Iowa Code § 234.35(4) (1983) to which you allude.

DELINQUENCY PROCEEDINGS

The comparable delinquency proceeding for pre-adjudication removal of a child from parental placement is a shelter care proceeding. Iowa Code §§ 232.2(45), (46); 232.20, .21, .44 (1983).

Iowa Code § 232.44(6) (1983) provides the juvenile court with the following authority:

> 6. If the court finds that there is probable cause to believe that the child is within the jurisdiction of the court under this chapter and that full-time detention or

> shelter care is authorized under section 232.21 or 232.22, it may issue an order authorizing either shelter care or detention until the adjudicatory hearing is held or for a period not exceeding seven days whichever is shorter.

Further, Iowa Code § 232.21(2) (1983) allows a child's placement in specifically designated facilities:

> 2. A child may be placed in shelter care as provided in this section only in one of the following facilities:
> a. A juvenile shelter care home.
> b. A licensed foster home.
> c. An institution or other facility operated by the department of social services, or one which is licensed or otherwise authorized by law to receive and provide care for the child.
> d. Any other suitable place designated by the court provided that no place used for the detention of a child may be so designated.

Subsection 2(b) allows the child's placement in a foster home licensed by the Department. Iowa Code Chapters 237, 238 (1983). One alternative available to the juvenile court would be to transfer legal custody to the Department, which would subsequently place the child in a foster home. Again, this transfer of legal custody would satisfy Iowa Code § 234.35(2) (1983) and render the Department liable for the cost of such a placement.

In conclusion, it is the opinion of this office that Iowa Code §§ 232.21, .44 and .95 (1983) would allow a pre-adjudicative transfer of legal custody of a child to the Department of Human Services and such a transfer of legal custody is sufficient to meet the requirements of Iowa Code § 234.35(2) (1983). That section would render the Department initially responsible for the costs of such placement.

Sincerely,

Brent D. Hege

Brent D. Hege
Assistant Attorney General

BDH/kap14

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

Mr. William E. Davis
Scott County Attorney
Scott County Courthouse
416 West Fourth Street
Davenport, Iowa 52801

Dear Mr. Davis:

You have requested an opinion of the Attorney General regarding the county indemnification fund established in Iowa Code Section 331.427 (1983). In particular, you ask:

> 1. Can a private insurance company, through an indemnification fund endorsement contained as a separate part of its Errors and Omissions policy, make the county indemnification fund as contained in Chapter 331.427, The Code, the primary source of payment and the insurance company the excess carrier.
>
> 2. Whether or not there is a need for a final judgment rather than an agreed settlement before the County Indemnification Fund as contained in Chapter 331, The Code, is available as a source of payment. If a final judgment is required as a condition precedent to making a claim on the County Indemnification Fund, can a judgment by agreement per Rule of Civil Procedure 226, incorporating the terms of a consensual settlement among the parties qualify?

3. Whether or not defense costs are covered by the County Indemnification Fund.

I.

In answer to your first question, it is our opinion that a county should not purchase "errors and omissions" coverage from a private insurance company and include a provision in the policy that designates the county indemnification fund as the primary source of payment and the insurance company the excess carrier. Our reasons are as follows.

Iowa Code § 331.427 (1983) governs the county indemnification fund and provides as follows:

> 331.427 County indemnification fund.
>
> 1. A county indemnification fund is created in the office of the treasurer of state, to be used to indemnify and pay on behalf of any county officer, township trustee, deputy, assistant, or employee of the county or the township, all sums that the person is legally obligated to pay because of an error or omission in the performance of official duties, except that the first five hundred dollars of each claim shall not be paid from this fund. All funds remaining in the county indemnification fund created under prior Codes as of July 1, 1981, are transferred to the county indemnification fund under this section.
>
> 2. The fund does not relieve an insurer issuing insurance under section 613A.7 from paying a loss incurred. An insurer shall not be subrogated to the assets of the fund regardless of provisions in a policy of insurance.
>
> 3. If the balance in the fund on September 30 is less than six hundred thousand dollars, the treasurer of state shall notify the board of each county to levy the amount authorized in section 331.421, subsection 7.
>
> 4. Not later than December 15 or June 15 of a year in which the tax is collected, the county auditor shall transmit the amount of the tax levied and collected, by warrant, to

> the treasurer of state who shall credit it to the county indemnification fund. The treasurer of state shall invest moneys in the fund in the same manner as other public funds and shall credit interest received from that investment to the county indemnification fund.
>
> 5. A claim for an act or omission of a county officer, township trustee, deputy, assistant, or employee of the county or the township, which occurred after July 1, 1978, shall be processed in accordance with chapter 613A and paid from the fund, except that payment of a claim, except a final judgment, in excess of fifteen hundred dollars must have the unanimous approval of all members of the state appeal board, the attorney general, and the district court of Polk county.
>
> 6. If a final judgment is obtained against a county officer, township trustee, deputy, assistant, or employee of the county or the township, for an act or omission which occurred subsequent to July 1, 1978, which is payable from the county indemnification fund, the county attorney shall ascertain if an insurance policy exists indemnifying the person against the judgment or any part of it. If no insurance exists, or if the judgment exceeds the limits of insurance, the county attorney shall submit a claim to the state comptroller against the county indemnification fund on behalf of the plaintiff for the amount of the judgment exceeding the amount recoverable by reason of the insurance. The state comptroller shall promptly issue a warrant payable to the plaintiff for that amount, and the treasurer of state shall pay the warrant. Payment discharges the person from liability for that act or omission.

As a technical matter, nothing in this section prohibits a county from purchasing an "errors and omissions" insurance policy which designates the insurance company as excess carrier and the indemnification fund the primary carrier. However, we believe this construction of § 331.427 is contrary to the legislative intent behind this statute, is contrary to the overall scheme of § 331.427, and is as a practical matter simply improper.

If a statute is ambiguous, as we believe § 331.427 is with regard to your question, a court may consider a number of factors in determining the legislature's intent, including the language used in the statute, the object sought to be attained by the statute and the consequences of a particular construction. Section 4.6; LeMars Mutual Insurance Co. v. Bonnecroy, 304 N.W.2d 422 (Iowa 1981); Shidler v. All-American Life and Financial Corp., 298 N.W.2d 318 (Iowa 1980). In construing a statute, a court should give it a sensible and logical construction. Hansen v. State, 298 N.W.2d 263 (Iowa 1980); Hamilton v. City of Urbandale, 291 N.W.2d 15 (Iowa 1980). We follow these same rules when attempting to determine legislative intent.

Applying these factors in the present case, we first review the plain language of § 331.427. Subsection (2) of this section is particularly relevant to your question. This paragraph makes clear that the county indemnification fund does not relieve an insurance company from paying a loss insured for by the county, and in addition clearly prohibits an insurance company from seeking reimbursement from the county indemnification fund under the theory of subrogation, the terms of the policy notwithstanding. This section, while not expressly prohibiting the arrangement you describe, does indicate that the legislature intended that claims against the county indemnification fund be paid only when a county has no insurance[1] or the county's insurance limits are exceeded. In other words, if a county does purchase liability insurance for its officers and employees, claims are not paid from the county indemnification fund until the limits of that insurance coverage are reached. This conclusion is further supported by that portion of § 331.427(6) emphasized above. That section provides that if a judgment exceeds the county's insurance limit, a claim against the indemnification fund will be paid to cover the amount above that limit.

In addition, we look to the consequences of purchasing a policy such as the one you describe. We believe that permitting counties to purchase insurance policies with a provision as the one you describe would render that policy virtually meaningless: a judgment against a county would be paid from the indemnification fund, and there would be no reason to invoke the insurance coverage. Under § 331.427 there is no express limitation on the amounts that are paid from the indemnification fund apart from

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[1] As you note in your opinion request, the language of § 613A.7 permits, but does not require, a county to purchase liability insurance. See also 1980 Op.Att'yGen. 30.

the $500.00 deductible.[2] See § 331.427(1). Because there is no such limitation, it arguably may never be necessary for the county to file a claim against the insurance policy assuming the indemnification fund is able to cover the entire amount claimed.

We do not believe the legislature intended the provisions of § 331.427 to lead to such an absurd situation. First, purchase of such a policy by the county would be a wasteful expenditure. Second, while the county would appear to be protected by insurance coverage, in fact the county is relying primarily, if not solely, on the indemnification fund, which is funded by all counties through property taxes, regardless of whether insurance coverage has been purchased by a county. See § 331.427(3). This situation could discourage counties which currently purchase liability insurance from incurring this additional expense and encourage them to rely solely on the indemnification fund. Such reliance is dangerous in that the indemnification fund is not designed to provide complete liability insurance for county officers and employees, but is simply available as a backstop measure. This view is supported by § 331.427(3), which states that the counties are to levy a tax if the balance of the fund falls below $600,000. Maintaining a $600,000 balance is clearly not sufficient to ensure liability insurance coverage for 99 Iowa counties.[3]

Accordingly, we do not believe the legislature intended that counties should purchase liability insurance policies to the type you describe.

II.

In answer to your second question, it is our opinion that there is no requirement that only a final judgment may be paid from the county indemnification fund. We believe § 331.427 makes clear that other types of claims, such as settlement agreements, may be paid from that fund. As set forth above, § 331.427(5)

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[2] There is no express limitation on the amount that must be paid from the fund for a judgment against the county. For claims other than final judgments which exceed $1500.00, the executive council must approve the claim before money is paid from the fund. Section 331.427(5).

[3] We understand that regardless of whether a county has purchased liability insurance, the appeal board has narrowly construed the phrase "acts and omissions" as that phrase is used in § 331.427(5) to include primarily incidents involving "paper shuffling negligence," as opposed to incidents constituting general negligence. Counties should therefore make the decision whether to purchase insurance with this construction in mind.

states that claims arising from an act or omission are to be paid from the fund, "except that payment of a claim, except a final judgment, in excess of fifteen hundred dollars must have the unanimous approval of all members of the state appeal board, the attorney general, and the district court of Polk County." (emphasis added) This section clearly contemplates payment of claims other than final judgments, but claims other than final judgments must secure the specified approval before payment.

You state in your opinion request that § 331.427(6) creates some ambiguity in that it "seems to require a final judgment to trigger a claim against the indemnification fund, but arguably this paragraph can be read as a procedural one, outlining the steps to process collection when a claim has been reduced to final judgment." We agree with your conclusion that § 331.427(6) simply sets forth the requirements for submitting a claim for payment from the indemnification fund but does not, for the reasons set forth above, limit payment from the fund to only those claims that fall within the category of final judgments. § 331.427(5).

In your opinion request you raise an additional question as to whether the "cumbersome consent procedure" of § 331.427(5) could be eliminated if the parties to a settlement agreement "simply stipulate their proposed settlement into a final judgment via [Iowa R.Civ.P.] 226, and proceed to draw directly on the indemnification fund" pursuant to § 331.427(6). Iowa R.Civ.P. 226 provides that:

> Except in actions for dissolution of marriage, separate maintenance and annulment of marriage, the clerk shall forthwith enter any judgment upon which all parties agree in open court, or by writing filed with the clerk; and execution may issue forthwith unless otherwise agreed.

Despite the language of this rule, it is our opinion that parties to a settlement agreement that becomes a final judgment by operation of Iowa R.Civ. P. 226 cannot avoid the procedure of § 331.427(5) for seeking payment from the indemnification fund.

One governing principle of statutory construction is that when a general statutory provision conflicts with a special provision and they cannot be harmonized, the special provision prevails as an exception to the general provision. Iowa Code § 4.9 (1983). The two provisions here in question, § 331.427(5) and Iowa R.Civ. P. 226, can be reconciled to the extent that a settlement agreement may take the form of a final judgment by operation of Rule 226, but that judgment is then treated as a settlement agreement for the purpose of applying § 331.427(5).

If these two provisions are read as conflicting, § 4.9 requires that § 331.427(5), as the more specific provision, would prevail. In either case, it is our opinion that the legislature clearly intended in § 331.427(5) to provide separate procedures for paying claims which were fully litigated before reaching final judgment and claims which were resolved by other avenues, such as settlement agreements. See §§ 613A.9 and 10. The purpose to be served by requiring a county which is a party to a settlement agreement to follow additional procedures in receiving payment of a claim from the indemnification fund would be simply avoided were settlement agreements treated as final judgments for the purpose of § 331.427(5) because of the operation of Rule 226. We do not believe the legislature intended this result.

III.

In answer to your third question, it is our opinion that the defense costs incurred by the county may not be paid from the indemnification fund. Section 613A.8 imposes a general duty on the county to defend county officers and employees against a tort claim arising out of an alleged act or omission occurring within the scope of their employment. However, § 331.427(1) provides that the indemnification fund is to pay "all sums that the [county employee] is legally obligated to pay because of an error or omission in the performance of official duties," except for the first five hundred dollars. A county employee sued under Ch. 613A is not legally obligated to pay defense costs because the duty to defend that employee rests with the county pursuant to § 613A.8. Accordingly, it is our opinion that defense costs cannot be paid from the indemnification fund because they are not costs the employee is legally obligated to pay under § 331.427(1). We believe that this conclusion is further supported by the legislative intent behind creation of the indemnification fund, which we believe was to serve as a secondary form of protection against county liability for large damage awards against county employees not covered, or not fully covered, by insurance. We do not believe the indemnification fund was designed to reimburse the county for every expense incurred by the county in defending county employees' acts or omissions, expenses that are simply not as burdensome to the county as large damage awards would be.

In conclusion, it is our opinion that: (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.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp