CONSTITUTIONAL LAW: FENCING OF RAILROAD RIGHTS OF WAY. U.S. Const. amend. XIV; Iowa Const. art. I, § 6; Iowa Code § 327G.81 (1983). Iowa Code § 327G.81 which places the total responsibility on owners, other than railroads, of railroad rights of way to construct, maintain and repair fencing on either side of the railroad right of way which is not used for agricultural purposes is not a denial of equal protection. (Olson to Black, State Representative, 1/31/84) #84-1-14(L)

The Honorable Dennis H. Black
State Representative
State Capitol
L O C A L

January 31, 1984

Dear Representative Black:

Your letter to this office asks that we review the constitutionality of Iowa Code § 327G. 81 (1983) which states:

> A person, including a state agency or political subdivision of the state, who acquires a railroad right of way after July 1, 1979 for a purpose other than farming has all of the following responsibilities concerning that right of way:
>
> 1. Construction, maintenance and repair of the fence on each side of the property, however, this requirement may be waived by a written agreement with the adjoining landowner.
>
> * * *
>
> This section does not absolve the property owners of other duties and responsibilities that they may be assigned as property owners by law. Subsection 1 does not apply to rights of way located on land within a corporate limits of a city except where the acquired right of way is contiguous to land assessed as agricultural land.

While section 327G.81 imposes several duties on owners of railroad rights of way that are not to be used for agricultural purposes, your question focuses on subsection 1 which compels the owner to construct, maintain and repair one hundred per cent of the fencing on both sides of the right of way. It is your concern that section 327G.81 is unconstitutional as a denial of equal protection of the law.

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The Iowa Constitution contains the equivalent of the federal equal protection clause in Iowa Const. art. I, § 6 which states that "[a]ll laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizens, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." This Iowa constitutional provision places essentially the same limitation upon state legislation as does the equal protection clause of the Fourteenth Amendment, although the Iowa Supreme Court is not bound by the U.S. Supreme Court's construction of an analogous federal constitutional provision. Bierkamp v. Rogers, 293 N.W.2d 577, 579 (Iowa 1980).

The threshhold question is whether the equal protection issue is to be decided under the traditional rational basis test or one of close scrutiny. Absent a suspect class based upon sex, race, national origin or alienage or an infringement of fundamental rights, the test to be applied in determining whether a statute violates the equal protection provision is the rational basis test. Lunday v. Vogelman, 213 N.W.2d 904, 907 (Iowa 1973). The Iowa Supreme Court has said that the rational basis test is as follows:

> The constitutional safeguard [of equal protection] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Rudolph v. Iowa Methodist Medical Ctr., 293 N.W.2d 550, 558, quoting McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S.Ct. 1101 (1966). While there must be a reasonable relationship between the purpose of the legislation and the basis of the classification, Bierkamp v. Rogers, 293 N.W.2d at 580, a legislative classification does not deny equal protection merely because the classification results in some inequality.

Lunday v. Vogelman, 213 N.W.2d at 907. When a statute is challenged on the ground that it denies equal protection, the burden is on the challenger to prove the statutory classification "is wholly irrelevant to the achievement of the state's objective", Rudolph, 293 N.W.2d at 558, and that no state of facts can reasonably be conceived to justify the classification. Lunday v. Vogelman, 213 N.W.2d at 907.

Thus, we turn to the decisive issue: what is the purpose of section 327G.81 and do the classifications bear a rational relationship to the purpose sought to be achieved. The classifications established by section 327G.81 are (1) owners of railroad rights of way used for farming purposes, and (2) all other owners of railroad rights of way, excepting rights of way within city limits which are not contiguous to assessed agricultural land. All owners of railroad rights of way that fit into classification two, above, are one hundred percent responsible for constructing, maintaining and repairing the partition fences on either side of the right of way. Iowa Code § 327G.81(1). It thus appears that the legislature's purpose in enacting section 327G.81 was to protect the owners of the contiguous agricultural land.

A railroad right of way generally constitutes a narrow strip of land that bisects agricultural and other properties. These rights of way create unique fencing problems as the contiguous landowner may own the land abutting both sides of the right of way. Under common law and Iowa Code chapter 113, this abutting landowner would be responsible for maintaining and erecting his share of each fence although the right of way provides him with no beneficial use. This situation was resolved by originally placing the duty to erect and maintain partition fences for railroad rights of way on the railroad. In Stevenson v. Atlantic & Northern Railway Co., 187 Iowa 1318, 1330, 175 N.W. 501 (1919), the court held that the railroad had the obligation to fence the right of way as part of the consideration the railroad paid to obtain the right of way, to serve as partition fences and to prevent collisions between animals and moving trains. Later this duty was codified in Iowa Code section 327G.3. Obviously section 327G.3 had a legitimate purpose in placing the burden of fencing on the railroads, which received the beneficial use of the right of way, in an attempt to protect the agricultural land and animals from the intrusion of the trains through the property.

Today, even though the use of the railroad right of way has changed, the problems of the right of way running

adjacent to or bisecting another's property continue to exist. To meet these problems, the protection afforded to agricultural property owners contiguous to railroad rights of way through past legislation has been extended by placing the burden of fencing on non-railroad owners. Iowa Code § 327G.81. It has prevented gaps in determining who was responsibile for maintaining the partition fence. See 1980 Op.Att'y.Gen. 617, 619.

Turning to the application of the rational basis test to the present classifications, there is no denial of equal protection if any state of facts can reasonably be conceived to justify the legislative classifications. It is our opinion that there exists a rational basis for the classifications in section 327G.81. While contiguous landowners to trackless rights of way no longer have to worry about trains hitting livestock, the potential for animals to escape or for trespassers to traverse onto the agricultural property still exists if the right of way is not fenced properly. Furthermore, owners of railroad rights of way may be absentee owners who are not readily available to cooperate in repairing or constructing a fence with adjoining landowners. This particular situation could result in the persons who own property on both sides of the right of way finding themselves maintaining two fences. Consequently, it may be favorable to place the onus on the right of way owner as part of the consideration for obtaining the right of way and to prevent disputes between abutting landowners.

Therefore, taking into consideration the purpose of the legislation and the reasonable relationship between the classifications established and the need to protect the agricultural landowner in Iowa, we believe that a court would sustain the validity of section 327G.81 if challenged under the equal protection provision.

Sincerely,

Kim M. Olson

KIM M. OLSON
Assistant Attorney General

KMO/nm

INSURANCE; CORPORATIONS: Procedure for placing subscribers on boards of directors of health service corporations. 1983 Iowa Acts, ch. 27, §§1, 2, 12, 15; Iowa Code sections 4.7, 4.8, 504A.15, 504A.18, 514.1 (1983). The nominating committee contemplated by 1983 Iowa Acts, ch. 27, is not the exclusive procedure for nomination of initial subscriber directors of the boards of directors of Iowa Code ch. 514 (1983) corporations; nomination of those directors by a petition of at least fifty subscribers or providers is also permitted. However, those two methods are exclusive. Therefore, existing subscriber directors cannot be considered as being automatically renominated but must be renominated by either the nominating committee or by petition (and be elected) in order to meet the percentage requirements for subscriber directors contained in the Act. Board vacancies need not be filled with subscriber directors once the two-thirds subscriber director requirement has been met; nevertheless, all vacancies occurring prior to the August 1, 1985 deadline for meeting that requirement must be filled with a subscriber director until the requirement is actually met. Neither the percentage requirement for subscriber directors nor the manner in which that requirement is to be implemented under the Act is unconstitutional. (Haskins to Foudree, Commissioner of Insurance, 1/19/84) #84-1-13(L)

The Honorable Bruce W. Foudree
Commissioner of Insurance
Insurance Department of Iowa
LOCAL

January 19, 1984

Dear Commissioner Foudree:

You asked the opinion of our office regarding the procedure for nomination of "subscriber directors" to the boards of directors of health service corporations under Iowa Code ch. 514 (1983).

The purpose of 1983 Iowa Acts, ch. 27 (hereafter referred to as the "Act"), is stated in §1 thereof as follows:

> As a result of rising health care costs and the concern expressed by health care providers, health care users, third-party payers, and the general public, there is an urgent need to abate these rising costs so as to place the costs of health care within reach of all Iowans without affecting quality.

Accordingly, a health data commission composed of the health commissioner, insurance commissioner, and social services commissioner is created to collect and monitor health care cost data. See 1983 Iowa Acts, H.F. 196, §2. The Act also imposes requirements on the composition of the boards of directors of corporations under Iowa Code ch. 514 (1983), specifically hospital service corporations, medical service corporations, dental service corporations, and pharmaceutical and optometric service corporations. See 1983 Iowa Acts, ch. 27, §12; Iowa Code section 514.1(1983). Existing corporations must have at least a majority of "subscribers" on the board of directors by August 1, 1984 and at least two-thirds of the directors must be "subscribers" by August 1, 1985. See 1983 Iowa Acts, ch. 27, §15. New corporations are likewise subject to the two-thirds requirement. Id. In general terms, a "subscriber" is a person who receives health care services from the health service corporation for a fee, while a "provider" is one who contracts with the corporation to provide health care services to "subscribers". "Subscribers" and "providers" are more specifically defined by the Act for board composition purposes, in order to ensure that a subscriber who is employed by or related to a provider could not be considered to be a "subscriber director" for purposes of meeting the composition requirement. See 1983 Iowa Acts, ch. 27, §12.

The Act is silent on the point, but it appears that subscriber directors will actually be elected like other directors, that is, in accordance with the articles and bylaws of the health service corporation. Under these charter documents, election is by "members", who are providers. The Act, however, creates a special procedure for nomination of the subscriber directors. Initial subscriber directors are chosen in accordance with a procedure which is the subject of your question. Once the initial subscriber directors are chosen, those directors make further nominations of subscriber directors. The procedure for nomination of subscriber directors is set forth in §12 of the Act, which states in relevant part as follows:

> The commissioner of insurance shall adopt rules pursuant to chapter 17A to implement the process of the election of subscriber directors of the board of directors of a corporation to ensure the representation of a broad spectrum of subscriber interest on each board. The rules shall provide for an independent subscriber nominating committee to serve until the composition of the board of directors meets the percentage requirements of this section. Once the composition requirements of this section are met, the nominations for subscriber directors shall be made by the subscriber directors of the board. A member of the board of directors of a corporation subject to this chapter shall not serve on the independent subscriber nominating committee. The nominating committee shall consist of subscribers as defined in this section and procedures to permit nomination by a petition of at least fifty subscribers or providers.

[Emphasis added.]

As can be seen, this section creates a nominating process implemented by rules of the commissioner. The rules are to create a nominating committee to make nominations for the initial subscriber directors. The insurance commissioner is thereby implicitly empowered to appoint the members of the nominating committee. The question is whether this committee is the sole source of nominations for subscriber directors, or whether nominations of those directors can also be made by petition. As can be seen, an awkward, but significant, fragment of language is contained in the last sentence of the above quoted section. It refers to "procedures to permit nomination by a petition of fifty subscribers or

providers". Weight must be given this language in interpreting the statute. Courts, in construing statutes, attempt to give meaning and effect to every part of the statute. See State v. Berry, 247 N.W.2d 263, 264 (Iowa 1976). Read as a whole, §12 contemplates that the insurance commissioner's rules shall recognize a two-part nominating process: a nominating committee which submits nominations for election as initial subscriber directors, together with such names as are submitted for nomination by a petition of at least fifty subscribers or providers. It should be noted that, at present, some health service corporations do utilize a nominating petition for their boards of directors. A cardinal principle of statutory construction is that a court, in searching for legislative intent, looks to what the legislature did say, rather than to what it might or should have said. See I.R.App.P. 14(f).

Draft rules of the insurance commissioner attempt to accommodate the reference in the sentence fragment by permitting the nominating committee to receive, for recommendation only, the names of persons submitted by petition. Under this approach, the nominating committee would not be bound to accept the nominations made by petition, nor would those names be independently placed in nomination. But this limited role for the petition process belies and frustrates the language of the sentence fragment: "nomination by a petition" (emphasis added). It appears from the sentence fragment that the petition process is to be more than simply a vehicle for the submission of recommendations for nominations of subscriber director; rather it is to be an independent source of nomination for those directors.

Some "lay" (i.e., subscriber and presumably non-provider affiliated) directors are presently on the boards of health service corporations. Such directors were not, of course, nominated in accordance with the procedure created by §12. The question is whether those existing subscriber directors may be considered as being automatically nominated and placed on the ballot for election as "subscriber directors" without going through the §12 nominating process. Section 15 of the Act is relevant in this connection and states:

> Section 12 of this Act takes effect August 1, 1983 and applies to corporations in existence on the effective date of this Act and to corporations formed on or after the effective date of this Act. However, a corporation in existence on the effective date of this Act shall fill any vacancy or any expired term of a director position with a subscriber director and shall have at least a majority of subscribers on the board of directors of the corporation by August 1, 1984 and at least two-thirds of the board shall be subscribers by August 1, 1985. Provider directors serving on the effective date of this Act may complete their terms of office so long as at least a majority of the board is subscribers by August 1, 1984 and at least two-thirds of the board are subscribers by August 1, 1985. Such director shall not serve a term of more than three years or shall serve the remainder of the term being served, whichever is shorter. Only subscriber directors elected pursuant to the rules adopted by the commissioner of insurance pursuant to section 12 of this Act shall be considered in meeting the percentage requirements of the board composition required in this section.

[Emphasis added.] This section clearly indicates that subscriber directors, in order to be counted toward the percentage requirement thereof, must be chosen in accordance with the procedure created by §12. That is, they must be nominated by the nominating committee or by a nominating petition of at least fifty subscribers or providers. Hence, existing subscriber directors must be renominated as provided by the process set out in §12

(and be elected) if they are to meet the percentage requirement for subscriber directors. Of course, existing subscriber directors could remain on the board without going through this process, but they would not be counted toward the percentage requirement. (For purposes of the board composition requirement, they would be treated as "provider directors".)

Two subsidiary points should be made here. First, it is clear under §15 that, for existing health corporations, once the two-thirds requirement is met, no further subscriber directors need be placed on the board. The first clause of the second sentence of §15 ("a corporation in existence on the effective date of this Act shall fill any vacancy or any expired term of a director position with a subscriber director. . . .") does not mean that a corporation must exceed the two-thirds requirement by appointing a subscriber director to every vacancy, even after the two-thirds requirement has been met. However, it does mean that vacancies occurring before the two-thirds requirement has been met must be filled by appointment of subscriber directors until that requirement has been satisfied. Thus, once the requirement in §15 that fifty percent of the directors be subscribers by August 1, 1984 has been met, vacancies thereafter occurring must be filled with subscriber directors so that the two-thirds requirement is met as soon as possible (and, of course, not later than August 1, 1985). Hence, in the case of an existing corporation between August 1, 1984 and August 1, 1985 which has met the fifty percent requirement, in the event a vacancy arises, the vacancy must be filled by a subscriber director.

As can be seen, the Act grants to a special nominating committee, which is composed of non-corporation members, the right to make nominations to the boards of directors of those corporations. Iowa Code ch. 504A (1983), governing nonprofit corporations generally, on the other hand, grants corporations, including those under Iowa Code ch. 514 (1983), the right to provide by articles of incorporation or bylaws for the procedure

for the election or appointment of directors as well as for the composition of the boards of directors. See Iowa Code §§504A.15, 504A.18. Existing articles and bylaws of health service corporations do not contain the kind of procedures and requirements that are in the Act. We believe that the Act prevails over Iowa Code ch. 504A in this regard. The Act is not only later in date of enactment, but is also the more specific statute as regards the boards of directors of corporations under Iowa Code ch. 514. See Iowa Code §§4.7, 4.8 (1983). Corporations are creatures of statute, see 19 C.J.S. Corporations §935, at 369 (1940); Schmid v. Automobile Underwriters, Inc., 215 Iowa 170, 175, 244 N.W. 729, 731 (1932), and their articles of incorporation cannot override a statute, see Shidler v. All American Life and Financial Corp., 298 N.W.2d 318, 324 (Iowa 1980). The provisions of the Act thus prevail over any inconsistent provisions of the articles or by-laws authorized by Iowa Code ch. 504A.

This result is consitutional, for it is not possible to argue that the Act, either in its requirement of a minimum percentage of subscriber directors or in the manner in which those directors are chosen, violates the contract or due process clauses of the United States Constitution (U.S. Const. art I, §10, Amend. XIV, §1). As indicated, health service corporations are purely creatures of statute. Notwithstanding the contract clause, "[p]rivate corporations, like other private persons, are always presumed to be subject to the legislative power of the state. . . ." Legislative Research Service, Library of Congress, The Constitution of the United States of America: Analysis and Interpretation 393 (1964). Unlike certain corporations which figured prominently in the early case law, see e.g. Trustees of Dartmouth College v. Woodward, 17 U.S. 14 Wheat.) 122 (1819), health service corporations are not specially chartered but were (and are) chartered under a general statute, Iowa Code ch. 514 (1983) (originally enacted as 1939 Iowa Acts, ch. 222). Moreover,

> it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.

Atlantic Coast Line v. Goldsboro, 232 U.S. 548, 558-559, 34 S. Ct. 364, 368, 58 L. Ed. 721, 726 (1914). Here, health service corporations can reasonably be viewed as having a unique role in remedying the problem of ever-increasing health care costs and that accordingly their boards of directors ought to be dominated by subscribers so as to ensure that efforts will be made to contain cost reimbursements to providers. Cf. Final Report: Governor's Commission on Health care Costs 11 (1982) ("Current provider payment or reimbursement mechanisms [of health service corporations] contain incentives that reward inefficient, cost-increasing behavior.") The legislature could also reasonably design the procedure for appointment of subscriber directors so as to ensure that they are independent of the provider members of the health service corporation. As it is, though, the Act leaves provider members with substantial control over the selection of the required subscriber directors by allowing them to nominate the initial subscriber directors by petition and to elect both them and any replacement subscriber directors. Of course, this latter fact only enhances the constitutionality of the Act.

In sum, the nominating committee contemplated by the Act is not the exclusive procedure for nomination of initial subscriber directors of the boards of directors of Iowa Code ch. 514 (1983) corporations; nomination of those directors by a petition of at least fifty

subscribers or providers is also permitted. However, those two methods are exclusive. Therefore, existing subscriber directors cannot be considered as being automatically renominated but must be renominated by either the nominating committee or by petition (and be elected) in order to meet the percentage requirements for subscriber directors contained in the Act. Board vacancies need not be filled with subscriber directors once the two-thirds subscriber director requirement has been met; nevertheless, all vacancies occurring prior to the August 1, 1985 deadline for meeting that requirement must be filled with a subscriber director until the requirement is actually met. Neither the percentage requirement for subscriber directors nor the manner in which that requirement is to be implemented under the Act is unconstitutional.

Very truly yours,

THOMAS J. MILLER
Attorney General of Iowa

Fred M. Haskins

FRED M. HASKINS
Assistant Attorney General

FMH/pm

SCHOOLS: Contracts; Iowa Code Sections 278.1, 279.12 (1983). School districts may enter into contracts which exceed one year in length of performance if the contract is proprietary in nature, as opposed to governmental or legislative in nature. School districts may lease equipment. (Norby to Tyson, Director, Energy Policy Council, and Benton, Superintendent, Department of Public Instruction, 1/17/84) #84-1-12(L)

Mr. Robert F. Tyson
Director
Energy Policy Council
Lucas State Office Building
L O C A L

January 17, 1984

Mr. Robert D. Benton
Superintendent
Department of Public Instruction
Grimes State Office Building
L O C A L

Dear Sirs:

We have received your request for an Attorney General's opinion concerning the ability of local governments, school districts and the State to enter into "shared energy savings contracts." You have described a shared energy savings contract as follows:

> These contracts involve the installation of various energy conservation equipment in public buildings by an energy service company (ESC). The ESC finances the investment, owns the equipment, and is responsible for all maintenance and operating costs of the efficiency improvements. The duration of the agreement ranges from five to ten years depending on the economic benefits resulting from the operation of the equipment. The ESC is compensated in an amount equaling a percentage (commonly 50%) of the energy savings realized in comparison with a base year figure for energy costs. The base figure is controlled for variation in weather, energy consumption (e.g. building additions) and changes in energy cost per unit. In essence, the public facility pays

> its regular utility bills as charged and pays the ESC a percentage of the savings realized in comparison with the base year figure.

Your questions concerning shared energy savings contracts are as follows:

> In regard to all Iowa public buildings, our primary concern is whether a shared savings contract would be considered a lease or a service contract. In regard to school districts, the following concerns have been brought to our attention:
>
> 1. If considered a service contract, from what fund should the payments be made?
>
> 2. While energy shared savings contracts could be executed on a yearly basis, it appears that multi-year contracts would provide a much greater incentive for ESCs to enter the Iowa public sector market. Thus, may multi-year energy shared savings contracts be entered?
>
> 3. If no municipal or governmental funds are used, are any bidding requirements necessary in connection with entering an energy shared savings contract?
>
> 4. What nature of approval is required prior to entering an energy shared savings contract, e.g. vote of board, vote of electorate?

I.

Initially, we note the issue of whether these contracts are considered a "lease" or a "service contract" is of primary importance for federal tax purposes for the contractor. Our office cannot offer an opinion on a federal tax question. We do not believe that this distinction is of any significance concerning the power of local governments to enter shared energy savings contracts. We note, however, that some controversy exists with regard to whether school districts may lease equipment or if purchasing of equipment is required.

A 1962 Attorney General's Opinion appears to have stated the principle that a school district may not lease equipment. 1962 Op.Att'yGen. 331. In this opinion, after acknowledging that

equipment will of necessity be required by a school district, the following is stated in regard to a lease of equipment:

> . . . However, even though the board of directors of a school district has authority to make purchases for a school district which are necessities for a school year, no contract can be executed for new equipment without the express vote of the electors. Manning v. Dist. Twp. of Van Buren, 28 Iowa 332 [1869]. These basic concepts underlying expenditures from the General Fund of a school district are of long standing. Thus, expenditures from the General Fund for equipment contemplates purchase of the item by the school district with funds which are available and not the leasing or renting of equipment. There is one statutory exception to this rule, which is found in § 285.10(3) having to do with schoolbuses.

1962 Op.Att'yGen. at 332. The legislation considered in Manning, 1862 Iowa Acts, ch. 172, section 7(5), empowered the electors to vote a tax for certain purposes including:

> . . . payment of any debts contracted for the erection of schoolhouses, and for procuring district libraries and apparatus for schools.

28 Iowa at 334.

The conclusions of the above cited opinion are based on a school finance system differing substantially from that in effect today. The general fund[1] is no longer created through a vote of the electorate. See Iowa Code § 278.1 (1983) (specific powers of electors). Accordingly, the school board, through § 279.12, not the electorate, now has general authority to manage procurement of equipment and services. See also Iowa Code § 274.7 (1983). Furthermore, pursuant to Iowa Code § 279.30 (1983), the Board may by resolution delegate authority to the secretary[2] to conduct much of a District's normal procurement of goods and services.

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[1] All school funds are credited to one of two funds, the schoolhouse fund and the general fund. Iowa Code § 291.13 (1983).

[2] See Iowa Code § 279.3 (1983).

In addition, we are uncertain why it was assumed that a rental payment can never be considered as being made from funds currently available. Cf. 1978 Op.Att'yGen. 598 (five-year lease not a debt for purposes of Iowa Const., art. VII, § 1).

Having failed to find a prohibition on leasing based on the rationale of 1962 Op.Att'yGen. 331, we next must determine whether entering leases is authorized by § 279.12. It is, of course, true that school districts are limited to those powers expressly or necessarily implied by statute. Silver Lake Consolidated School District v. Parker, 238 Iowa 984, 29 N.W.2d 219 (1947). In conjunction with this principle, we note that several examples of specific authority for school districts to enter leases are provided in the Code. See Iowa Code § 278.1(10) (rental of buildings); § 285.10(3) (purchase or lease of buses and transportation facilities); § 279.12 (rental of schoolrooms); § 279.26 (District may enter leases funded by schoolhouse tax for purposes consistent with the purposes for which the tax was authorized by the voters). While acknowledging the principle of the Silver Lake case, caution should be exercised in construing the authorizations of one provision as limiting those of another. See Bettendorf Education Ass'n v. Bettendorf Community Schools, 262 N.W.2d 550 (Iowa 1978) (provision in § 279.40 for minimum sick leave benefits did not prohibit payment as compensation for accrued unused sick leave as a contract benefit pursuant to § 279.13); 1980 Op.Att'yGen. 840.

Section 279.12 refers to the power to "contract." We believe this must include the power to procure tangible items by purchase or lease and to procure services which are necessary or proper for performing the duties of the board. Accordingly, we believe a school district is not barred from entering a shared energy savings contract even if such a contract is considered a lease of equipment.

II.

In a recent opinion of this office, the ability of a county government to enter multi-year contracts was extensively discussed. Op.Att'yGen. #83-6-4 (issued June 2, 1983). The issue of whether a governing board may enter a multi-year contract arises from a concern that decisions of a present board not bind future boards. As discussed in the above referenced opinion, a board may not bind its successors in matters that are essentially legislative or governmental in nature, as opposed to those matters that are proprietary in nature.[3] We believe the

[3] 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

government/proprietary distinction is applicable to school districts as well as cities and counties. Dodds v. Consolidated School District of Lamont, 263 N.W. 522 (Iowa 1935); Burkhead v. Independent School District of Independence, 107 Iowa 29, 77 N.W. 491 (1898); Dubuque Female College v. District Township of the City of Dubuque, 13 Iowa 555 (1862).

In apparent conflict with the authorities cited above, a 1962 opinion states that ". . . by virtue of long administrative interpretation [of the State Department of Public Instruction] the board of directors of a school district cannot enter into a lease for transportation facilities which would extend beyond the length of the term of the board of directors." 1962 Op.Att'yGen. 129. In contrast, a 1963 opinion sanctions the leasing of school rooms and buses for periods beyond the term of the present board. 1964 Op.Att'yGen. 351. This latter opinion makes reference to the administrative interpretation cited in 1962 Op.Att'yGen. 129 and states that this interpretation is no longer adopted by the Department of Public Instruction.[4] We remain in agreement with this 1963 opinion that no across-the-board prohibition[5] on contracts exceeding one year applies to school districts.

Having stated the above, we further believe that a shared energy savings contract constitutes a proprietary, and not a governmental/legislative, contract. In essence, these contracts

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[3] (cont'd) 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); First National Bank v. City of Emmetsburg, 157 Iowa 555, 138 N.W. 451, 455 (1912). See also McQuillin, 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.

[4] Regardless of the ability in 1962 of the Department of Public Instruction to dictate to local districts that multi-year contracts cannot be entered, we note that no equivalent administrative rule has been enacted by the Department pursuant to Iowa Code ch. 17A. We note, but need not consider in the instant opinion, that adoption of such a rule would raise questions regarding the scope of the Department's and the State Board's rulemaking authority. Cf. Iowa Code §§ 257.9, 257.10 and 257.19 (1983) (powers of the Board and the Department) with § 279.12 (power of local boards to make contracts).

[5] We note, however, that certain contracts are limited expressly by statute for particular time periods, e.g. Iowa Code § 279.13 (teacher contracts); § 279.20 (Superintendent's contract).

involve procuring goods and services in an effort to cut utility costs. Cf. Sampson v. City of Cedar Falls, 231 N.W.2d 609, 613 (Iowa 1975) (City may enter multi-year contract for construction and operation of electrical generating facilities); City of Des Moines v. City of West Des Moines, 30 N.W.2d 500, 507 (Iowa 1948) (cities may enter multi-year contract concerning sewage disposal). We do not believe that an energy service contract rises to the level of an important policy area properly considered legislative in nature. Cf. Burkhead, 27 N.W.2d at 492 (teacher contacts). Accordingly, we believe school districts may enter into multi-year shared energy services contracts.

III.

Your third question is whether any bidding requirements are necessary if no school district funds are necessary in connection with entering a shared energy savings contract. We understand that in framing this question you have assumed that by entering an energy shared savings contract the district will realize a net savings on utilities, and in this sense will not be expending funds in an amount exceeding that which would be spent on utilities in the absence of the shared energy savings contract. Notwithstanding the above proposition, the district will be contracting with a party for the shared energy services contract and, in all likelihood, making a payment to them. Regardless of any net savings realized through reduced utility bills, we believe the shared energy services contract must be subject to whatever requirements would otherwise apply.

School districts are required to use a competitive bidding system in connection with those instances specified in the Code concerning construction and repair of schoolhouses,[6] and in procuring textbooks and school supplies.[7] No requirement for competitive bidding appears to be required in connection with entering a shared energy savings contract.

We add a note of caution, however, due to the fact that a shared energy services contract may constitute a multi-year expenditure of general fund monies. In light of the nature of such a contract, any particular contract should be carefully scrutinized to ensure that it does not amount to a device for

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[6] Iowa Code § 297.7 (1983) (which incorporates the provisions of Iowa Code §§ 23.2 and 23.18 (1983)).

[7] Iowa Code §§ 301.1 and 301.5 - 301.9 (1983).

avoiding a requirement of voter approval, competitive bidding, or a debt limitation. These questions should especially be considered where the contract involves long term leasing of capital equipment items. See Cray v. Howard-Winneshiek Community School District, 260 Iowa 465, 150 N.W.2d 84 (1967); Porter v. Iowa State Board of Public Instruction, 259 Iowa 571, 144 N.W.2d 920 (1966).

IV.

Your last question concerns what nature of approval is required prior to entry of a shared energy savings contract by a school district. The power to enter a shared energy savings contract is not among those which are subject to control through an election, see § 278.1, but appears to fall within the general power of a school board to enter contracts pursuant to § 279.12. Accordingly, a shared energy contract may be entered upon approval by the board.

Sincerely,

STEVEN G. NORBY
Assistant Attorney General

SGN:rcp

LAW ENFORCEMENT: POLICEMEN AND FIREMEN: IOWA LAW ENFORCEMENT: Minimum Training Standards. Iowa Code §80B.11(2) (1983). The law enforcement Academy has authority to set minimum training requirements for all law enforcement officers in service after July 1, 1968. (Hayward to Administrative Rules Review Committee, 1/17/84) #84-1-11(L)

Administrative Rules Review Committee January 17, 1984
c/o Joseph Royce
Statehouse
LOCAL

Dear Committee Members:

You have asked this office for its opinion regarding the meaning of the word "employed" in Iowa Code §80B.11(2) (1983). Specifically you have asked, "Is Iowa Code §80B.11(2) (1983) a grandfather clause exempting peace officers employed prior to July 1, 1968, from the Iowa Law Enforcement Academy's basic training requirements?" We do not believe that this section provides an exemption for officers in place on July 1, 1968.

Iowa Code §80B.11 (1983) states in pertinent part:

> The director of the academy, subject to the approval of the council, shall promulgate rules and regulations 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:
>
> * * * *
>
> 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.
>
> * * * *

(Emphasis added.) The key to answering your question is ascertaining the meaning of the word "employed" in this statute.

Generally, words in statutes are given their meaning in ordinary usage. State v. Jackson, 305 N.W.2d 420 (Iowa 1981), and rules of construction, are applied only when that meaning is ambiguous. Le Mars Mut. Ins. Co. of Iowa v. Bonnecroy, 304 N.W.2d 422 (Iowa 1981). The word "employed" has several potential meanings in this context. It means both "to give employment to" and "to have employment." Black's Law Dictionary, 617 (4th Ed.Rev. 1968). If the former meaning is applied to §80B.11(2), only persons hired after July 1, 1968, must complete academy training. On the other hand, if the latter meaning is applied, all persons serving as law enforcement officers after July 1, 1968, are subject to academy basic training requirements. Because of this inherent ambiguity, it is necessary to employ the rules of statutory construction to derive the appropriate meaning.

The goal of statutory construction is to ascertain the intent of the legislature when it enacted the provisions, and, if possible, to give it effect. State v. Prybil, 211 N.W.2d 308 (Iowa 1973). The general intent of the legislature when it enacted Iowa Code Ch. 80B (1983) is set forth in §80B.2, which states:

> It is the intent of the legislature in creating the academy and the 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.

This express intent of "upgrading law enforcement to professional status" seems inconsistent with an interpretation of Iowa Code §80B.11(2) (1983) which exempts each and every law enforcement officer serving at the time of enactment from minimal training requirements.

Also, §80B.11(2) (1983) refers to training requirements needed "to remain eligible for continued employment." This implies the authority vested in the Iowa Law Enforcement Academy to set minimum training requirements for officers who wish to continue such employment after July 1, 1968, rather than just those hired after that date.

For these reasons, it is our opinion that Iowa Code §80B.11(2) (1983) gives the Iowa Law Enforcement Academy authority to set minimum training standards for law enforcement officers in service after July 1, 1968.

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General

GLH:dkl

CONSERVANCY DISTRICTS: Iowa Code Sections 467D.3, 467D.5, 467D.6, and 467D.8 (1983). Conservancy districts may adopt rules to govern conduct of meetings and elections. Such rules are not subject to review by the State Soil Conservation Committee. (Norby to Gulliford, Director, Iowa Department of Soil Conservation, 1/11/84) #84-1-10(L)

January 11, 1984

Mr. James B. Gulliford
Director
Department of Soil Conservation
Wallace State Office Building
L O C A L

Dear Mr. Gulliford:

We have received your request for an opinion of the Attorney General concerning rulemaking[1] authority of conservancy districts[2] and the supervisory authority of the Department of Soil Conservation over such rulemaking. You are particularly concerned in the area of rules of an administrative nature, such as rules of conduct for district meetings and rules concerning elections of the board of directors.[3]

A conservancy district is initially governed by the state soil conservation committee (committee). Iowa Code § 467D.4 (1983). As the committee is clearly a state agency for purposes of ch. 17A, it would be compelled by §§ 17A.2(7) and 17A.3 to adopt rules concerning board elections through § 17A.4 procedure if it chose to do so prior to the establishment of an elected board pursuant to §§ 467D.4 and 467D.5. Furthermore, any rules adopted by the committee remain in effect upon installment of an elected board. § 467D.8(2).

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[1] Conservancy districts are authorized to adopt "rules," see § 467D.6(1) and (11), 467D.10(2), although the extent of their regulatory authority is very unclear.

[2] Conservancy districts are established by Iowa Code ch. 467D.

[3] Iowa Code § 467D.5 (1983) provides a detailed apportionment system for board elections, but does not specify particular election procedures.

If the conservancy district were an agency subject to ch. 17A, sections 17A.2(7) and 17A.3 would not only authorize them to adopt rules of procedure, but would compel adoption. We do not, however, believe that conservancy districts are agencies for purposes of ch. 17A, despite numerous requirements of review of conservancy district action by state agencies. See §§ 467D.5(1), 467D.6(1), 467D.7, and 467D.13 (1983). A similar result was reached in 1980 Op.Att'yGen. 244, which stated that soil conservation districts are not state agencies for purposes of ch. 25A, the state tort claims act. Soil conservation districts are subject to a degree of supervision by the Department of Soil Conservation, as are conservancy districts, but both are established as political or governmental subdivisions. §§ 467A.3(1) and 467D.3; 1980 Op.Att'yGen. at 255, fn. 1. See also Stanley v. Southwestern Community College Merged Area, 184 N.W.2d 29, 33-34 (Iowa 1971) (a merged area community college not an agency despite supervision by the Department of Public Instruction); Graham v. Worthington, 146 N.W.2d 626, 632-633 (Iowa 1966) (municipalities are not agencies for purposes of Ch. 25A, the tort claims act).

The only express authorization to adopt rules is contained in § 467D.6(1), concerning water resources. We believe, however, that other duties imposed on the conservancy districts call for broad statements of policy or principle, as opposed to discrete or individual decisions, which imply an authorization to adopt rules. See §§ 467D.6(3), 467D.16, and 467D.17 (adoption of a plan to achieve the objectives of the district); § 467D.12 (biennial budget): cf. Iowa Code § 17A.2(7) (definition of rule); Schwartz, Administrative Law, § 56, p. 149.

We do not believe that administrative rules, as defined by your request, are subject to review in any manner by the State Soil Conservation Committee. The numerous instances in which specific actions of a conservancy district are subject to review by an agency implies that the conservancy district may act without such review in organizing its meetings and elections.

Sincerely,

Steven G. Norby

STEVEN G. NORBY
Assistant Attorney General

SGN:rcp

ANTITRUST: Iowa Competition Law; A private coalition whose members include competing hospitals may not compile non-price hospital data and use that data to formulate a health care plan for its community, since such an agreement would be a violation of the antitrust laws which would not be exempt from those laws. If, however, the coalition was formed pursuant to the National Health Planning and Resources Development Act of 1974 such activities would be exempt from the antitrust laws. (Perkins to Lind, State Senator, 1/9/84) #84-1-9(L)

Thomas A. Lind
State Senator, Thirteenth District
111 Frederic Avenue
Waterloo, IA 50701

January 9, 1984

Dear Senator Lind:

You have asked for the opinion of the Attorney General on the question of whether the compilation of various types of hospital data by a private coalition of interested persons in a community for the purpose of formulating health care recommendations for that community would violate the Iowa Competition Law [Iowa Code Chapter 553].[1] The coalition has not been organized under the auspices of the National Health Planning and Resources Development Act of 1974 ("NHPRDA") 42 U.S.C. § 300 1.

After having talked with several people involved in organizing this coalition, I have the following understanding of how it will operate. The coalition will consist of approximately twenty-five to thirty individuals in the community selected from health care providers (hospitals, allopathic and osteopathic physicians, dentists, and other allied health practitioners), health insurance carriers, business, labor, local government and consumers of health services.

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[1] The federal cases cited in this opinion have precedential value for Iowa law by virtue of Iowa Code section 553.2. See also Neyens v. Roth, 326 N.W.2d 294 (Iowa, 1982). It should be noted, however, that this opinion is limited to an analysis of Iowa law. It should not be construed as either an expression of federal law or the position the United States Department of Justice might take on this issue.

The initial task of the coalition will be to gather information from the participating hospitals, which will consist of the following institution-specific data:

1. A brief history of the hospital, with emphasis on the hospital's existing physical plant, i.e., date of construction, factors which determined size and bed complement, utilization of existing areas, any shelled space, etc.

2. Overview of equipment, emphasis being placed on major items -- Radiology, Laboratory, Special Procedures, Critical Care Units, etc.

3. An overview of services; emphasis being placed upon those services which are provided by only one of the hospitals in the area. The overview would include those services which are common to each facility.

4. Utilization statistics for a twelve month period including actual bed count; i.e., the number of beds staffed and operational; overall percentage of occupancy; average number of patients hospitalized on any given day; a breakdown of medical/surgical patients; pediatric patients; obstetrical patients; psychiatric or rehab patients; and nursery patients, both newborns and transfers. Data presented will include outpatient volume, both visits and occasions of service. Included will be Emergency Room, Ambulatory Surgeries and Ambulance. Also sought will be the volume of specialized areas, e.g., dialysis and cardiac and also the patient base by county of origin.

The next step will be to obtain guidelines for the ideal hospital services and equipment necessary to serve that particular community's health care needs. These guidelines may come from the state certificate of need program, medicaid standards, national standards developed by the federal government and standards developed by the American Hospital Association to name a few sources.

The final step will be for the coalition to formulate a plan which, on an institution-specfic basis, makes recommendations as to the services and equipment each hospital in the community should provide. The plan would undoubtedly call for some hospitals to drop some services or equipment and others to expand or add some services or equipment.

Once the recommendations have been formulated and approved by the coalition, the plan would be distributed to the community through the news media and by other means. At this time the coalition's function would substantially end. The coalition would have no power to compel any hospital to conform to the plan and an individual hospital would be free to adopt or reject any or all recommendations that pertain to it.

The proposed coalition activities go beyond the mere solicitation and compilation of data and include the formulation of that data into a recommended plan for the allocation of hospital services and equipment among the community's hospitals.

While the solicitation and dissemination of information from and between competitors may, in some circumstances, cause antitrust liability, it would appear the mere solicitation of the non-price types of data sought from the hospitals by the coalition would raise no antitrust problems in this situation. The data by itself, however, would appear to be essentially worthless, its value being in its use in assessing the resource consumption of health care equipment and services in the community in order to formulate a plan for the recommended allocation of such equipment and services. This use of the data raises potential antitrust problems.

The allocation of services, products, territories or customers (patients) through an agreement by competitors is referred to as a "horizontal allocation" and is per se unlawful under state and federal antitrust laws. United States v. Topco-Associates, Inc., 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). This means that no excuse or justification for the conduct, such as proof that the plan will result in a more efficient allocation of hospital equipment and services which will lower health care costs, thus fulfilling the

intentions of Congress in passing the NHPRDA, will be allowed as a defense for violating the antitrust laws. This is so because the courts will not imply a repeal of the antitrust laws by Congress, especially:

> . . . where the antitrust implications of a business decision have not been considered by a governmental entity.

National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378, 101 S.Ct. 2415, 69 L.Ed.2d 89 (1981).[2]

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[2] In Arizona v. Maricopa County Medical Society, ____ U.S. ____, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982) a group of doctors agreed to fix their fees. The Supreme Court held that this was price fixing, which had long been held to be a per se antitrust violation, and the fact it was engaged in by doctors made no difference. The doctors argued that since they were involved in the health care field with which the antitrust laws had had little experience, the Court should review the actual economic effect and look to the doctors' justifications for their action. The Court rejected this approach, citing a previous case in which they had held:

> . . . '[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.' We also stated that '[t]he elimination of so-called competitive evils [in an industry] is no legal justification' for price fixing agreements. (citations omitted)

But see Hospital Building Co. v. Trustees of Rex Hospital, 691 F.2d 678 (4th Cir. 1982) where the Fourth Circuit Court of Appeals held that health care planning activities of a private coalition which it was alleged, had engaged in traditional per se antitrust violations, including horizontal allocations, should be analyzed under a narrow rule of reason, with the defendants, including a hospital, being given the chance to show as a defense that their actions were:

> . . . undertaken in good faith and . . . their actual and intended effects law within those envisioned by specific federal legislation in place at the time of the challenged activities as desirable consequences of such planning activities.

The coalition members, other than competing hospitals, do not fit within the parameters of the antitrust prohibitions and their actions would not present antitrust problems. The question thus becomes whether the competing hospitals, by participating in a private coalition which formulates a plan for the allocation of those hospitals' services and equipment, have entered into a conspiracy in violation of the antitrust laws, for if they have, whatever laudable motives they may have are simply not relevant.

A conspiracy, within the meaning of the antitrust laws, has been defined as the following:

> Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.

American Tobacco Co. v. United States, 328 U.S. 781, 809-810, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946).

No formal agreement between competitors is necessary to show a conspiracy or an unlawful agreement; it is sufficient to show a tacit or an implied agreement to violate the antitrust laws. Norfolk Monument Co. v. Memorial Gardens, Inc., 394 U.S. 700, 89 S.Ct. 1391, 22 L.Ed.2d 658 (1969), United States v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966), American Tobacco Co. v. United States, supra. Each hospital's antitrust liability will therefore turn on the factual issue of whether it's decision to drop, extend or add services or equipment was a unilateral, independent decision or was the product of an agreement or understanding with its competitors.[3]

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[3] The same result will ensue even if it is necessary for the hospitals to receive certificates of need pursuant to Iowa Code Section 135.63 to implement the plan, since that statute neither contemplates nor needs this type of anticompetitive activity in order to make it work. See e.g. Huron Valley Hospital, Inc. v. City of Pontiac, 666 F.2d 1029 (6th Cir. 1981).

Thus, if each hospital, as a member of the coalition, submits non-price data to the coalition for the purpose of reallocating hospital services and equipment, participates in the decisions as to which services and equipment should be reallocated among all the hospitals on an institution-specfic basis, which leads to the adoption of a final plan for the community, and thereafter attempts to implement the plan, or a part of it, as to its hospital, each such hospital would violate the antitrust laws by having been part of an agreement to allocate hospital services and equipment. This is so because the plan itself is an express agreement, which by their consensus in adopting, the hospitals have presumably agreed to attempt to implement.

If, on the other hand, the community's hospitals simply provided all the necessary data, but took no part in the formulation of the plan, made no agreement, expressed or implied, with each other as to whether they would all attempt to implement the plan, and in fact, made independent judgments to adopt the plan or part of it as it applied to their hospital, there would be no antitrust liability.

These situations represent the polar extremes. A wide range of activity may occur between these which could, to a lesser or greater degree, engender antitrust liability. Suppose, for instance, all the hospitals actively participated in the formulation of the plan but were non-voting members with no voice in whether the plan should finally be approved. The plan is then approved by the voting members. For the purposes of this example let us further suppose that the plan calls for Hospital 1 to drop services A & B and to expand service C, and for Hospital 2 to expand services A & B and drop service C. Both hospitals are making a profit on the services they are to drop. If the hospitals followed the plan, a jury would be justified in inferring from the fact each hospital took an action which was against its economic interest (by dropping a profitable service) that it was done pursuant to an unlawful agreement to allocate those services. Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3rd Cir. 1977) cert. denied 434 U.S. 1086 (1978), Venzie Corp. v. U.S. Mineral Products Co., 521 F.2d 1309 (3rd Cir. 1975).

Because of the number of different fact situations which could occur in the coalition's activities, it is not possible to give a definite opinion on whether any particular activity might violate the antitrust laws other than to, as previously stated, set out the outer boundaries of permissible and impermissible conduct.

This office is sensitive to the growing concerns of rising health care costs and the efforts being made to contain those costs. It was for this reason the NHPRDA was passed. This act recognized that, in certain areas, the health care field did not respond in a normal fashion to competitive conditions and that some actions, normally classed as anticompetitive, must be undertaken in order to help contain these costs. The act sets up health systems agencies (HSA's) whose memberships are to include consumers of health care, providers of health care, and hospitals, among others. 42 U.S.C. § 300 1-1(b)(3)(c).

One responsibility of an HSA is to restrain increases in the cost of health care by providing for the effective development and promotion of health services and by reducing inefficiencies. 42 U.S.C. § 300 1-2(a). In order to fulfill these responsibilities an HSA is directed to study the health resources, including hospitals, in its area. 42 U.S.C. § 300 1-2(b)(1). The HSA is to then compile a health systems plan (HSP) based on the data it collects, which will be submitted to the Secretary of the Department of Health and Human Services. The HSP is to have as its goal the delivery of quality health services at a reasonable cost to members of the community. The HSP shall:

> . . . state the extent to which existing health care facilities are in need of modernization, conversion to other uses, or closure and the extent to which new health care facilities, need to be constructed or acquired. 42 U.S.C. § 300 1(b)(2).

In National Gerimedical, supra., the Supreme Court rejected the motion that the NHPRDA provided a blanket exemption from the antitrust laws by impliedly repealing them as to health care issues. The Court did state, however, in footnote 18 that:

> Nevertheless, because Congress has remained convinced that competition does not operate effectively in some parts of the health care industry . . . we emphasize that our holding

> does not foreclose future claims of antitrust immunity in other factual contexts. Although favoring a reversal in this case, the United States as amicus curiae asserts that "there are some activities that must, by implication, be immune from antitrust attack if HSA's and State Agencies are to exercise their authorized powers" . . . . Where, for example, an HSA has expressly advocated a form of cost-saving cooperation among providers, it may be that antitrust immunity is "necessary to make the [NHPRDA] work". 452 U.S. at 393.

The NHPRDA expressly exempts an HSA from antitrust liability for damages from the antitrust laws when it is acting within the scope of its authority. 42 U.S.C. § 300 k-1.

Since Congress has expressly provided that an HSA (or a sub-area advisory council) which includes hospital personnel as members, should develop an HSP which may call for the reallocation of hospital services or equipment in a community, it must be implied that hospitals who participate in the formulation of the HSP, even though they are competitors, are exempt from the antitrust laws as to that specific activity. In other words, while normally it is unlawful for competing hospitals to agree to allocate services or equipment, when those results are obtained through the formulation of an HSP by an HSA there is an exemption from the antitrust laws for those participating hospitals. Based upon the foregoing reasoning it is the opinion of this office that if the private coalition was to become an HSA, or a sub-area advisory council to an HSA, then the gathering of data and formulation of a health care plan, along the lines proposed by the private coalition, would be exempt from the antitrust laws. See also Trident Neuro-Imagina Lab v. Blue Cross and Blue Shield, (D.C. S.C., 11/2/83) 1982-2 Trade Cases ¶ 69,299-149.

It cannot be too strongly emphasized that participation by a hospital or other health care provider in an HSA or sub-area advisory council does not confer blanket antitrust immunity. As the Supreme Court pointed out in National Gerimedical:

> Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry. 452 U.S. at 389.

For instance, if competing hospitals agree to help implement an HSP by attempting to boycott a hospital which refuses to follow the plan, there could be antitrust liability for those hospitals, since the NHPRDA neither allows nor contemplates such activities to implement those plans. Thus, for the activities to be immune, they must rigorously adhere to those allowed or required by the Act.[4] Anything less than such a strict adherence may cause the activities to fall outside the scope of protection.

These activities, if conducted by an HSA or a sub-area advisory council, will also be exempt from the antitrust laws pursuant to the "state action exemption" first articulated in Parker v. Brown, 317 U.S. 341 (1943) which has been refined by subsequent holdings to immunize from antitrust liability those private anticompetitive activities which are mandated by the state by a "clearly articulated and affirmatively expressed state policy" to regulate or limit competition, which is actively supervised by the state. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S.Ct. 1123, 1135 (1978). See also, California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937 (1980). Since the NHPRDA is implemented through Iowa Code Chapter 135 and Iowa Administrative Code Chapters 470-202 and 203, and is actively supervised by the state, anticompetitive activity contemplated to carry out this state policy would be exempt.

It seems appropriate to conclude this opinion with this oft-cited quote of Mr. Justice Brandeis of the United States Supreme Court:

> I have been asked many times in regard to particular practices or agreements as to whether they were legal or illegal under the Sherman law. One

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[4] 42 U.S.C.300 k-1. See also Huron Valley Hospital, Inc., v. City of Pontiac, supra. where the Sixth Circuit Court of Appeals held that a plaintiff's allegations that members of an HSA, including a hospital, had conspired to keep the plaintiff from receiving a certificate of need to build a competing hospital, by engaging in various activities outside the scope of the NHPRDA, were sufficient to allege a possible antitrust violation which would not be protected by the NHPRDA.

gentleman said to me, "We do not know where we can go." To which I replied, "I think your lawyers or anyone else can tell you where a fairly safe course lies. If you are walking along a precipice no human being can tell you how near you can go to that precipice without falling over, because you may stumble on a loose stone, you may slip, and go over; but anyone can tell you where you can walk perfectly safely within convenient distance of that precipice." The difficulty which men have felt generally in regard to the Sherman law has been rather that they have wanted to go the limit than that they have wanted to go safely. (Senate Committee on Interstate Commerce, Hearings on Control of Corporations, Persons and Firms Engaged in Interstate Commerce, 62d Cong., p. 1161 (1911).

Sincerely yours,

JOHN R. PERKINS
Assistant Attorney General
Antitrust Division
Hoover State Office Building
Second Floor
Des Moines, IA 50319

JRP/mel

BEER AND LIQUOR CONTROL: Class "B" Permit. Iowa Code §§ 123.2 and 123.122 (1983). The issue of whether the charging of an admission fee constitutes, in whole or in part, the "sale" of beer is a factual question to be determined on a case-by-case basis. A factor to be considered is whether services other than the provision of beer are covered in the admission fee. If it is determined that the admission fee constitutes the "sale" of beer, then a Class "B" permit is required. (Walding to Bauch, Blackhawk County Attorney, 1/9/84) #84-1-8(L)

January 9, 1984

The Honorable James C. Bauch
Blackhawk County Attorney
309 Courthouse Building
Waterloo, Iowa 50703

Dear Mr. Bauch:

We are in receipt of your request for an Attorney General's opinion regarding the licensing provisions of Iowa Code Chapter 123 (1983), the Iowa Beer and Liquor Control Act. Specifically, you ask:

> Do private persons who dispense large quantities of keg beer at a party which is advertised to the general public in advance; which is located on private residential property; which is attended by up to several hundred people; for which admission tickets are sold; and at which beer is then given away without additional charge; all without obtaining a retail beer permit, violate the provisions of Sections 123.2 and/or 123.122, Code of Iowa, 1983, which prohibits sale of beer at retail without a license?

You relate that the question arises as a result of "large beer keg parties" conducted by university students.

The issue posed was examined in a prior opinion of our office. In 1974 Op.Att'y.Gen. 728, we opined that a beer permit was not required for a private citizen or an organization to give away beer at functions where an admission fee is charged or a donation is requested. A dual interpretation of that opinion is possible. The opinion could be construed to mean that the beer is "given away" unless further consideration is paid beyond the admission fee. Alternatively, it could be interpreted to mean that the issue of whether the charging of an admission fee constitutes, in whole or in part, the "sale" of beer is a factual question to be determined on a case-by-case basis. We adopt the latter as the correct interpretation.

The 1974 opinion commences with the premise that an activity, if not expressly prohibited, is legal. Iowa Code § 123.2 (1983), however, states that unless expressly permitted by Ch. 123, traffic in beer is prohibited. The state possesses the authority to regulate the manufacture and sale of intoxicating liquors, regarded as being "dangerous to the public health, safety, and morals," under its police power. 1964 Op.Att'y.Gen. 248. Under Iowa Code § 123.122 (1983) no person may "sell" beer without an applicable license. For an event where beer will be consumed at the location it is sold, a class "B" permit is required. Iowa Code § 123.131 (1983). The operative word in all these provisions is "sell." It is not a defined term, so it has its ordinary meaning in common usage. A legal dictionary defines "sell" to mean "to dispose of by sale." Black's Law Dictionary, 1525 (4th rev. ed. 1969). "Sale" is in turn defined to mean "a contract between two parties, called, respectively, the 'seller' (or vendor) and the 'buyer' (or purchaser), by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and possession of property." Id. at 1503. Of course, a resulting profit or loss is not determinative of whether a transaction constitutes a "sale."

Accordingly, it is our judgment that the issue of whether the charging of an admission fee constitutes, in whole or in part, the "sale" of beer is a factual question to be determined on a case-by-case basis. A factor to be considered is whether services other than the provision of beer are covered in the admission fee. If it is determined that the admission fee constitutes the "sale" of beer, then a Class "B" permit is required.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:cjc

CEMETERIES: Perpetual care fund. Iowa Code section 566A.3 (1983). Income from a perpetual care and maintenance fund established under § 566A.3 may not be used for capital improvements. (Peters to Herrig, Dubuque County Attorney, 1/9/84) #84-1-7(L)

January 9, 1984

Mr. James Herrig
Dubuque County Attorney
555 Fischer Building
Dubuque, Iowa 52001

Dear Mr. Herrig:

You have requested an opinion on whether a cemetery may use the income from a perpetual care and maintenance fund established under Iowa Code section 566A.3 (1983) for capital improvements, for example, installation of a watering system and replacement of irreparable roads. I conclude that the income from the fund may not be used for capital improvements.

Section 566A.3 provides:

> Guarantee fund. Any such organization subject to the provisions of this chapter which is organized or commences business in the state of Iowa after July 4, 1953 and desires to operate as a perpetual care cemetery shall, before selling or disposing of any interment space or lots, establish a minimum perpetual care and maintenance guarantee fund of twenty-five thousand dollars in cash. The perpetual care and maintenance guarantee fund shall be permanently set aside in trust to be administered under the jurisdiction of the district court of the county wherein the cemetery is located. The district court so having jurisdiction shall have full jurisdiction over the approval of trustees, reports and accounting of trustees, amount of surety bond required, and investment of funds. Only the income from such fund shall

> be used for the care and maintenance of the cemetery for which it was established.
>
> ....
>
> The initial perpetual care fund established for any cemetery shall remain in an irrevocable trust fund until such time as this fund has reached fifty thousand dollars, when it may be withdrawn at the rate of one thousand dollars from the original twenty-five thousand dollars for each additional three thousand dollars added to the fund, until all of the twenty-five thousand dollars has been withdrawn.

The legislature decided that only the income from the perpetual care fund may be used "for the care and maintenance of the cemetery." Unfortunately, the legislature did not define the words "care and maintenance."

In determining the meaning of statutes, the goal is to ascertain and give effect to the intention of the legislature. Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530, 532 (Iowa 1981). Unless the legislature otherwise defines terms, they are given their ordinary meaning. State v. White, 319 N.W.2d 213, 215 (1982).

The purpose of a perpetual care fund is to assure adequate income for the upkeep and maintenance of a cemetery, particularly after all lots are sold. In re Trust of Highland Perpetual Maintenance Society, Inc., 254 Iowa 164, 171, 117 N.W.2d 57, 61 (1962).

The words care and maintenance ordinarily mean to protect, preserve and keep up. The care and maintenance of a cemetery includes cutting and trimming the lawn, shrubs and trees, maintaining burial lots and markers, keeping drains, water lines, roads, fences, buildings and other structures in repair, hiring employees to do this work and obtaining and maintaining equipment to do such tasks. If the legislature had intended to allow the income from the perpetual care fund to be used for capital improvements, it could have used language to clearly allow for such use.

The last paragraph of § 566A.3 allows a cemetery to withdraw the original twenty-five thousand dollar perpetual care fund under certain circumstances. The legislature did not put any restrictions on the use of the twenty-five thousand dollars after it is withdrawn, and therefore it could be used for capital improvements.

Very truly yours,

JAMES M. PETERS
Assistant Attorney General

/mr

TOWNSHIPS; Fire Protection Service; Anticipatory Bonds; Ch. 28E Agreements. Iowa Code Ch. 28E (1983); Ch. 345; §§ 28E.5; 331.441(2)(b)(5); 331.443; 359.42; 359.43; 359.45. A bond election is generally not required when a township requests the supervisors to issue anticipatory bonds for fire protection service pursuant to § 359.45. In addition, a township may use revenues from these bonds to contribute to a Ch. 28E agreement for provision of fire protection services. (Weeg to Huffman, Pocahontas County Attorney, 1/4/84) #84-1-4(L)

January 4, 1984

Mr. H. Dale Huffman
Pocahontas County Attorney
15 N.W. 3rd Avenue
P.O. Box 35
Pocahontas, Iowa 50574

Dear Mr. Huffman:

You have requested an opinion of the Attorney General on two questions concerning a township's authority with regard to fire protection service. You state that a township in your county has entered into a Ch. 28E agreement with a city for the provision of fire protection. The township wishes to contribute to the cost of purchasing a new fire station to be located in and owned by the city, but due to insufficient levies at the present time the township intends to direct the board of supervisors to issue general obligation bonds pursuant to Iowa Code § 359.45 (1983). You first ask whether a bond election would be required in these circumstances. You also ask whether the revenue from the bond sales may be used to contribute to the construction cost of a fire station that will belong to the city rather than to the township.

First, it is our opinion a bond election will generally not be required. Section 359.45 authorizes the township to anticipate the collection of taxes authorized by § 359.43 for provision of township fire protection and ambulance service by directing the supervisors to issue bonds "under sections 331.441 to 331.449 relating to essential county purpose bonds . . ." (emphasis added). Section 331.441(2)(b) enumerates the projects which constitute "essential county purposes." Subsection 5 of this provision includes the following within that definition:

> Public buildings, including the site or grounds of, and the erection, equipment, remodeling, or reconstruction of, and

> additions or extensions to the buildings, and including the provision and maintenance of juvenile detention or shelter care facilities, when the cost does not exceed the limits stated in section 345.1.[1], [2]

Section 331.443 governs issuance of bonds for essential county purposes. Under this section, a bond election is not required; instead, the supervisors are required to give notice of the bond proposal and to receive and consider oral and written objections to that proposal from township residents at a meeting of the supervisors. § 331.443(2). This section further authorizes an appeal to the district court if a township resident objects to the supervisors' action on the bond proposal. Id.

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[1] Section 345.1 generally requires the county to submit the question of whether to spend county money for designated purposes to the voters. Application of this requirement depends on a number of factors, including the amount and source of the money to be spent and the size of the county. See Ch. 345. However, § 345.1 expressly provides that it does not apply "if bonds are to be issued to pay all or part of the expenditure, and the county complies with [§§ 331.441-331.471] . . ." Accordingly, § 345.1 is not applicable in the present case if the township issues bonds for the township's portion of the expense of constructing the fire station in accordance with the designated provisions.

[2] We note that a question may arise if the cost of the project in question exceeds the limits of § 345. We have already concluded that the referendum requirement of § 345.1 would not be applicable in this case. See n. 1, supra. However, if the project cost exceeds the limits set forth in § 345.1, the project may no longer be considered an "essential county purpose" under § 331.441(2)(b)(5), but a "general county purpose" under § 331.441(2)(c)(9). In the latter case, § 331.442 may apply rather than § 331.443. Section 331.422 would require the township to hold a special election to vote on the question of issuing the bonds.

It is unclear whether the legislature in § 359.45 intended by its reference to "§§ 331.441-331.449 relating to essential county purpose bonds" that § 331.441(2)(b)(5) relating to general county purpose bonds apply in the event the project cost exceeds the § 345.1 limits, or whether the legislature intended the provisions concerning essential county purpose bonds to apply in any event. Although you have not asked us to address this specific question, we believe this issue should be considered if relevant to your situation.

Second, it is our opinion that revenue from such a bond sale may be used to contribute to the cost of construction of a fire station that will belong to the city but will be used to provide fire protection service to the township pursuant to a Ch. 28E agreement between the township and the city. First, § 359.42 expressly authorizes a township to "contract with any public or private agency under chapter 28E for the purpose of providing fire protection service . . . under this section." A township is further authorized to levy taxes, § 359.43, or request issuance of anticipatory bonds, § 359.45, in order to exercise the powers granted to it by § 359.42. Accordingly, the township may use tax levies or bond revenues to contribute to a Ch. 28E agreement for the provision of fire protection services.

However, we believe one consideration should be noted. Section 28E.5 requires that a Ch. 28E agreement specify, inter alia, the duration of the agreement, § 28E.5(1), and the method to be used in partially or completely terminating the agreement and disposing of property upon such termination, § 28E.5(5). In light of the fact that township monies will be used for construction of a fire station that will be owned entirely by the city, we believe the township would be well-advised to consider an amendment to the agreement to take this fact into account and to protect the township's investment to a greater degree than perhaps it is now protected.

In conclusion, it is our opinion that a bond election is generally not required when a township requests the supervisors to issue anticipatory bonds for fire protection service pursuant to § 359.45. In addition, a township may use revenues from these bonds to contribute to a Ch. 28E agreement for provision of fire protection services.

Sincerely,

THERESA O'CONNELL WEG
Assistant Attorney General

TOW:rcp

CONFIDENTIALITY: COMMUNITY MENTAL HEALTH CENTER RECORDS: Iowa Code §§ 230A.16, 230A.17, 230A.18, 498 I.A.C. §§ 33.4(1)(h) and (i). Iowa Code §§ 225C.4(1)(r), 225C.6(1)(d), 230A.16 - 230A.18, and 498 I.A.C. §§ 33.4 (1)(h) and (i), authorize Division accreditation auditors' access to Community Mental Health Center patient records. Those provisions do not operate to make Center records available to the public. Rather, they merely define a right of access by Division staff while maintaining patient confidentiality. (Williams to Reagen, 1/3/84) #84-1-2(L)

Commissioner Michael V. Reagen, Ph.D. January 3, 1984
Iowa Department of Human Services
Fifth Floor
Hoover State Office Building
L O C A L

Dear Commissioner Reagen:

You ask whether the Division of Mental Health, Mental Retardation, and Developmental Disabilities Division of the Iowa Department of Human Services (Division) has the statutory authority to require Community Mental Health Centers to open their records to Division accreditation auditors. Before examining opposing concerns, the statutory and regulatory basis for such a requirement should be examined.

As required by Iowa Code §§ 225C.6(1)(d) and 230A.16, the Mental Health and Mental Retardation Commission establishes accreditation standards for Community Mental Health Centers. The Director of the Division also is required to "[r]ecommend and enforce minimum accreditation standards for the maintenance and operation of community mental health centers under section 230A.16". Iowa code § 225C.4(1)(r). Iowa Code § 230A.17 also places the task of auditing the Centers for accreditation on the Director and Iowa Code § 230A.18 clarifies § 230A.17 by affirmatively stating that the Director's review should determine whether "the Center fails to meet any of the standards established pursuant to section 230A.16, subsection 1 ...." Iowa Code § 230A.18.

The sole sanction available to the Director is a denial of accreditation. Counties may only expend funds from the general allocation of the state mental health and mental retardation services fund at licensed or accredited centers. Iowa Code § 225C.10(2)(a)(1). Thus, by failing to comply with

accreditation standards, centers jeopardize the eligibility of their client-counties for such funds. Arguably, it would also appear that such a failure would constitute grounds for withdrawal of county support.

As required, the Commission promulgated standards in the form of rules. One such rule, 498 I.A.C. § 33.4(1)(h), specifically delineates the minimum required contents of each patient record. These record keeping standards clearly serve the purpose "of ensuring that each center ... furnishes high quality mental health services within a framework of accountability to the community it serves." Iowa Code § 230A.16. Clearly, those standards operate well within the statutory framework they were created to implement by ensuring accountability for, as well as the quality of, services.

A rule is held to be within an agency's power to adopt when a rational agency could conclude that the rule is within its delegated authority. Hiserote Homes, Inc. v. Riedmann, 277 N.W.2d 911 (Iowa 1979); Community School District v. Civil Rights Commission, 277 N.W.2d 907 (Iowa 1979). Because the record keeping rules serve the purpose stated in the statute, the Division can reasonably conclude that adoption of such record keeping standards is within its delegated authority. Accordingly, those rules are within the agency's power to adopt pursuant to Iowa Code §§ 17A.4 et. seq. Once duly promulgated, the record keeping standards acquired the force and effect of a legislated statute. Community School District v. Civil Rights Commission, 227 N.W.2d 907, 909 (Iowa 1979); Young Plumbing & Heating Co. v. Natural Resources Council, 276 N.W.2d 377, 382 (Iowa 1979).

Quite obviously, in order to fulfill his duty to review and evaluate Centers' compliance with the record keeping requirements rules, the Director or his designee must have access to Center records. 498 I.A.C. § 33.4(1)(h)(1) requires each service record to "[c]ontain all necessary consumer identifying information." Id. In order to enforce that standard pursuant to the mandate of Iowa Code § 225C.4(1)(r), Division auditors must be able to verify that the record contains the requisite identifying information. Thus, we conclude that Division auditors have statutory authority to review service records that contain identifying information.

This right of access is supported by the standards/rules which require Centers to maintain minimum "written policies and procedures which assure the confidentiality of service records...." 498 I.A.C. § 33.4(1)(i). Given the sensitive nature of mental health services, these confidentiality standards

clearly promote "high quality mental health services within a framework of accountability...." Iowa Code § 230A.16. Thus, like the record keeping rules, the Division may safely assume that these rules are within their power to adopt, and have the force of law.

The confidentiality rules list the minimum elements required to be in each Center's policy, specifically providing that "[e]xceptions to these policies will be permitted only for disclosures provided by law, bona fide medical and psychological emergencies and center accreditation purposes." 498 I.A.C. § 33.4(1)(i)(3). (Emphasis supplied.) Additionally, the rules require the Centers to establish a procedure to be followed when Division auditors ask to see service records. They require each Center to obtain a signed statement from each auditor attesting that the auditor will maintain the patients' confidentiality. 498 I.A.C. § 33.4(1)(i)(4).

It must be recognized that the accreditation provisions do not authorize the "[r]elease of information which would identify an individual who is receiving or has received treatment as a community mental health center...." Iowa Code § 230A.13 (Emphasis supplied). Rather, those provisions define a right of access to patient records by Division auditors for accreditation purposes. In this context, the Division auditors may be likened to Center staff members, for both have access to patient records and are required to maintain the patients' confidentiality.

The ethical restraints placed upon Center staff members by their professions do not conflict with the auditors' right of access. Confidentiality is maintained. Additionally, this type of accreditation audit is not substantively different from a Medicaid program audit, or a Joint Commission on Accreditation of Hospitals audit. In both the latter situations, ethical considerations do not interfere with the auditor's right of access. Thus, those considerations do not preclude auditor access in the accreditation context.

This same analysis applies to a patient consent requirement. As confidentiality is maintained, the patient's interest in privacy is not infringed upon. Absent such infringement the patient has no legal interest to waive. Further, a patient consent limitation could be used to thwart enforcement of the accreditation standards. That result clearly would negate the legislature's intent in creating an accrediting agency. Statutes "shall be liberally construed with a view to promote [their] objects...." Iowa Code § 4.2. Accordingly, we must conclude that Division auditors, like Center staff, do not need patient consent to review service records.

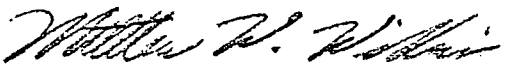
A final concern relates to the effect of Iowa Code § 230A.13 on the auditors' right of access. Section 230A.13 provides that "[r]elease of information which would identify an individual who is receiving or has received treatment at a community mental health center shall not be made a condition of support of that center by any county under this section." Id. (Emphasis supplied)

As noted above, the "release" of information authorized by the accreditation provisions is not a "release" of information as contemplated by § 230A.13. While the former merely refers to auditor access, the latter speaks to public examination within the meaning of Iowa Code § 68A.1 et seq. Because auditors and center staff members maintain patient confidentiality, the provisions of § 230A.13 do not apply to the Division's ability to deny accreditation for failure to allow access to service records.

Further, § 230A.13 clearly addresses the claim procedure required by Chapter 331 of the Iowa Code. The import of § 230A.13 is to prevent counties from requiring centers to submit identified bills, which would then become public records. In this context, § 230A.13 does not apply to accreditation auditors who maintain patient confidentiality.

In sum, Iowa Code §§ 225C.4(1)(R), 225C.10(2)(a)(1), 230A.16, 230A.17, 230A.18, 770 I.A.C. §§ 33.4(1)(h)and (i) authorize Division accreditation auditors access to Community Mental Health Center patient records, upon penalty of denial of accreditation. Those provisions do not make Center records accessible to the public. Nor do those provisions authorize any direct sanction greater than denial of accreditation.

Sincerely,



Matthew W. Williams
Assistant Attorney General

MWW/jaa

EMPLOYMENT; Judicial Districts Departments of Community Corrections; Parole and Work Release Officers; Department of Corrections: SF 464 (Ch. 96 Acts of The 70th GA, 1983 Session); Chapter 905, Chapter 20, The Code.

Legislative transfer of parole and work-release employees to the judicial departments of community corrections does not involve a reduction-in-force and those procedures but an administrative reorganization; employees transferred retain accrued vacation, sick leave, and seniority but terms and conditions of employment will thereafter be determined by judicial district schedules; the transfer of state-owned office equipment and outstanding lease obligations may be dealt with on a 28E agreement. (Allen to Farrier, Department of Corrections, 1/4/84) #84-1-3(L)

Mr. Hal Farrier, Director
Department of Corrections
Jewett Building
L O C A L

January 4, 1984

Dear Mr. Farrier:

You have requested an opinion of the Attorney General on several issues arising from the transfer of State employed personnel to the employment of Judicial District Departments of Correctional Services. These personnel are employed in parole and work release services and on July 1, 1984, those services and positions will be transferred to the judicial districts as provided in Senate File 464 (Ch. 96, Acts of the 70th G.A., 1983 Session).

S.F. 464, which created the new Department of Corrections continued the responsibility for the accreditation and funding functions of the community based corrections program outlined in Ch. 905, The Code, with the newly created Department which functions had been performed by the division of corrections within the Department of Social Services. S.F. 464 further provided that the Department of Corrections would continue to perform the functions of the parole and work release programs as it had as a division of the Department, until no later than July 1, 1984. On that date, the following language of S.F. 464 becomes effective, from which language your questions arise.

> The Iowa Department of Corrections in consultation with the Iowa Merit Employment Department and subject to approval by the Executive Council, shall determine which positions of the Iowa Department of Corrections shall be transferred to the Judicial District Departments when the transfer of parole and work

> release programs and responsibilities is made pursuant to this act.
>
> Employees of the Iowa Department of Corrections who become employees of Judicial District Departments of Correctional Services because of the transfer of parole and work release programs and responsibilities to the judicial district departments, shall be credited with all the seniority, vacation and sick leave that had accrued to the employee at the time of the employee's transfer to the District Department.

S.F. 464 also amended Ch. 905 to include parole and work release functions within the responsibility of the judicial district departments but did not amend that chapter in any way significant to a reconsideration of the position taken by the division of corrections and now the Department that the Judicial District Departments are hybrid entities in government. The districts are controlled by a board of directors appointed by and administrative functions are provided by county government within the judicial district. For purposes of Ch. 20 (collective bargaining), the employees of the judicial district are State employees but are State employees for that purpose only. For all other purposes, the employees are employees of the individual district and the district departments are not State employers within the meaning of The Code, nor are the employees State employees. At the present time, judicial district employees are not under the Merit system despite the lack of an exclusion in Ch. 19A. Accordingly, the legislature in S.F. 464 has mandated an organizational change that removes certain employees from State government. Your questions address the effects of this removal from the protections and responsibilities of State employment on the individual employees transferred.

It is important to note initially the distinction between "positions" and "employees" within the cited portion of the statute. Transfer of positions is to be made by the Department in consultation with Iowa Merit and subject to the approval of the Executive Council. Thereafter, the employees who become employees because of the transfer of the positions shall be "credited" with certain and specific rights reserved to them by operation of the statute. The rules of statutory construction require that the entire statute must be construed as a whole and must, to the maximum extent possible, be given effect in its entirety. We must presume that the legislature intended a smooth

and effective transition with no diminution of services by the respective agencies as a result of the transition. Further, we presume that the legislature would do nothing in derogation of the employment status, position, or rights of incumbent employees, and that the language chosen is in furtherance of that legislative no-harm policy.

2. Must the Department of Corrections go through a "reduction in force" layoff to transfer parole and work release facility employees or does S.F. 464 make that unnecessary?

Although listed as question number 2, this is a threshold inquiry, the result of which is that a reduction in force procedure would have fiscal ramifications that a transfer would not, and would most likely result in bumping and layoff of other staff in some instances to avoid the reduction in force. Legislative intent is useful in determining the effect of statutory language and significantly, the manifest intent of the legislature will prevail over the literal import of the words used. Spencer v. City of Spencer, 92 N.W.2d 633 (1958). However, rules of statutory construction may be resorted to only when the terms of the statute are ambiguous. Precise and unambiguous language is given its plain and rational meaning as used in conjunction with the subject considered. It is not for the court to speculate as to the wording used in the statute. The court must look to what the legislature said rather than what it should or might have said. LaMars Mutual Insurance Company of Iowa v. Bonneroy, 304 N.W.2d 422 (Iowa 1981).

The statute is unambiguous. The act makes no mention of pre-empting contract language or Merit rules and therefore none should be inferred. The language itself must be examined and that for which the statute fails to provide, is not authorized. The language chosen by the legislature clearly states that a transfer is to occur pursuant to organizational change.

The language in question was added as an amendment to S.F. 464 by the House and is clearly meant to not harm those employees transferred by crediting accrued benefits. It is our view this no-harm policy may not be construed to grant these transferred employees credit for certain employee benefits and also grant layoff benefits and rights. Additionally, it is significant that the legislature chose not to follow the language used regarding the transition from Human Services to Corrections, wherein "a special procedure for the period beginning July 1, 1983, and

ending September 1, 1983" was created for consideration of applications from persons and further provided for the "termination" of employees whose duty assignments are transferred or reassigned. The legislature clearly stated its intent and presumption that the employees of the Department of Corrections would be transferred to the judicial district with the functions not in a reorganizational layoff, but rather as an administrative adjustment. The legislature carefully detailed that special procedures would initially be used to staff the Department of Corrections and recognized that some employees would be displaced. Neither of these concerns are involved or mentioned in the Judicial District Department transfer. Accordingly, the legislature did not perceive the statute to involve any displacement or layoff.

An organizational change by the legislature will always supersede contract language and Merit rules. Iowa Code § 20.7(9), 1983, provides that a public employer shall have the exclusive power, duty and right to:

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

The Department of Corrections is obligated to transfer certain functions and to credit the employees affected with certain benefits and to do nothing more. The employer, as that term is defined in Ch. 20, has not made this change and therefore the contract language has been superseded. Iowa Code § 20.28 provides that if a Code section and a contract term are inconsistent, the Code prevails. The appointing authority has not determined to layoff employees and therefore relevant rules do not apply. The express intent of the legislature for an organizational restructuring leads us to the conclusion that a layoff is not contemplated by the legislature and reduction in force procedures are unnecessary.

> Nos. 1, 3, 4: State employees will take accrued vacation and sick leave with them when transferred, will they they also be guaranteed existing salary and future vacation and sick leave accrual according to State employment schedules?

Employees so transferred "shall be credited with all the seniority, vacation and sick leave that had accrued to the employee at the time of the transfer...". The plain and

unambiguous language leads us to the conclusion that accrual of vacation and sick leave subsequent to the transfer shall be according to Judicial District Department employment rules. It is to be noted that those employment rules will be or have been the subject of collective bargaining pursuant to Iowa Code Ch. 20. These "new" employees of the judicial districts will thereafter have the terms and conditions of their employment, other than those specific credits guaranteed to them by the legislature, determined by the existing employment contract.

Similarly, the statute makes no provision for salary retention and on first impression, your question would seem to be answered in the negative. These "new" employees subsequent to the transfer will be subject to salary schedules in all respects identical to their co-employees in the judicial district departments. The legislature, had it elected to do so, could have included in the enumeration of those rights reserved to these transferred employees, existing salary. The legislature chose not to do so.

However, this apparent harm to these employees so transferred can in most instances be addressed by a political solution. Ch. 905 establishing the Judicial District Departments was not changed in its basic organizational structure by the amendments thereto contained in S.F. 464. Although the Judicial District Departments are separate and independent from State government, their hybrid nature nevertheless allows the Department of Corrections to approve the "range ... of compensation of ... the Director and the District Department staff". (Iowa Code § 905.4(2)) The budget of the District Department is submitted to the State Department of Corrections in accordance with the provisions of Ch. 8, and thereafter incorporated in the budget of the State Department of Corrections to be processed as prescribed by the uniform budget accounting and administrative procedures established by the State Comptroller. (Iowa Code § 905.5(1)) The power over the purse strings remains with the State Department of Corrections wherein no funds may be allocated until this Judicial District Department has been reviewed. (Iowa Code § 905.8)

The harm to any specific individual employee implied by your question might occur. However, the process of identification through cooperation and consultation and the transfer of specific employees should seek to avoid that result to the extent that such a result would result in a decrease in administrative efficiency and programmatic response. The legislature not only intended but presumed a cooperative and orderly transition and made no provision for its non-attainment. The concerns of the employees that their status with respect to salary remain

unchanged subsequent to the transfer is certainly within the power of the Department of Corrections to protect pursuant to Ch. 20 and the fiscal review process contemplated in Ch. 905.

5. Do state employees transferring with seniority as prescribed in S.F. 464, also transfer their "position level" as well as length of employment?

It is the position within the Department of Corrections which is transferred to the Judicial District Departments. Subsequent to that transfer, the employee in that position retains seniority rights. Seniority, as a term of art, is customarily defined by contract. Without the benefit of the particular contracts applicable in the respective judicial districts in this state, it is ordinary and customary that seniority as defined does not include position level, but is the method by which position level is determined during contest. It is more than likely that transfer with "credited seniority" will not guarantee position level subsequent to the transfer. However, the relationship between the State Department of Corrections and the Judicial District Departments described in Ch. 905 and examined above, provide the mechanism by which the Department of Corrections can, through the process of negotiation and cooperation, protect its to-be transferred employees.

6 & 7. What effect will the transfer of functions have on state owned office equipment and outstanding lease obligations?

The statute is silent and in response to your specific question, does not prohibit the transfer of state-owned equipment to the Judicial District Department of Corrections. However, that transfer must be for consideration and consistent with the intent of the legislature, pursuant to negotiation and cooperation. The statutory method for such negotiated compromise by and between governmental agencies is as you are aware, Chapter 28E. Reservation of rights, transfer of equipment, transfer of

lease-hold obligations and the fiscal considerations concomitant to those negotiations, may all be the subject of a 28E agreement by and between the Department and the Judicial Districts.

Sincerely,

Gordon E. Allen
Special Assistant
Attorney General

GEA/jaa

MUNICIPALITIES; Civil Service; Veterans' Preference. Iowa Code § 400.10 (1983). A person who was not on active duty during the period set forth in § 400.10 would not be entitled to a veteran's preference. (Weeg to Neighbor, Jasper County Attorney, 2/27/84) #84-2/15(L)

February 27, 1984

Mr. Charles C. Neighbor
Jasper County Attorney
301 Courthouse Building
Newton, Iowa 50208

Dear Mr. Neighbor:

You have requested our opinion on two questions concerning the veterans' preference provisions of Iowa Code Section 400.10 (1983), which are found in the municipal civil service act. Your question is as follows:

> 1. Does a person qualify for veterans preference when that person:
>
> a) Enlisted in the U.S. Army;
> b) Entered active duty August 5, 1959;
> c) Separated from active duty August 1, 1962, and transferred into inactive reserve; and
> d) Received honorable discharge July 31, 1965.

Under the U.S. Army enlistment rules in effect at this time a person who enlisted was required to fulfill a six year military obligation that consisted of two years active duty and four years inactive duty.

> 2. If the answer to Question 1 is in the affirmative, does that person receive a preference over all others seeking the same vacant position where his score on a civil service test is such that he qualifies for the position but has a lower score than others who also qualify for the same position?

Section 400.10 currently provides as follows:

> In all examinations and appointments under the provisions of this chapter, other than promotions and appointments of chief of the police department and chief of the fire department, honorably discharged men and women from the military or naval forces of the United States in any war in which the United States was or is now engaged including the Philippine Insurrection, China Relief Expedition and the Korean Conflict at any time between June 25, 1950 and January 31, 1955, both dates inclusive, and the Vietnam Conflict beginning August 5, 1964, and ending on the date the armed forces of the United States are directed by formal order of the government of the United States to cease hostilities, both dates inclusive, and who are citizens and residents of this state, shall be given the preference, if otherwise qualified.
>
> For the purposes of this section World War II shall be from December 7, 1941, to December 31, 1946, both dates inclusive.

(emphasis added) We believe that the language of § 400.10, in particular that portion emphasized above, plainly requires a person to have served as a member of the armed forces during one of the designated wars in order to qualify for the veteran's preference. We further believe such service must have been designated as active duty in order to invoke the statutory preference.

These conclusions are supported by the changes in § 400.10 and its predecessor statutes. This provision formerly provided that:

> In all examinations and appointments under the provision of this chapter [the municipal civil service act], honorably discharged soldiers, sailors, or marines of the regular or volunteer army or navy of the United States shall be given the preference, if otherwise qualified.

This provision was amended in 1947 to limit this preference to those persons who had served "in any war," including certain designated wars. Later amendments made additions to this list of

specific conflicts and made other related changes. The 1947 amendment thus restricted the preference from all persons who served in the armed forces to those persons who served in the armed forces in any war, thereby limiting application of the preference to a far smaller number of persons than had previously been affected. We believe that this restriction to service "in any war" evidences the legislature's intent that the preference apply only to persons who were on active rather than inactive duty.

This result is consistent with federal law which defines a veteran as a person who served in active military, naval, or air service. 38 U.S.C. § 101(2).

We would therefore conclude that a person who was not on active duty during the periods set forth in the statute would not be entitled to a veteran's preference.

Because of our conclusion to your first question, we find it unnecessary to reach your second question. However, in the event the question arises again, we would refer you to ch. 70, the Veterans' Preference Law, and a number of Iowa Supreme Court cases discussing the preference provisions of both ch. 70 and § 400.10 and its predecessor statutes. See Dennis v. Bennett, 258 Iowa 664, 140 N.W.2d 123 (1966); Glenn v. Chambers, 242 Iowa 760, 48 N.W.2d 275 (1951); Geyer v. Triplett, 237 Iowa 664, 22 N.W.2d 329 (1946); Ervin v. Triplett, 236 Iowa 272, 18 N.W.2d 599 (1945); Zanfes v. Olson, 232 Iowa 1169, 7 N.W.2d 901 (1943); Herman v. Sturgeon, 228 Iowa 829, 293 N.W. 488 (1940).

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

CONSUMER PROTECTION: BOARD OF REGENTS: Negative options. Iowa Code §§ 262.7, 262.9(2), 262.12, 556A.1 (1983); Iowa Consumer Fraud Act, § 714.16(2)(a). An offeror can treat offeree's silence as acceptance only if the offeree intends silence to be acceptance. Absent adequate disclosure and circumstances sufficient to indicate intent to accept, a negative option could constitute a deceptive or unfair practice. The Board of Regents should determine in the first instance whether a specific negative option proposal for optional student fees is lawful and appropriate. (Osenbaugh to Varn, House of Representatives, 2/23/84) #84-2-14(L)

February 23, 1984

Representative Richard J. Varn
House of Representatives
State of Iowa
State House
Des Moines, Iowa 50319

Dear Representative Varn:

We have received your request for an opinion concerning a proposal for United Students of Iowa to utilize a "mandatory refundable fee" or a "negative check-off" as a funding mechanism.

You first ask whether a Regents' policy approving "the concept of a negative check-off" for the University of Northern Iowa can be interpreted as general approval of this concept. Whether the Regents intended a particular policy to apply to only one institution does not raise a question of law to be resolved by this office.

You also ask whether a "negative check-off" or "mandatory refundable fee assessment" is a legal method for raising money for this group. You have not indicated any specific question of law which has been raised with regard to this proposal nor has the specific proposed collection procedure been described to us.

The Board of Regents has broad authority to govern the institutions under its control. This power would include authority over methods of fund raising by student groups especially where the universities assist in the collection of the funds. See Iowa Code §§ 262.7, 262.9(2), 262.12 (1983). If the Board of Regents approved a negative check-off option for this group, its decision would be upheld unless unreasonable or arbitrary and capricious or contrary to law. It would be for the Board of Regents in the first instance to determine whether a reasonable basis existed to justify use of this collection procedure by student groups.

Because students can elect whether or not to pay the fee, we assume that the obligation to pay would be based on contract principles. "Usually as an essential prerequisite to the formation of an informal contract there must be an agreement; a mutual manifestation of assent to the same terms. The agreement is ordinarily reached by a process of offer and acceptance." Service Employees International v. Cedar Rapids Comm. School Dist., 222 N.W.2d 403, 408 (Iowa 1974) (citations omitted). Negative check-off options depend upon silence as acceptance of the offer. In Prestype Inc. v. Carr, 248 N.W.2d 111, 120 (Iowa 1976), the Court in finding sufficient evidence that the failure to reject merchandise in the business setting there described constituted acceptance, stated:

> Ordinarily, an offeror does not have power to cause the silence of the offeree to operate as an acceptance when the offeree does not intend it to do so. However, . . . "there are many cases in which, because of the past relations of the parties or of accompanying circumstances, the silence of the offeree after receipt of an offer has been held to constitute acceptance and to create a contract. These are all cases in which the conduct of the party denying a contract has been such as to lead the other reasonably to believe that silence, without communication, would be sufficient." (1 Corbin on Contracts, § 75, pp. 316-319.)

The Restatement (Second) of Contracts § 69, states:

> Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
>
> * * *
>
> (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the

> offeree in remaining silent and inactive intends to accept the offer.
>
> * * *

See also 1 Williston on Contracts (3rd ed. Jaeger), § 91, quoted in Prestype, Inc., 248 N.W.2d at 120-121.

"An offeror has no power to transform an offeree's silence into acceptance when the offeree does not intend to accept the offer. . . ." Karlin v. Avis, 457 F.2d 57, 62 (2nd Cir. 1972) (citation omitted). The key factor in determining acceptance is the intent of the offeree. If the offeree intends silence to serve as acceptance then the offeree will be bound. As in any case where intent must be proved, the offeror may be hard-pressed to prove the offeree intended silence as acceptance. Therefore, the offeror of a negative check-off is left in an uncertain position. As the comments of the Restatement section cited point out, "[T]he offeror who has invited such an acceptance cannot complain of the resulting uncertainty in his position."

Compelling payment of a negative check-off option may also result in an unfair or deceptive practice contrary to consumer protection laws where applicable.

The Federal Trade Commission has adopted rules limiting the use of negative check-off options in the sale of merchandise. Absent compliance with various requirements for prior agreement, adequate disclosure of the plan, and adequate disclosure of each election to purchase, the F.T.C. has declared such plans to be deceptive or unfair trade practices. 16 C.F.R. 425. It would be the view of this office that merchandise plans not complying with the F.T.C. rules would also constitute a violation of Iowa Code § 714.16(2)(a), the Iowa Consumer Fraud Act. The Iowa legislature has also stated that a recipient of unsolicited goods may keep such goods without any obligation to the seller if the goods were mailed voluntarily and the recipient did not actively order or request such goods, either orally or in writing. Iowa Code section 556A.1 (1983).

While the F.T.C. rules and section 556A.1 govern only the sale of goods, similar concerns exist with regard to any negative check-off options which result in a debt without a positive act evidencing acceptance of the obligation.

The Iowa Consumer Fraud Act, § 714.16(2)(a), also applies to services. Absent adequate disclosure and circumstances sufficient to indicate intent to accept the duty by silence, a negative check-off option could constitute a deceptive practice. Whether the specific option to be proposed by this group is

lawful would be dependent upon the circumstances and cannot be resolved by an Attorney General's Opinion. See 1972 Op.Att'yGen. 686.

We would also note that the negative check-off option raises significant issues of policy which are for the Board of Regents and each educational institution to resolve.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:cjc

EMINENT DOMAIN; COUNTIES; Solid waste landfill facility: Iowa Code Chapter 28E, Iowa Code Sections 28F.1, 28F.11, 331.304(8), 455B.302 (1983). The county can acquire an existing solid waste landfill facility for its own use or for use by a 28E commission through eminent domain. (McGuire to Shoultz, State Representative, 2/17/84) #84-2-13(L)

February 17, 1984

Honorable Don Shoultz
State Representative
State Capitol
L O C A L

Dear Representative Shoultz:

This is in response to your request for an opinion from the Attorney General in regards to the eminent domain power of counties and commissions formed under chapter 28E of the Iowa Code. Specifically you ask "would a county or a commission formed under 28E of the Iowa Code have the right to acquire an existing facility if the intended use of the facility is to close or restrict use of the acquired facility."

You state that the Black Hawk County Board of Supervisors has set an election to decide whether to purchase a privately owned landfill and hazardous waste site.

It is our opinion that (1) the county does have the power of eminent domain to acquire such a facility; (2) the commission formed under 28E does not possess power of eminent domain to obtain the landfill; and (3) the intended use of the facility after condemnation is a question of public use which is a question to be decided by the courts.

Counties have the power of eminent domain and can condemn private property for public use. Iowa Code § 331.304(8) (1983). This power must be exercised in accordance with chapters 471 and 472 of the Iowa Code. § 331.304(8). Section 471.4 confers the right to take private property for public use on specific entities, which specifically includes counties. § 471.4(1). Chapter 472 delineates the procedures which must be followed for the condemnation of private property for public use.

Since counties possess the power of eminent domain, the only question is whether the proposed condemnation is for a public purpose. Specifically, in this case, the question is whether condemnation of an existing landfill and hazardous waste site is a public use.

The county has a duty to provide a sanitary disposal project for its residents. According to § 331.381(16) the board shall "establish a sanitary disposal project" which must be in compliance with chapter 455B.

Section 455B.302 requires that "every city and county of this state shall provide for the establishment and operation of a sanitary disposal project for final disposal of solid waste by its residents . . . ." This may be provided by the county itself, through joint participation of public agencies, or by contracting with another entity to provide the services. § 455B.302.

It is our opinion that condemnation of private property for use as a sanitary disposal project constitutes a public use. The legislature has declared it a function of the counties to provide such a facility to its residents. "The use of property by a public agency in the exercise of its functions is a public use . . . ." Simpson v. Low-Rent Housing Agency of Mount Ayr, 224 N.W.2d 624, 630 (Iowa 1974) (quoting Merritt v. Peet, 237 Iowa 1200, 24 N.W.2d 756 (1946)).

The legislature's declaration that a use of property is a public use is entitled to great weight. Simpson v. Low-Rent Housing Agency of Mount Ayr, 224 N.W.2d at 627. However, it is ultimately up to the courts to determine if eminent domain was used for a public use. Id. See generally 29A C.J.S. Eminent Domain § 30.

It is our opinion that the county does have the power to acquire an existing solid waste landfill facility through eminent domain since it is a public use. However, the Commission does not have a power of eminent domain of its own.

You state that the Black Hawk County Solid Waste Commission was created pursuant to Iowa Code Chapter 28E. This Commission is a separate legal entity, distinct from the public agencies which created it. § 28E.4. The powers of the Commission are those described in the terms of its creation. § 28E.5.

Chapter 28F deals with joint financing of public works and facilities and is applicable in this case. This chapter applies to financing by public agencies of "works or facilities useful and necessary for the collection, treatment, purification and

disposal . . . of liquid and solid waste . . . ." § 28F.1. "The provisions of this chapter apply to the acquisition . . . of such works or facilities, by a separate administrative or legal entity created pursuant to chapter 28E." § 28F.1. This chapter thus applies in this situation.

Section 28F.11 specifically deals with the power of eminent domain. This section provides that "[a]ny public agency participating in an agreement authorizing the joint exercise of governmental powers pursuant to this chapter may exercise its power of eminent domain to acquire interests in property . . . for the use of the entity created to carry out the agreement . . . ." The property acquired becomes the property of the entity. § 28F.11.

Thus, according to this section, the separately created entity itself, in this case, the Black Hawk County Solid Waste Commission, does not possess the power of eminent domain. Rather, the public agencies which participated in creating the entity must use their powers of eminent domain to acquire property through condemnation for the use of the created entity.

Your question also concerns the intended use of the facility after acquiring it through eminent domain, specifically whether the facility can be closed or restricted.

If the county condemns the landfill for operation by the County Solid Waste Commission under § 28F.11, it must be for a "useful and necessary . . ." means in the "collection, treatment, purification and disposal . . . of liquid and solid waste . . .." § 28F.1. Therefore, under the power of eminent domain under § 28F.11, it would appear that the condemnation must be to use the land for a solid waste facility. The facility could not be acquired in order to close it under § 28F.11.

However, as stated previously, the county possesses eminent domain power for any public purpose under § 471.4(1), which would encompass condemning land for a solid waste facility for use by the county. The question is then whether acquiring a landfill to close it or restrict it would constitute a public purpose.

The question whether a condemnation is for a public use is ultimately a question to be decided by the courts. Such a decision would turn on the specific facts regarding the intended use of the facility. And, in such a case, the person whose property was condemned would have the right to bring suit to enjoin the condemnation proceeding to ascertain the existence of "fraud, oppression, illegality or abuse of power or discretion by

the condemnor." Mann v. City of Marshalltown, 265 N.W.2d 307 (Iowa 1978).

Condemning property through eminent domain in order to prevent a particular use of the property has been upheld as a public use in certain instances. Generally, in these cases, a statute authorizing the use of eminent domain to restrict a property use was in force and the courts found they encompassed a public use or purpose.

In finding such restrictions to be a public use, the courts looked at various factors. Statutes allowing for eminent domain to clear slum areas were found to encompass a public use based on public health, safety, and welfare. Berman v. Parker, 348 U.S. 26 (1954); Simpson v. Low-Rent Housing Agency of Mount Ayr, 224 N.W.2d 624 (Iowa 1974). Similarly, statutes allowing for eminent domain to prevent certain uses of property have been upheld based on the finding of a public use in preserving the aesthetic quality of the land, Kamrowski v. State, 142 N.W.2d 793 (Wis. 1966); and in promoting the general public health, Miller v. Jensen, 113 N.W. 914 (Iowa 1907). See generally 2A Nichols, The Law of Eminent Domain §§ 7.1-7.627 (3d ed. 1980).

These factors would undoubtedly be among those the courts would examine in determining whether acquiring the landfill facility in order to close it is a public use. Relevant factors would include the county's reasons for acquisition; the fact that there is no statute specifically authorizing the use of eminent domain by the county to close a landfill facility; the fact that the county is mandated to provide a solid waste facility for its residents, § 455B.302; and the fact that the existing facility is operated pursuant to rules of the Department of Water, Air, and Waste Management. § 455B.304.

The specific facts surrounding the closure or restrictions placed on the use of the condemned property would need to be known before ascertaining whether or not there was a public purpose. An Attorney General's opinion cannot resolve questions of fact. 1972 Op.Att'yGen. 686.

It is our opinion that the county could acquire an existing solid waste landfill by eminent domain for the use of its residents in accordance with § 28F.11. In certain instances courts have found that condemnation to prevent a use in order to protect the public health, safety, or welfare is a lawful

exercise of the power of eminent domain. We do not determine whether condemnation to close or restrict this specific facility would serve a public purpose.

Sincerely,

Maureen McGuire

MAUREEN McGUIRE
Assistant Attorney General

MM:rcp

IOWA CONSUMER CREDIT CODE: IOWA INDUSTRIAL LOAN LAW: Restrictions on property insurance and rebates of insurance charges; §§ 537.2501(2)(b), 536A.23(3), 536A.31(3) and 537.2510(4)(b), Iowa Code, 1983. 1) The Iowa Consumer Credit Code § 537.2501 (2)(b) does not conflict with and therefore does not supersede § 536A.23(3) of the Industrial Loan Law. 2) Under the Iowa Consumer Credit Code, upon prepayment in full of a consumer credit transaction, rebates for unearned charges for insurance are not subject to the § 537.2510 (4)(b) definition of interval. (Lowe to Johnson, Auditor of State, 2/17/84) #84-2-12(L)

February 17, 1984

Mr. Richard D. Johnson, C.P.A.
Auditor of State
Office of Auditor of State
State Capitol Building
L O C A L

Dear Mr. Johnson:

In your letter of November 28, 1983, you requested the opinion of this office on two questions. Your first question was whether Iowa Code Section 536A.23(3), Iowa Industrial Loan Law, 1983, is in conflict with, and is therefore superseded by, Iowa Code Section 537.2501(2), Iowa Consumer Credit Code, 1983. Your second question was whether Iowa Code Section 537.2510(4)(b), Iowa Consumer Credit Code, 1983, applies to charges for insurance when a lender is computing a rebate due to prepayment of a loan.

The answer to your first question is that § 536A.23(3), Iowa Industrial Loan Law, 1983, is not in conflict with Iowa Code § 537.2501(2), Iowa Consumer Credit Code, 1983, hereinafter referred to as the ICCC. Therefore § 536A.31(3) which states that: "A provision of the Iowa consumer credit code applicable to loans regulated by this chapter shall supersede a conflicting provision of this chapter" does not apply to § 536A.23(3) with respect to the question of restricting the type of property insurance sold. The issue of whether there is a conflict between the two subsections in question arises because § 536A.23(3) restricts property insurance, which may be sold to borrowers by industrial loan companies, to insurance on the property which is used as security for the loan. Under § 536A.23(3), an:

> ...industrial loan company may collect from the borrower, at the option of the borrower, and transmit the premiums charged for insuring real or personal property used by the borrower as security for a loan.... (emphasis added)

In contrast, the ICCC provides in § 537.2501(2)(a), that a charge for property insurance may be made by a creditor in a consumer credit transaction when the charge is:

> 2. ...made for insurance written in connection with the transaction, as follows:
>
> a. With respect to insurance against loss of or damage to property, or against liability arising out of the ownership or use of property.... (emphasis added)

Paragraph 537.2501(2)(a), is the only provision in the ICCC which deals specifically with property insurance written in connection with a consumer credit transaction.

You noted in your opinion request that the pertinent language of § 537.2501(2)(a) is silent regarding the matter of restricting the sale of property insurance to insurance on the property used as security for the loan. It is true that § 537.2501(2)(a) does not contain language which, on its face, imposes the same restriction contained in § 536A.23(3). However, when construing a statute or any part thereof, such as § 537.2501(2)(a) of the ICCC, it is necessary to seek to harmonize it, whenever possible, with other statutes relating to the same subject. See Doe v. Ray, 251 N.W.2d 496, 501 (Iowa 1977).

The general language of paragraph (a) of § 537.2501(2), if read together with the qualifying language of § 537.2501(2) which precedes it, does provide for the same restriction as § 536A.23(3) concerning the sale of property insurance. Subsection 537.2501(2) applies to insurance "...written in connection with the transaction." Property insurance which is "written in connection with" the consumer credit transaction would have to be property insurance which was somehow a necessary cost of that transaction. Insurance on property other than the property used as security or collateral for the loan could not be "connected with" or necessary for the transaction. A sale of insurance on property which was not connected with the transaction would have to be treated as an entirely separate and second transaction. The ICCC recognizes such separate sales transactions of insurance by grouping them as "changes for other benefits" under § 537. 2501(1)(f).

Furthermore, when the language of § 537.2501(2)(a) is compared to the provisions governing credit life, accident and Health insurance in § 537.2501(2)(b), it is apparent that § 537.2501(2)(a) restricts the sale of property insurance to insurance on the collateral. Paragraph 537.2501(2)(b) provides that the creditor may sell credit life, credit accident, or credit health insurance only if it is disclosed that the insurance is not required. In contrast, the property insurance provisions of § 537.2501(2)(a) do not state that the creditor must disclose whether the property insurance is required. Therefore, we conclude that § 537.2501(2)(a) deals with required property insurance.

Finally, it should be noted that § 536A.23(3) of the Industrial Loan Law, which governs and restricts the sale of property insurance by industrial loan companies, is found under the category of "Powers of Industrial Loan Companies." The ICCC in Iowa Code Subsection 537.1108(3)(b), explicitly provides that it does not displace "limitations on powers an organization is authorized to exercise under the laws of this state or the United States." (emphasis added). The restrictions contained in § 536A.23(3) serve as limitations on the power to sell property insurance which § 536A. 23 gives to the loan companies, Therefore, these restrictions are not displaced by the ICCC. (See C.C.H., Consumer Credit Guide, Vol. 1A, 1974 U.C.C.C. § 1108, Comment 6.)

This opinion addresses only the narrow question of whether § 536A.23 of the Industrial Loan Law conflicts with the ICCC § 537.2501(2). This opinion does not address and therefore does not prohibit creditors from selling property insurance which is not "written in connection with the transaction."

Your second question was whether § 537.2510(4)(b) of the ICCC applies to rebates of insurance charges. Section 537.2510 requires that when a precomputed consumer credit transaction is paid in full, the creditor must rebate the unearned finance charge and "any other unearned charges including charges for insurance." Under Subsection 537.2510(1):

> ...the creditor shall rebate to the consumer an amount not less than the amount of rebate provided in subsection 2, paragraph "a", or redetermine the earned finance charge as provided in subsection 2, paragraph "b", and rebate any other unearned charges including charges for insurance. [emphasis added]

It is our opinion that if the creditor rebates unearned charges for insurance under § 537.2510(2)(a), the term "interval," as defined in § 537.2510(4)(b) would not apply to the rebate of unearned charges for insurance.

The term "interval" is defined in § 537.2510(4)(b) is not used in any part of § 537.2510(1) or (2). However, paragraph "a" of § 537.2510(2) which governs the method for determining the "amount of rebate," does use the term "computational period" in reference to the manner in which the creditor shall determine the time remaining in the loan term. Computational period is defined in § 537.2510(4)(a), for purposes of computing rebates pursuant to § 537.2510(4)(a) as follows:

> a. "Computational period" means the interval between the scheduled due dates of installments under the transaction if the intervals are substantially equal or, if the intervals are not substantially equal, one month if the

> smallest interval between the scheduled due dates of installments under the transaction is one month or more, and otherwise one week. [emphasis added]

Also see Op.Att'yGen. #82-9-25(L).

Section 537.2510 is the only ICCC provision governing rebates. Insurance charges, according to § 537.2510(1), must be rebated. However, close scrutiny of § 537.2510(1) reveals that the methods for rebating outlined in § 537.2510(2)(a) and (b) were not intended to apply to rebates of unearned insurance charges. Section 537.2510(1) states that the creditor shall "determine the amount of rebate" under § 537.2510(2)(a) and "redetermined the earned finance charge" under § 537.2510(2)(b) but does not state the manner in which the creditor must rebate unearned charges for insurance.

A comparison of the ICCC provisions on insurance and rebates with the 1974 UCCC is instructive. Section .2510 of the 1974 UCCC does not include any reference to rebates or refunds of unearned charges for insurance, but is otherwise essentially similar to ICCC § 537.2510. Furthermore, when the Iowa Legislature enacted the ICCC, it omitted some of the 1974 UCCC Article IV which deals with insurance written in relation to credit transactions. The most notable omission was a 1974 UCCC provision which covers the methods for refunding or rebating insurance. The 1974 UCCC provides in § .4108(3)(b):

> ...the creditor shall promptly make or cause to be made an appropriate refund to the consumer with respect to any separate charges made to him for insurance if:
>
> * * *
>
> (b) the insurance terminates before the end of the term for which it was written because of prepayment in full or otherwise.

See C.C.H., Consumer Credit Guide, Vol. 1A, 1974 UCCC, § .4108(3)(b)

While the ICCC does in § 537.2510(1) incorporate the UCCC requirement that unearned insurance charges must be rebated, it omits the following 1974 UCCC § .4108 language which provides for determining the method of rebate:

> (4) a refund required by subsection 3 is appropriate as to amount if it is computed according to method prescribed or approved by the [Commissioner] of Insurance....

See C.C.H. Consumer Credit Guide, Vol. 1A, 1974 UCCC, § .4108(4)

In summary, the restrictions imposed upon the sale of insurance under § 536A.23(3) are not in conflict with the provisions of § 537.2501(2)(a) of the ICCC, and therefore, are not superseded by the ICCC. Furthermore, because § 536A.23(3) constitutes a limitation on the powers of industrial loan companies pursuant to § 537.1108(3)(b), it is not displaced by the ICCC. In addition, the § 537.2510(4)(b) definition of interval does not apply to rebates of unearned charges for insurance when precomputed consumer credit transactions are prepaid in full.

Sincerely,

Linda T. Lowe

LINDA THOMAS LOWE
Assistant Attorney General

cf

COUNTIES; Clerk of Court; Filing Fees; Waiver of fee for Department of Revenue distress warrants. Iowa Code § 626.31 (1983); 1983 Iowa Acts, ch. 204, § 14. The Department of Revenue is not required to pay filing or docketing fees under § 14 when filing a distress warrant pursuant to § 626.31. (Weeg to Richter, Pottawattamie County Attorney, and Bair, Director, Department of Revenue, 2/13/84) #84-2-11(L)

Mr. David Richter
Pottawattamie County Attorney
Pottawattamie County Courthouse
227 S. 6th Street
Council Bluffs, Iowa 51501

February 13, 1984

Mr. Gerald D. Bair, Director
Department of Revenue
Hoover State Office Building
L O C A L

Dear Messrs. Richter and Bair:

You have requested an opinion of the Attorney General as to whether the clerk's fees set forth in 1983 Iowa Acts, ch. 204, § 14, apply to garnishment actions instituted by the Iowa Department of Revenue.

As you note in your opinion request, the fees imposed in § 14 are two-fold. First, § 14(a) requires a thirty-five dollar fee "for filing a petition, appeal, or writ of error and docketing them . . ." Section 14(b) imposes a twenty-five dollar fee "for payment in advance of various services and docketing procedures, excluding small claims . . ." However, in the case of a garnishment action instituted by the Department of Revenue, Iowa Code § 626.31 (1983) expressly provides that "the clerk of the district court shall docket an action thereon without fee . . ."

While ch. 204 eliminated a number of previous Code sections relating to fees and established a new fee structure, § 626.31 was not affected by these changes. We believe this fact, taken in conjunction with the express waiver of a fee in § 626.31, evidences the legislature's intent that no fees be charged by the clerk for filing or docketing a garnishment action instituted by the Department of Revenue pursuant to §§ 626.29-626.31. In addition, under well-established principles of statutory construction, the waiver provision of § 626.31 would prevail, as

it is more specific than the general fee provisions of § 14. See § 4.7.

There may be some question as to whether the language of § 626.31, which requires the clerk to "docket [a garnishment action] without fee," waives the thirty-five dollar filing and docketing fee of § 14(a), the twenty-five dollar docketing fee of § 14(b), or both. We believe § 626.31 requires waiver of both for the reasons set forth above. Additionally, § 14(a) imposes a fee for the filing and docketing of a "petition, appeal, or writ of error." To initiate a garnishment action, the Department of Revenue files a distress warrant with the clerk. We do not believe a distress warrant may be categorized as a petition, appeal, or writ of error, and therefore the § 14(a) filing fee is not required. See Op.Att'yGen. #81-10-15(L) (an indictment or trial information is not a "petition, appeal, or writ of error," and therefore no statutory filing fee is required). Further, the fee requirement of § 14(b) expressly covers docketing procedures, the identical item for which the fee is waived in § 626.31.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

JUVENILE CODE, VICTIM RESTITUTION: Iowa Code Sections 910.1(1), 910.1(4), 232.29, 232.52, 232A: Although not expressly stated, the intent of the Legislature in providing for restitution alternatives in juvenile case disposition was to exclude insurers from the definition of victim, to whom restitution might be ordered, which is consistent with the Legislature's express exclusion in the adult restitution statute. (Hunacek to Roderer, Criminal & Juvenile Justice Planning Agency, 2/10/84) #84-2-10(L)

Mr. David M. Roederer
Executive Director
Iowa Criminal and Juvenile
Justice Planning Agency
Lucas State Office Building
Des Moines, IA 50319

February 10, 1984

Dear Mr. Roederer:

You have requested an opinion of the Attorney General regarding interpretation of the word "victim" in statutes relating to juvenile victim restitution programs. Specifically, you have asked:

> Does the exclusion of the insurer as a victim pursuant to Chapter 910 also apply to the restitution activities of Juvenile Court through Chapters 232 and 232A?

For the reasons expressed below, we conclude that although the definition of "victim" that appears in Chapter 910 does not automatically carry over to Chapter 232, the term "victim" as used in the juvenile restitution statutes does not include insurers.

For purposes of victim restitution, Iowa law treats separately those who have been the victim of an adult offender's criminal activities and those who have been the victim of juvenile delinquency. Iowa Code Chapter 910 sets out conditions under which a trial court in an adult criminal case may impose restitution as part of the defendant's sentence or as a condition of probation, work release, or parole. The chapter authorizes restitution only to "victims." Iowa Code §910.1(4) (1983). The term "victim" is defined thus: "'Victim' means any person who has suffered pecuniary damages as a result of the offender's

criminal activities. However, for purposes of this chapter, an insurer is not a victim and does not have a right of subrogation." Iowa Code §910.1(1) (1983). Other sections of the Code are implicated in cases of restitution to victims of juvenile delinquents. Iowa Code §232.29(2) authorizes, as part of an informal adjustment of a complaint, the intake officer to, among other options, require the child to make restitution consisting of a monetary payment to the victim or a work assignment directly of value to the victim. Iowa Code §232.52(2)(a) authorizes a juvenile court, as part of its disposition of a juvenile delinquency hearing, to order restitution consisting of monetary payment or work assignment of value to the victim. These provisions of the Code must be read in concert with Iowa Code Chapter 232A, created as Chapter 94, House File 528, of the 1983 Regular Session of the 70th General Assembly. This chapter creates a juvenile victim restitution program funded through monies appropriated by the General Assembly, and also sets forth procedures for ordering of restitution by juveniles who have committed a delinquent act. Nowhere in Chapters 232 or 232A, is the term "victim" explicitly defined.

There is nothing in the definition of "victim" that appears in Chapter 910 that automatically makes it apply to Chapter 232 or to Chapter 232A. Iowa Code §910.1, by its own terms, is limited to the definition of words "as used in this chapter." Moreover, the same word may receive a different construction in different statutes. State v. Whetstine, 315 N.W.2d 758, 761 n. 4 (Iowa 1982).

However, the conclusion that the definition of "victim" in Chapter 910 does not automatically apply to Chapter 232 does not end our inquiry, since we interpret your request as being principally concerned not with whether a particular definition applies to Chapter 232, but rather with the question of whether the word "victim" as used in Chapter 232 encompasses insurers. As is always the case in interpreting a statute, the ultimate goal is to ascertain, and if possible, give effect to, the intent of the legislature. Hines v. Illinois Central Gulf Railroad, 330 N.W.2d 284, 288 (Iowa 1983). Although the legislature has clearly indicated its intent to exclude insurers as victims for purposes of the adult restitution statute, it has not clearly expressed its intent regarding this question in the juvenile context. The Iowa Supreme Court has not explicitly resolved this question, either. However, courts in other jurisdictions have considered the issue of whether the word "victim" in the restitution statute includes insurance companies. Because judicial interpretations of similar statutory language in other jurisdictions are entitled to great weight, Quaker Oats Co. v. Cedar Rapids Human Rights

Commission, 268 N.W.2d 862, 866 (Iowa 1978), it is helpful to consider these cases.

A substantial majority of these cases have interpreted the word "victim" or the synonymous term "aggrieved party" to exclude insurance companies. See People v. King, 648 P.2d 173 (Colo. App. 1982); Montgomery v. State, 292 Md. 155, 438 A.2d 490 (1981); People v. Grago, 24 Misc.2d 739, 204 N.Y.S.2d 774 (1960); State v. Rose, 405 Or.App. 879, 609 P.2d 875 (1980); State v. Stalheim, 275 Or. 683, 552 P.2d 829 (1976). A variety of rationales for this conclusion can be discerned. First, some courts have held that there is simply no ambiguity in the use of the word "victim" and that this term clearly refers to the "direct victim" of the crime. For example, in concluding that the victim of a car theft was the owner of the car, rather than the insurance company, the court in Rose stated:

> The fact that the owner may be contractually bound to pass on the payments to his insurer does not alter the validity of the order; "The reparation statute is a rehabilitative tool of the common law; its applicability should not be affected by the happenstance of whether the owner carries insurance."

609 P.2d at 876. Secondly, courts have also noted that an award of restitution is not a substitute for civil damages. King, 648 P.2d at 175; Grago, 204 N.Y.S.2d at 777. Thirdly, courts have noted that when a defendant is ordered to make reparation to persons other than the direct victim of a crime, the rehabilitative effect of making the offender clearly appreciate the injury caused by his offense would be significantly diluted. Stalheim, 552 P.2d at 832; see also State v. Eilts, 94 Wash.2d 489, 617 P.2d 993, 996 (1980). Finally, courts have expressed concern in the difficulties inherent in drawing the "line of demarcation" between compensable and noncompensable victims if people other than direct victims of a crime could be considered "victims." Grago, 204 N.Y.S.2d at 778.

These concerns are not insubstantial. In United States v. Welden, 586 F.Supp. 516, 534 (N.D. Ala. 1983), the court found the federal victim restitution statute unconstitutional because it converted an order of restitution into a civil judgment against the defendant without benefit of jury trial, and because it did not provide ascertainable standards for the formulation of this order of restitution. Although you have not requested an opinion concerning the constitutionality of our own restitution statutes, and we do not give such an opinion here, we do note that the Welden case illustrates the dangers inherent in

interpreting a victim restitution provision very broadly. The precise question of statutory interpretation was not an issue in Welden because the statute itself makes clear that restitution may be ordered "to any person who has compensated the victim for such loss to the extent that such person paid the compensation." 18 U.S.C. §3579(e)(1). It is noteworthy that this specific statutory language implicitly assumes that a third party payor is not a "victim."

In some jurisdictions, courts have held that the term "aggrieved party" encompasses insurers. See United States v. Follette, 32 F.Supp. 953 (E.D. Pa. 1940) (statute providing for restitution to "aggrieved party or parties" was properly interpreted to allow restitution to surety company which had reimbursed the victim of an embezzlement); State v. Yost, 232 Kan. 370, 654 P.2d 458 (1982) (statute allowing for restitution to "aggrieved party" justified award of restitution to insurer). These cases are based both on what the court believed to be reasonable construction of the language of the statute, and also on a policy rationale that the insurer should not be required to initiate a civil action when the trial court could directly order payment. However, in view of the concerns expressed in Welden, the validity of this policy is questionable.

On balance, we believe that the Iowa legislature intended the word "victim" in Chapters 232 and 232A to exclude insurers. This conclusion is consistent with the weight of authority and is also suggested by the statutes themselves. We do not believe the legislature intended to treat insurance companies differently, depending on whether that company's insured was a victim of a juvenile offender or an adult offender. Moreover, we do not believe the legislature intended to make juvenile restitution more expensive, or payable in more cases, than adult restitution. Because interpretation of the word "victim" in Chapters 232 and 232A would have precisely these effects, we belive that an insurance company is not a "victim" for purposes of these statutes.

Sincerely,

Mark Hunacek

Mark Hunacek
Assistant Attorney General

MH/jlf4

PUBLIC RECORDS; Clerk of Court; Dissolution of Marriage: Iowa Code Ch. 68A (1983); §§ 68A.2; 598.26; 1983 Iowa Acts, Ch. 186, § 9104. The clerk of court is required by § 598.26(3) to keep a separate docket for dissolution actions. The record and evidence in dissolution actions is to be kept confidential under § 598.26(1) until a final dissolution decree is entered, unless the court orders portions of the record sealed pursuant to § 598.26(2). However, under § 598.26(2) orders, decrees, and judgments are always public records once the final decree is entered. (Weeg to Martino, Greene County Attorney, 2/10/84) #84-2-9(L)

February 10, 1984

Mr. Nicola J. Martino
Greene County Attorney
202 N. Wilson
P.O. Box 126
Jefferson, Iowa 50129

Dear Mr. Martino:

You have requested an opinion of the Attorney General concerning the clerk's duties under Iowa Code Ch. 68A (1983), the Iowa Public Records Act, given the provisions of § 598.26 imposing certain confidentiality requirements in dissolution of marriage cases. Your question is as follows:

> The 70th Iowa Acts, Chapter 186, § 9104 require the District Clerks of Court to maintain a record book containing entries of the proceedings of the Court. Such record book would appear to be a public record under Iowa Code Section 68A.1.
>
> Iowa Code Section 598.26(1) makes the record and evidence in a dissolution of marriage action confidential until a decree of dissolution of marriage has been entered. It would appear that the Clerks of District Court are required to include orders in a dissolution of marriage action in the record book required by 70th Iowa Acts, Chapter 186, § 9104, since they are not specifically exempted from inclusion in that record book.
>
> This letter is to request an opinion as to the appropriate method to reconcile those two sections, or if they cannot be reconciled,

your suggestion as to how the Clerks of Court should comply with the mandates of both sections.

1983 Iowa Acts, Ch. 186, § 9104 provides in part as follows:

> 1. The records of the court consist of the original papers filed in all proceedings.
>
> 2. The following books shall be kept by the clerk:
>
> a. A record book which contains the entries of the proceedings of the court and which has an index referring to each proceeding in each cause under the names of the parties, both plaintiff and defendant, and under the name of each person in either party.
>
> * * *

This provision was previously found in Iowa Code § 331.704 (1983), and before that in Iowa Code §§ 606.7 and 606.8 (1981). Despite these recodifications, this provision has substantively remained unchanged.

Section 68A.2 provides that:

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

(emphasis added) Records of the clerk of district court under § 9104 unquestionably constitute public records as that term is defined in § 68A.1; further, there is no provision in Ch. 68A or any other statutory provision that we can find that would generally exempt records in the clerk's office from disclosure. See § 68A.7.

However, § 598.26 expressly provides as follows:

> The record and evidence in each case of marriage dissolution shall be kept pursuant to the following provisions:

> 1. Until a decree of dissolution has been entered, the record and evidence shall be closed to all but the court and its officers. No officer or other person shall permit a copy of any of the testimony, or pleading, or the substance thereof, to be made available to any person other than a party to the action or a party's attorney. Nothing in this subsection shall be construed to prohibit publication of the original notice as provided by the rules of civil procedure.
>
> 2. The court shall, in the absence of objection by another party, grant a motion by a party to require the sealing of an answer to an interrogatory or of a financial statement filed pursuant to section 598.13. The court may in its discretion grant a motion by a party to require the sealing of any other information which is part of the record of the case except for court orders, decrees and any judgments. If the court grants a motion to require the sealing of information in the case, the sealed information shall not thereafter be made available to any person other than a party to the action or a party's attorney except upon order of the court for good cause shown.
>
> 3. If the action is dismissed, judgment for costs shall be entered in the judgment docket and lien index. The clerk shall maintain a separate docket for dissolution of marriage actions.
>
> 4. Violation of the provisions of this section shall be a serious misdemeanor.

(emphasis added) Pursuant to this provision, the record and evidence in dissolution cases is to be kept confidential until a decree of dissolution has been entered. § 598.26(1). We believe the record in a pending dissolution case would include any orders entered before the final decree is entered. The court additionally has the discretion upon the request of a party to seal any information that is part of the record except for court orders, decrees, and judgments. § 598.26(2). Accordingly, once a final dissolution decree is entered, requested portions of the record may be sealed, but any orders, decrees, and judgments could never be sealed and would always be considered public records, even if they had previously not been disclosed to the

public pursuant to § 598.26(1). Finally, the clerk is specifically directed to maintain a separate docket for dissolution actions. § 598.26(3). This requirement was presumably imposed to facilitate compliance with the confidentiality requirements of § 598.26.

Accordingly, it is our opinion that the statutory requirements are clear. The specific requirement of § 598.26(1) that the record and evidence in dissolution cases be kept confidential until a dissolution decree has been entered, and the provision in § 598.26(2) that such evidence may be sealed at the discretion of the court, constitute express exceptions to the disclosure requirement of Ch. 68A. These documents must be kept confidential in accordance with § 598.26, which further requires the clerk to keep a separate docket for dissolution cases to facilitate this confidentiality requirement. However, once the dissolution decree is entered, any orders, judgments, or decrees would be public records pursuant to § 598.26(2). See also Op.Att'yGen. #81-9-3(L) (support record book is a confidential record); Op.Att'yGen. #81-3-5(L) (support record book established by § 598.22 should not be open to public inspection, but only to the parties and their attorneys); 1976 Op.Att'yGen. 95 (clerk is not required to index dissolutions action in lis pendens book).

In light of these conclusions, the duties of the clerk of court with regard to Ch. 68A and § 598.26 are as follows. First, the clerk is required to keep a separate docket for dissolution actions. § 598.26(3). The record and all the evidence in such actions is to be kept confidential until a final dissolution decree is entered, unless the court orders certain portions of the record sealed pursuant to § 598.26(2), in which case those portions are kept confidential on a permanent basis. While certain portions of the dissolution of marriage docket may thus be confidential while other portions are public records, the clerk does not have the option of keeping the entire docket confidential for the sake of convenience. See Op.Att'yGen. #82-10-3 (records custodian may not keep entire record confidential on the ground that part of it may be kept confidential; however, custodian may delete confidential information).

Sincerely,

Theresa O'Connell Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

TAXATION: Assignment By County of Scavenger Tax Sale Certificate of Purchase. Iowa Code §§446.19, 446.31, 447.1, 447.12, 448.1 (1983). Board of Supervisors can compromise and assign certificate of purchase during the ninety day period after date of completed service of notice of expiration of right of redemption. Even if a compromise is not made, certificate of purchase can be assigned by board of supervisors for full amount. Where the notice of expiration is given by the holder of the certificate of purchase, a subsequent assignment of the certificate does not require the assignee to give such notice again. Where no compromise is involved, assignment by county of certificate of purchase should include all costs which are associated with the requirements of Iowa Code Chapters 446 and 447 and can include all other costs incurred by county. (Griger to Mahaffey, 2/10/84) #84-2-8(L)

February 10, 1984

Michael W. Mahaffey
Poweshiek County Attorney
405 E. Main
Montezuma, IA 50171

Dear Mr. Mahaffey:

You have requested an opinion of the Attorney General as follows:

> In order to consider the questions to be addressed, the following facts should be assumed. The County is the purchaser and holder of the certificate of purchase from a scavenger sale pursuant to Section 446.19 of the Code. The County has held the certificate for a year or more pursuant to the law and no assignment has been made during that period of time pursuant to Section 446.31 of the Code. It should further be assumed that the appropriate newspaper publications have been published, the people in whose name the property is held have been notified according to law of the expiration of right of redemption and any lienholders and mortgagees have been notified pursuant to law in compliance with the requirements of Chapter 447 of the Code. The only requirement that is left to fulfill before the County can take a tax deed pursuant to

Section 448.1 of the Code is to wait for the expiration of ninety days from the date of completed service. It is this ninety day period from the date of completed service that is the key to the questions asked in this opinion.

During this ninety day period, a party or parties request from the County an assignment of the certificate of purchase. The questions that we would like to have addressed are as follows:

1. Given the fact that there has been a request for an assignment made during the ninety days from the date of completed service of the notice provided in Section 447.12, can the Board of Supervisors compromise and assign the said certificate of purchase, with the written approval of all tax-levying and tax-certifying bodies having any interest in said general taxes, pursuant to Section 446.31, during this ninety day period of time?

2. If compromise cannot be made during this ninety day period, can an assignment of the certificate without compromise be made under the laws of the State of Iowa?

3. If assignment of the certificate of purchase is made, does the assignee stand in the County's legal position as that position relates to the completed service required before a deed can be executed?

4. If there is an assignment of the certificate of purchase but no compromise, can all costs associated with that parcel of real estate and the requirements of Chapters 446, 447 and 448 be included in the assignment?

5. If the assignee cannot take the place of the County for the purposes of meeting the ninety day from date of completed service of the notice requirement, when does the ninety day time limit start for the assignee?

Iowa Code §446.31 (1983) provides:

"The certificate of purchase shall be assignable by endorsement and entry in the register of tax sales in the office of county treasurer of the county from which said certificate issued, and when such assignment is so entered, it shall vest in the

> assignee or his legal representatives all the right and title of the assignor. The statement in the treasurer's deed of the fact of the assignment shall be presumptive evidence thereof. When the county acquires a certificate of purchase and has the same in its possession for one year, or more, the board of supervisors may compromise and assign the said certificate of purchase, with the written approval of all tax-levying and tax-certifying bodies having any interest in said general taxes. All money received from assignment of said certificates shall be apportioned to the tax-levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold."

The answer to your first question is dictated by the Iowa Supreme Court's decision in Fleck v. Duro, 227 Iowa 356, 288 N.W. 426 (1939). In Fleck, Polk County was the bidder at a scavenger sale for delinquent taxes, interest, and penalty, and received a certificate of purchase. Notice of expiration of right of redemption from the tax sale was given by Polk County on October 16, 1937. Affidavit of service was made on November 9, 1937. On December 15, 1937, Polk County assigned the certificate to the city of Des Moines which, on December 16, 1937, assigned the certificate to Leo Fleck. No redemption was made from the tax sale within ninety days from the service of the redemption notice. A tax deed was issued to Leo Fleck on February 9, 1938. The Court held that the assignment by Polk County of the certificate of purchase, during the ninety day redemption period, was valid, and that Leo Fleck was entitled to a tax deed. If assignment as such can be made during the ninety day redemption period, assignment accompanied by compromise can also be made. Your first question is answered in the affirmative.

Your second question, in essence, concerns whether a county, as a holder of a certificate of purchase, can make an assignment without making a compromise. Iowa Code §7265 (1935), the predecessor of §446.31, provided:

> "The certificate of purchase shall be assignable by endorsement and entry in the register of tax sales in the office of county treasurer of the county from which said certificate issued, and when such assignment is so entered, it shall vest in the assignee or his legal representatives all the right and title of the assignor. The Statement in the treasurer's deed of the fact of the assignment shall be presumptive evidence thereof."

This was the assignment statute involved in Fleck v. Duro, 227 Iowa 356, 288 N.W. 426 (1939).

Section 7265 was amended in 1939 to add the following:

> "When the county acquires a certificate of purchase and has the same in its possession for one year, or more, the board of supervisors may compromise and assign the said certificate of purchase, with the written approval of all tax-levying and tax certifying bodies having any interest in said general taxes. All money received from assignment of said certificates shall be apportioned to the tax-levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold."

1939 Iowa Acts, ch. 210.

Section 7265, as it existed in the 1937 situation involved in Fleck, made no express mention of assignment of tax sale certificate of purchases by a county. Nevertheless, it is clear that a county could make an assignment. But, prior to enactment of 1939 Iowa Acts, ch. 210, the county board of supervisors had no authority to assign the certificate and compromise the taxes. Cf. 1932 Op.Att'yGen. 183.

While the 1939 legislation gave the board of supervisors the authority, under certain criteria, to assign and compromise the certificate of purchase, we do not believe that this legislation abrogated the county's ability to make an assignment without compromise, as in the Fleck case.

In Isaacson v. Iowa State Tax Commission, 183 N.W.2d 693, 695 (Iowa 1971), the Iowa Supreme Court stated:

> "Construction of any statute must be reasonable, sensible and fairly made with the view of carrying out the obvious intention of the legislature enacting it. Construction resulting in unreasonableness and absurd consequences will be avoided. Krueger v. Fulton, Iowa, 169 N.W. 875, 877; Janson v. Fulton, Iowa, 162 N.W.2d 438, 442, 443; France v. Benter, 256 Iowa 534, 541, 128 N.W.2d 268, 272."

If the 1939 legislation was construed to require that a county could only assign a tax sale certificate in a compromise situation, then if the assignee subsequently obtained a tax deed, the full amount of the taxes for which the property was sold at scavenger sale would never be paid. It is absurd and unreasonable to construe the 1939 legislation to preclude the county from obtaining, by assignment, the full amount

to which it would be otherwise entitled under its bid pursuant to §446.19 if no assignment had been made and, instead, redemption had occurred. The board of supervisors and the tax-levying and tax-certifying bodies, having an interest in the taxes, may desire to effectuate a compromise in assigning the tax sale certificate of purchase, but it is unreasonable to construe §446.31 to require that some sort of compromise be sought when, instead, an assignment can be made for the full amount. Thus, we are of the opinion that your second question requires an affirmative answer.

The Fleck case also provides the answer to your third question. The Court stated in 227 Iowa at 365:

> "It is next contended that, assuming the assignments were valid, the notice of expiration given by the county was not sufficient and that there should have been another notice served by the assignee. The purpose of the notice is to give the owner of the property ninety days in which to make arrangements to redeem. One notice services this purpose and is all the law requires, if it is given by the then holder of the tax sale certificate. To require such assignee, in turn, to give another notice of expiration would be an unreasonable requirement and would serve no useful purpose. Appellant cites no authority to sustain his claim."

Your third question requires an affirmative answer. Therefore, there is no response required to your fifth question.

Your fourth question concerns whether costs can be included in the assignment where no compromise occurs. Iowa Code §446.19 (1983) requires that the county's bid, at scavenger sale, be for an "amount of all delinquent general taxes, special assessments, interest, penalties and costs charged against the real estate" except that no money is paid at that time. Iowa Code §447.1 (1983) requires, for redemption purposes, that the redeemer pay an amount which would include "costs paid by the purchaser or the purchaser's assignee for any subsequent year." In addition, certain costs are set forth in Iowa Code §447.13 (1983). Upon redemption, these costs must be paid, even if the taxes have been compromised. 1942 Op.Att'yGen. 93. Where the county assigns the certificate of purchase, in the absence of compromise and redemption, the only source for recovery of costs is the assignee.

The county, as a tax sale purchaser, has no title or right of possession to the property prior to issuance of a tax deed and, therefore, is not generally obligated to incur expenses associated only with the property. Currington v. Black Hawk County, 184 N.W.2d 675 (Iowa 1971); 1978 Op.Att'yGen. 233, 234. However, if the county

should incur expense associated with the real estate, there is no reason why the county would be precluded from attempting to recover such costs in the assignment. Cf. 1940 Op.Att'yGen. 607.

Therefore, where no compromise is involved, an assignment by the county should include all costs which are included in the county's bid under §446.19 and all other costs which are incurred and which are associated with the requirements of Iowa Code Chapters 446 and 447. In addition, the county can attempt to include in the assignment any other costs which it incurred.

Costs unique to Iowa Code Chapter 448 (1983) would only be the three dollar fee for a tax deed issued by the county treasurer to the tax sale certificate holder in the event that there is no redemption. This cost would not be included in the assignment since it would not have been incurred at that time.

Very truly yours,

Harry M. Griger

Harry M. Griger
Special Assistant Attorney General

WP2

COUNTIES; Municipal Tort Claims; Duty of county to defend and indemnify employees of county boards. Iowa Code Chapter 613A (1983); Sections 613A.2; 613A.7; 613A.8. All appointees to county boards are county employees for the purposes of Ch. 613A, but the determination of which governmental entity has the duty to defend and indemnify a particular employee under Ch. 613A for acts and omissions occurring within the scope of his or her duties depends on an analysis of the specific statutory provisions governing each particular board and its employees. (Weeg to Murtaugh, Shelby County Attorney, 2/9/84) #84-2-7(L)

Mr. Daniel J. Murtaugh
Shelby County Attorney
602 Market Street
Harlan, Iowa 51537

February 9, 1984

Dear Mr. Murtaugh:

You have requested an opinion of the Attorney General concerning whether the county assessor, members of the board of review, members of the conference board, and appointees to other county boards generally, are county employees for the purpose of determining "whether the county would be required to defend and indemnify them under its liability and errors and indemnity insurance coverage." It is our opinion that all the persons discussed in your opinion request are county employees for the purposes of Iowa Code Chapter 613A (1983), the Iowa Municipal Tort Claims Act. However, the county does not have the duty to defend and indemnify all county employees for acts and omissions under Ch. 613A. The question of which entity has that duty depends on an analysis of the specific statutory provisions governing each particular board and its employees.

Our analysis begins with a review of § 613A.2, which defines the term "employee" for the purposes of Ch. 613A as any person:

> . . . who performs services for a municipality whether or not the person is compensated for the services, unless the services are performed only as an incident to the person's attendance at a municipality function.

(emphasis added)

Next, § 613A.8 requires the county to defend any of its officers and employees, "elected or appointed" (emphasis added), and to save harmless and indemnify those persons against any tort claim for an alleged act or omission occurring within the scope

of their employment or duties, with the exception of willful and wanton conduct. Section 613A.7 authorizes, but does not require, the county to purchase liability insurance to protect itself against such claims. Thus, it would appear at first glance that the county has the duty under § 613A.8 to defend and indemnify any person who performs services for the county, including any persons who serve as appointees to various county boards. See 1976 Op.Att'yGen. 345 (members of governing board of solid waste agency created by Ch. 28E agreement between cities covered by Ch. 613A); 1970 Op.Att'yGen. 672 (volunteer employees of municipalities covered by Ch. 613A).

However, § 613A.8 goes on to provide that:

> . . . Any independent or autonomous board or commission of a municipality having authority to disburse funds for a particular municipal function without approval of the governing body shall similarly defend, save harmless and indemnify its officers and employees against such tort claims or demands.

Such an "independent or autonomous board or commission" is separately authorized, but not required, by § 613A.7 to "procure liability insurance within the field of its operation." Thus, a county board which may disburse funds without approval of the board of supervisors, and not the county, has the duty to defend and indemnify its employees.

Accordingly, the determination of whether the county or an individual board or commission has the primary responsibility to defend and indemnify its employees will depend on an analysis of the particular statutory provisions creating such a board or commission. For example, it is clear that the assessor (§§ 441.6 and 441.17), members of the conference board (§§ 441.2-441.16), and members of the board of review (§§ 441.31-441.37) perform services for the county and therefore are county employees under the definition contained in § 613A.2.[1] Accordingly, it would appear that these persons would be defended and indemnified by the county under § 613A.8 for any errors or omissions occurring within the scope of their employment.

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[1] We note that the members of the conference board and the board of review, as well as the assessor, perform services not only for the county but for the cities and school districts in the county. See Ch. 441. Indeed, the county conference board consists of city mayors, representatives from the high school district board of directors, and the board of supervisors. See § 441.2.

However, closer review of Ch. 441 establishes that the conference board is an "independent or autonomous board or commission" within the meaning of §§ 613A.7 and 613A.8. Both the assessor (§§ 441.6 and 441.9) and the board of review (§§ 441.31 and 441.32) are employed at the discretion of the conference board. Further, § 441.16 establishes that the conference board is to annually consider and approve the budget of the assessor and the board of review; this duty is to be exercised in accordance with Ch. 24, The Local Budget Law. The assessor is authorized by this same section to levy a tax "for the maintenance of the office of assessor and other assessment procedure," and the conference board is declared to be the certifying board for all tax levies and expenditures, which are subject to Ch. 24. § 441.16. Thus, Ch. 441 makes clear that the conference board is an independent board within the meaning of §§ 613A.7 and 613A.8, and therefore has the duty pursuant to § 613A.8 to defend and indemnify its employees for acts and omissions within the scope of their employment. Accordingly, the conference board, rather than the county, has the obligation to purchase liability insurance, though such an obligation is not mandatory under § 613A.7. Correspondingly, the county itself has no duty to defend or indemnify employees of such a board, and if the county does purchase liability insurance under § 613A.7, it has no obligation to include such employees within its coverage.

In concluding, we caution that this opinion is simply a discussion of the relevant law and in no way decides whether certain employees are covered under your county's existing liability insurance policy. Negotiation and subsequent interpretation of the terms of such a policy is left entirely to the parties to that policy and is not a proper subject of an attorney general's opinion. In addition, we do not by this opinion implicitly limit the county's authority to purchase liability insurance coverage for county employees it is not required to defend and indemnify: we believe the counties have the authority under § 613A.7 to either not purchase liability insurance or purchase any degree of coverage it believes appropriate.[2]

In conclusion, it is our opinion that all appointees to county boards are county employees for the purposes of Ch. 613A, but the determination of which governmental entity has the duty to defend and indemnify a particular employee under Ch. 613A for

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[2] For a discussion of the relationship between county liability insurance and the county indemnification fund, § 331.427, see Op.Att'yGen. #83-11-1(L).

acts and omissions occurring within the scope of his or her duties depends on an analysis of the specific statutory provisions governing each particular board and its employees.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

COUNTIES; Sheriff; Civil service for deputy sheriffs; Regular, reserve, and special deputies: Iowa Code Chs. 80D; 341A (1983); Sections 80B.3(3); 80D.1; 331.652(1); 331.903; 331.904(4); 341A.6; 341A.7; and 341A.10. (1) The civil service commission should adopt rules which specify when, how often, and in what manner examinations should be administered and interviews conducted for civil service positions; (2) The commission has the discretion to both set requirements for civil service positions, subject to statutory guidelines, and to reject applicants as unqualified; (3) Those employees in the sheriff's office who do not actually perform law enforcement duties are not covered by Ch. 341A; (4) Generally, the sheriff will be assisted by regular deputies subject to Ch. 341A or reserve deputies appointed pursuant to Ch. 80D. The sheriff has authority pursuant to § 331.652(1) to appoint special deputies, however that authority should be exercised only in very unusual circumstances. Special deputies may be compensated, but that decision is within the sole discretion of the board of supervisors. (Weeg to Krejci, Marshall County Attorney, 2/9/84) #84-2-6(L)

February 9, 1984

Please note under § 3 of this opinion that § 331.653(4) states that bailiffs do not need to be covered by civil service even though they may serve some law enforcement functions. They also do not need to be provided law enforcement training.

Mr. Phil Krejci
Marshall County Attorney
Marshall County Courthouse
Marshalltown, Iowa 50158

Dear Mr. Krejci:

You have requested an opinion of the Attorney General on several questions relating to the county civil service commission for deputy sheriffs and the sheriff's office. We shall address each question in turn.

1.

Your first question is:

> How often should the civil service commission administer examinations and conduct interviews? Should it be done annually or at some other frequency related to time? Should it be done each time a vacancy occurs at the sheriff's office? Should it be done only when the commission is unable to generate a list of ten names? Regarding the last question, the commission may be able to generate a list of twenty qualified applicants. At the time of the

> next vacancy, they may still be able to submit to the sheriff a list of ten names from the prior list of twenty. When the next vacancy occurs, the commission may still have at least ten qualified persons whose names may be submitted, and so on.[1]

Iowa Code Ch. 341A (1983) governs county civil service for deputy sheriffs. There are no specific provisions in Ch. 341A which answer your particular questions. However, § 341A.6 sets forth the powers and duties of the civil service commission. These duties include the following:

> 1. To adopt, and amend as necessary, rules pursuant to the provisions of this chapter, which shall specify the manner in which examinations are to be held and appointments, promotions, transfers, reinstatements, demotions, suspensions, and discharges are to be made. The rules may make such other provisions regarding personnel administration and practices as are necessary or desirable in carrying out the purposes of this chapter. The commission rules, and their amendments, shall be printed and made available without cost to the public.
>
> * * *

(emphasis added) Accordingly, it is our opinion that the commission should adopt rules which specify when, how often, and in what manner examinations should be administered and interviews conducted for civil service positions.[2]

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[1] With regard to your last question, it appears you assume an eligibility list must include ten names. However, we recently held that the certified eligible lists referred to in §§ 341A.8 and 341A.13 need not include the names of ten deputies if there are fewer than ten deputies who meet the qualification requirements of that section. Op.Att'yGen. #83-10-8(L) (a copy of which is enclosed).

[2] We note that while the commission is empowered to adopt rules governing the frequency of examinations, such rules must comply with the relevant provisions of Ch. 341A. For example,

2.

> Does the civil service commission have discretion to reject an applicant as unqualified? There must be some such power in the commission or there would be no need for them to interview the applicants. If they have that power, then a situation may arise where the commission would be unable to provide the sheriff with a list of names of ten qualified applicants.[3] Must the vacancy remain unfilled until another examination is administered and more interviews conducted?

It is our opinion that the commission does have the discretion to reject an applicant as unqualified when compiling an eligibility list of applicants for appointment or promotion. Section 341A.6(6) provides that a commission is to establish eligibility lists as a result of competitive tests. However, compilation of such lists is not to be made solely on the basis of the competitive examinations provided for in § 341A.6. First, § 341A.2 also requires administration of practical tests as described in that section. Section 341A.8 provides that appointments and promotions are to be based on competitive examinations and "impartial investigations." As discussed above, § 341A.6(1) provides the commission is to adopt rules for the appointment and promotion of persons to civil service positions, which presumably includes rules to implement these sections. Accordingly, a number of factors are to be considered by the commission when compiling eligibility lists, and the exercise of discretion on the part of the commission is clearly contemplated by these statutory provisions when viewed as a whole. In sum, the commission does have discretion to both set requirements for county civil service positions, subject to statutory guidelines,

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[2] (cont'd) § 341A.8 provides in part that:

> 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 . . . .

[3] See footnote 1, supra.

and to reject applicants for these positions for failing to meet these requirements.

We do note, however, that there is no specific requirement in Ch. 341A that the commission conduct interviews of applicants. Section 341A.8 does provide that appointments and promotions to civil service positions be made "solely on merit, efficiency, and fitness, which shall be ascertained by open competitive examinations and impartial investigations . . ." (emphasis added) There are no further guidelines in Ch. 341A for determining what such "impartial investigations" are to consist of. However, as set forth above, § 341A.6(1) provides in part that the commission is to adopt rules specifying the manner in which such appointments are to be made. Again, it is our opinion that the commission should adopt rules to determine what such "impartial investigations" should consist of. We do note that use of the term "impartial" should not be overlooked.

3.

Your third question is as follows:

> Which employees of a sheriff are covered by Chapter 341A? Process servers? Jailers? Dispatchers? Custodians? Office "deputies" who deal with civil cases or records? Is the term "deputy" defined by duties? If so, what are the duties which, when performed by an employee of the sheriff's office, render that employee a deputy covered by Chapter 341A?

Sections 341A.7 and 341A.10 set forth the guidelines for determining which persons in the sheriff's office are covered by civil service. Section 341A.7 provides that:

> The classified civil service positions covered by this chapter shall include persons actually serving as deputy sheriffs who are salaried pursuant to section 331.904, subsection 2, but do not include a chief deputy sheriff, two second deputy sheriffs in counties with a population of more than one hundred thousand, and four second deputy sheriffs in counties with a population of more than two hundred thousand. A deputy sheriff serving with permanent rank under this chapter may be designated chief deputy sheriff or second deputy sheriff and retain such rank during the period of service as

> chief deputy sheriff or second deputy sheriff and shall, upon termination of the duties as chief deputy sheriff or second deputy sheriff, revert to the permanent rank.

(emphasis added) Section 341A.10 provides that:

> An applicant for any position under civil service shall be a citizen of the United States who can read and write the English language, and shall meet the minimum requirements of the Iowa law enforcement academy for a law enforcement officer.

In 1974 Op.Att'yGen. 193 we reviewed these provisions to answer an identical question as follows:

> Under [subsection] 7, persons actually serving as deputy sheriffs shall be covered by civil service although chief deputies and second deputies in counties of certain population levels are excluded. We interpret this to mean that only those deputies who are required to perform the duties of a deputy sheriff as set out in the Code will be included.

(emphasis added) We concluded that deputy sheriffs are law enforcement officers within the meaning of § 80B.3(3), which currently provides that:

> "Law enforcement officer" means an officer appointed by the state conservation commission, a member of a police force or other agency or department of the state, county or city regularly employed as such and who is responsible for the prevention and detection of crime and the enforcement of the criminal laws of this state and all individuals, as determined by the council, who by the nature of their duties may be required to perform the duties of a peace officer.

(emphasis added) We then held that "in order to be in a classified civil service position, a deputy sheriff must meet [the minimum statutory requirements of Ch. 141A] and be employed in a position with duties as defined under § 80B.3." 1974 Op.Att'yGen. 193. We additionally note that § 801.4(7)(a) similarly includes within the definition of the term "peace

officer" all "sheriffs and their regular deputies who are subject to mandated law enforcement training."

In sum, those employees in the sheriff's office who do not actually perform law enforcement duties are not covered by the civil service provisions of Ch. 341A. 1974 Op.Att'yGen. 193. The determination of whether a particular employee is performing law enforcement duties is a factual question, to be resolved upon an analysis of that employee's job duties. Such a factual determination should be made on a case-by-case basis, and in any case, is not the proper subject of an Attorney General's opinion.

4.

Your fourth and final question is as follows:

> Does the sheriff have the power to appoint "special deputies" who are not subject to Chapter 341A? If the sheriff has that power, can such "special deputies" claim a salary from the county or must they be volunteers, such as sheriff's reserves, who serve without pay? Can such "special deputies" be permanent employees? What duties can be performed by "special deputies?"

It is our opinion that a county sheriff does have the authority to appoint "special deputies" who would not be subject to Ch. 341A.

Generally, the sheriff must comply with the provisions of Ch. 341A (civil service for deputy county sheriffs) and § 331.903 (appointment of deputies) when appointing or removing deputy sheriffs. See § 331.652(7). Chapter 80D further authorizes the county to establish a sheriff's reserve force, which consists of volunteer, non-regular, sworn members of the sheriff's office who serve with or without compensation. § 80D.1. The reserve:

> has regular police powers while functioning as [the sheriff's] representative and participates on a regular basis in the [sheriff's] activities including those of crime prevention and control, preservation of the peace and enforcement of the law.

Id. The legislature has thus provided a means for the sheriff to appoint both regular deputies, for usual sheriff's office business, and reserve deputies, for those unusual situations where the force of regular deputies is not adequate or available.

Accordingly, the need for establishing yet a third tier of "special" deputies does not seem great.

However, the legislature has provided in § 331.652(1) that one of the general powers of the sheriff is as follows:

> The sheriff may call upon any person for assistance to:
>
> a. Keep the peace or prevent the commitment of crime.
> b. Arrest a person who is liable to arrest.
> c. Execute a process of law.

This section authorizes the sheriff to "call upon any person for assistance" to perform functions designated therein. We believe this section authorizes appointment of persons who would not otherwise be classified as regular or reserve deputies; indeed, a similar statute, which preceded § 331.652(1), was interpreted by this office on two recent occasions as authorizing the sheriff to appoint special deputies. 1978 Op.Att'yGen. 822; 1972 Op.Att'yGen. 605. In our 1972 opinion, which we affirmed in 1978, we relied inter alia on former § 337.1, which provided that:

> The sheriff, by himself or deputy, may call any person to his aid to keep the peace or prevent crime, or to assert any person liable thereto, or to executive process of law;
> . . .

This section was repealed by 1981 Iowa Acts, ch. 117, § 1097; § 331.652(1) stands in its place.

We note that our earlier opinions were written prior to the enactment in 1980 of Ch. 80D, governing sheriff's reserves. See 1980 Iowa Acts, ch. 1191, § 1. We further note that § 80D.1 concludes with the following sentence:

> This chapter constitutes the only procedure for appointing reserve peace officers.

However, we believe this section does not foreclose appointment of special deputies pursuant to § 331.652(1), as that latter section was revised in 1981 and included as part of the new County Home Rule Act. We must assume that the legislature in 1981 was aware of the restriction in § 80D.1 when it revised § 331.652(1), and further that it was aware of this office's construction of a similar provision. See § 4.8. In further

support of this conclusion we refer to the principle of statutory construction that all the language of a particular statute is to be given effect. See § 4.4(2); Millsap v. Cedar Rapids Civil Service Commission, 249 N.W.2d 679 (Iowa 1977); State v. Berry, 247 N.W.2d 263 (Iowa 1976). Section 331.652(1) may be reconciled with § 80D.1 if the latter section is read narrowly as restricting procedures for appointment of reserve deputies but not foreclosing appointment of a separate category of special deputies pursuant to § 331.652(1).

However, the fact that Ch. 341A and § 331.903, and Ch. 80D, generally govern appointment of regular and reserve deputies in the sheriff's office, taken in conjunction with the exigent nature of the designated statutory functions for which a sheriff may appoint "special deputies," leads us to conclude that the legislature intended the sheriff's authority to appoint "special deputies" pursuant to § 331.652(1) be very limited, and only temporary in nature. Accordingly, we believe that any exercise of authority under § 331.652(1) should be limited to dire emergency situations in which the sheriff is required to exercise his or her authority under § 331.652(1) because of the impossibility of calling upon regular or reserve deputies. Once the emergency has passed, however, the sheriff would be required to comply with Ch. 341A and § 331.903, or Ch. 80D, if he or she wishes to appoint a "special deputy" to a more permanent position as regular or reserve deputy in the sheriff's office. In sum, we believe that the sheriff should resort to appointment of special deputies pursuant to § 331.652(1) only in very unusual circumstances.

You also ask whether "special deputies" must serve as volunteers without pay or whether they may receive a salary. Certainly such deputies may serve as volunteers. We can find no authority which would prohibit the county from reimbursing such deputies for services performed on behalf of the county. Therefore, we believe the county could exercise home rule authority to compensate special deputies if it chose to do so. However, we believe such payment would be subject to the requirements of § 331.904, which governs the salaries of deputies, assistants, and clerks in the sheriff's office. Specifically, § 331.904(2) governs annual salaries of deputy sheriffs, i.e., those deputies covered by civil service, and therefore does not apply to temporary appointments of special deputies pursuant to § 331.652(1). Section 331.904(4), however, requires the supervisors to set the salaries of all other assistants and clerks appointed by the principal officer, in this case, the sheriff. Accordingly, we believe § 331.904(4) would require the supervisors to determine the amount of compensation, if any, that such special deputies should be awarded.

Finally, you ask what duties can be performed by special deputies. We believe § 331.652(1)(a) through (c), which are set forth above, clearly delineate the specific duties which may be performed by such deputies.

Conclusion

In conclusion, it is our opinion that: (1) The civil service commission should adopt rules which specify when, how often, and in what manner examinations should be administered and interviews conducted for civil service positions; (2) The commission has the discretion to both set requirements for civil service positions, subject to statutory guidelines, and to reject applicants as unqualified; (3) Those employees in the sheriff's office who do not actually perform law enforcement duties are not covered by Ch. 341A; (4) Generally, the sheriff will be assisted by regular deputies subject to Ch. 341A or reserve deputies appointed pursuant to Ch. 80D. The sheriff has authority pursuant to § 331.652(1) to appoint special deputies, however that authority should be exercised only in very unusual circumstances. Special deputies may be compensated, but that decision is within the sole discretion of the board of supervisors.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

Enclosure

GENERAL RELIEF: Conditions of Relief; Residency; Financial Status. §§ 251.27, 252.2, 252.5, 252.6, 252.13, 252.25, 252.27. Counties may not impose, as a condition for eligibility, income and net worth criteria for relatives of county relief applicants, nor may the county impose a requirement that each appliant disclose the financial status of relatives. Under certain specified conditions, the county may offer residence at a county care facility in lieu of direct county relief. (Williams to Vanderpool, Cerro Gordo County Attorney, 2/9/84) #84-2-5(L)

NOTE: Reference in text to § 251.27 should be § 252.27.

Mr. William S. Vanderpool
Cerro Gordo County Attorney
121 Third Street N.W.
Mason City, Iowa 50401

February 9, 1984

Dear Mr. Vanderpool:

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

1. May a county impose, as conditions of eligibility for county relief, income and net worth criteria for relatives of an applicant.

2. May a county impose, as a condition of eligibility for county relief, a requirement that each applicant disclose the financial status of relatives.

3. May a county offer residency at a county care facility in lieu of direct county relief.

Iowa Code § 252.25 provides that "[t]he board of supervisors of each county shall provide for the relief of poor persons in its county who are ineligible for," or awaiting approval for state or federal assistance. Id. (Emphasis supplied). "The word 'shall' imposes a duty". Iowa Code § 4.1(36); Taylor v. Dept. of Transportation, 260 N.W.2d 521, 523 (Iowa 1977). Thus, each county has a duty to provide some relief to poor persons within the county, the form and amount of which assistance is within the discretion of the Board. Iowa Code § 251.27.

Parents, and children, and in their absence, grandparents and grandchildren, are also responsible for the relief, maintenance, and support of a poor person. Iowa Code §§ 252.2 and 252.5. However, it is clear that the Code does not

contemplate a denial of county relief because of the resources of relatives, but rather what is contemplated is the potential for reimbursement of county funds expended.

> Upon the failure of such relatives so to relieve or maintain a poor person who has made application for relief, the county board of supervisors, county social welfare board, or state division of child and family services of the department of social services may apply to the district court of the county where such poor person resides or may be, for an order to compel the same.

Iowa Code § 252.6.

Given the mandate of § 252.25, it is clear that the county is statutorily required to provide relief during the pendency of a § 252.6 action. Iowa Code § 252.13 supports this analysis by expressly providing the legal vehicle for the county to recover sums expended for support during the suit. Accordingly, we conclude that a county may not deny relief on the bases of relatives' resources.

The county has an admitted interest in obtaining information on the financial status of applicants' relatives so that a § 252.6 suit might be initiated. As noted above, however, that financial status alone cannot be made a condition of eligibility for county relief. Thus, a refusal to report relatives' financial status would have little bearing on the applicant's eligibility.

In this light, refusal to report relatives' financial status is not a proper condition for county relief eligibility. Of course, the county may properly deny relief for a failure to report support payments actually made by relatives.

Your final question relates to the offer of care facility residence in lieu of monetary relief.

> [T]he board of supervisors [of the county] shall determine the form of the relief [and t]he amount of assistance issued shall be determined by the board of supervisors.

Iowa Code § 252.27.

The intent of this provision is to place the selection of the precise form of relief with the county. As this provision "shall be liberally construed with a view to promote its objects...", Iowa Code § 4.2, it appears as though the county may elect to fulfill its statutory duty to provide relief through the county care facility. This conclusion is consistent with the county's home rule authority described in Iowa Code § 331.301.

Further, in Collins v. Hoke, 705 F.2d 959 (8th Cir. 1983), the Eighth Circuit Court of Appeals upheld the ability of a county to offer residence in a care facility in lieu of monetary assistance in excess of $1,000. The Collins court concluded that "[t]he liberty interest protected by the Fourteenth Amendment does not include the right to state-support of a chosen life-style". Id. at 961. Thus, Cedar County's refusal to pay more than $1,000 in monetary benefits did not constitute interference with Collins' freedom to live alone. Rather, Collins' indigency removed that option.

As a caveat, we note that Cedar County successfully defended an ordinance that required a specified standard for emergency assistance ($1,000) to be exceeded before relief was limited to care facility residence. Although not discussed by the Collins court, this provision of Model Ordinance for County Relief may well have been determinative of that court's decision. Further, we note that Collins dealt with an individual who desired to live alone. Quite obviously, care facility residence for families may not receive such favorable judicial review when such residence imposes a segregated dormitory living arrangement on the family unit.

Accordingly, we limit our opinion on this matter to the holding of Collins. Additionally, we suggest that you review the Model Ordinance for County Relief, a copy of which may be obtained from the Iowa State Association of Counties (ISAC).

Cordially,

Matthew W. Williams
Assistant Attorney General

MWW/jaa

MENTAL HEALTH; MENTAL RETARDATION; FUNDING; COUNTIES. §§ 4.1(36), 222.13, 222.60, 252.16, 331.425(13)(a)(2), 331.425(13)(b), Code of Iowa 1983. The discretionary language of § 331.425(13)(b) does not modify the mandatory funding obligations imposed by § 222.60, Iowa Code. Assuming that all of the conditions of § 222.60 have been met in a given case, the board of supervisors of the county in which the patient has legal settlement has no discretion regarding the funding for the care and treatment of patients either adjudicated mentally retarded and committed to a Chapter 222 facility or voluntarily admitted to a Chapter 222 facility. (Lynn to Burk, Assistant Black Hawk County Attorney, 2/9/84) #84-2-4(L)

February 9, 1984

Mr. Peter W. Burk
Assistant Black Hawk County Attorney
309 Courthouse Building
Waterloo, Iowa 50703

Dear Mr. Burk:

You have requested advice in your letter of December 16, 1983, regarding the effect of Iowa Code § 331.425(13) on the financial obligations imposed on the county pursuant to § 222.60 of the Code. You appear to be asking:

(I) What is the effect of the discretionary language in § 331.425(13)(b) on county funding obligations?

(II) Does the county board of supervisors have any discretion regarding funding for the care and treatment of patients adjudicated to be mentally retarded or developmentally disabled and committed to a ch. 222 facility?

(III) Is the answer to (II) different if the patient is voluntarily admitted under § 222.13 to a ch. 222 facility?

I. What is the effect of the discretionary language in § 331.425(13)(b) on county funding obligations?

County funding obligations arise under § 222.60 of the Code. That section states that:

> All necessary and legal expenses for the cost of admission or commitment or for the treatment, training, instruction, care,

> habilitation, support and transportation of patients in a state hospital-school for the mentally retarded, or in a special unit, or any public or private facility within or without the state, approved by the commissioner of the department of human services shall be paid by either:
>
> 1. The county in which such person has legal settlement as defined in section 252.16.
>
> 2. The state when such person has no legal settlement or when such settlement is unknown.

This section establishes the obligation to pay and sets out the conditions under which the county must pay. Four criteria are set out which must be met before the responsibility of bearing the expense is imposed on the county:

(a) the expense must be necessary and legal;

(b) the expense must be related to admission, commitment or treatment;

(c) the costs must be for a patient at an authorized facility;

(d) the patient must have legal settlement in that county.

Section 331.425, on the other hand, is a funding statute. It recognizes that the county has certain funding obligations and requires that a particular fund be established to meet those obligations. Section 331.425 provides that:

> A county shall establish the following funds:
>
> ....
>
> 13. A county mental health and institutions fund. 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:
>
> ....
>
> (2) Care and treatment of patients by either of the state hospital-schools or by any other facility established under Chapter 222.
>
> ....
>
> b. Any portion which the board deems advisable of the cost of professional evaluation, treatment, training, habilitation, and care of persons who are mentally retarded, autistic persons, or persons who are afflicted by any other developmental disability, at a suitable public or private facility providing inpatient or outpatient care in the county....

Section 331.425(a)(2) refers to "charges which the county is obligated by statute to pay". One such statute is § 222.60. Thus, § 331.425(13) requires the establishment of a fund out of which the obligations imposed by § 222.60 will be paid. The funding provisions of § 331.425(13) do not create any new or different payment obligations, nor do they provide any greater discretion for the Board; they merely provide the payment vehicle for obligations established elsewhere in the Code.

Subsection (13)(b) of § 331.425 does not modify the obligation imposed by § 222.60 or increase the Board's discretion in the amount funded. Keeping in mind the criteria established in § 222.60 before the county is absolutely liable for payment, you will notice that (13)(b) addresses expenses for care and treatment at any "suitable public or private facility providing inpatient or outpatient care in the county." It is very likely that there are patients who fall into this (13)(b) group, receiving care in the county, but who do not meet all of the criteria of § 222.60--for example, legal settlement is not in that county. In such cases, while the county may not be required to pay expenses, the board of supervisors may decide to pay all or a portion of the costs, and there the board has discretion as to the amount.

II. Does the county board of supervisors have any discretion regarding funding for the care and treatment of patients adjudicated to be mentally retarded or developmentally disabled and committed to a ch. 222 facility?

Assuming that all of the conditions of § 222.60 have been met in a given case, the board of the county of the patient's legal settlement has no discretion as to the amount it will pay if the patient has been committed to a ch. 222 facility. Expenses "shall be paid" by the county in which the person has legal settlement. § 222.60, Iowa Code. "The word 'shall' imposes a duty". § 4.1(36), Iowa Code. The county is obligated to pay "all necessary and legal expenses," which should not be read narrowly in view of the fairly exhaustive list in the statute of types of services covered.

III. Is the answer to (II) different if the patient is voluntarily admitted under § 222.13 to a ch. 222 facility?

The answer to (II) would not be different if a patient is voluntarily admitted to a ch. 222 facility. Section 222.60 states that the county of legal settlement is liable for all costs of "admission or commitment" or treatment of patients in authorized facilities. That language is used consistently throughout ch. 222, and no distinction is made between voluntarily admitted and committed patients for purposes of payment. A preadmission diagnostic evaluation attests to the need for the admission of a voluntary patient, see § 222.13, Iowa Code, so the need for the services is not a factor upon which to distinguish. The central inquiry underlying the county's obligation to pay involves the financial need of the patient. A patient is no less financially needy simply because he or she was voluntarily admitted. There is no reasonable basis for authorizing payment for § 222.13 patients at a rate less than the amount paid for committed patients.

Likewise, liability for reimbursement to the county from a third-party source is the same whether the admission was voluntary or involuntary. Benton County v. Wubbena, 300 N.W.2d 168 (Iowa 1981).

Whether the board has any discretion regarding funding for the care and treatment of voluntarily admitted patients in a private facility is not dealt with here. That question is involved in a case currently pending in which the State of Iowa is a party. It has been the consistent policy of the Attorney General's Office not to issue opinions on matters that are pending in litigation.

Sincerely,

Eleanor E. Lynn

Eleanor E. Lynn
Assistant Attorney General

EEL/jaa

ELECTIONS: Ballot; Surname. Chp. 49; §§ 49.30, 49.31, 49.33, 49.38. The candidate's surname must be included on the election ballot. (Pottorff to Halvorson, State Representative, 2/9/84) #84-2-3(L)

February 9, 1984

Honorable Roger A. Halvorson
State Representative
Box 627
Monona, Iowa 52159

Dear Representative Halvorson:

You have requested an opinion of the Attorney General concerning the form of the candidate's name to be placed on an election ballot. You point out that a candidate for public office may use only his or her first and middle name for professional or personal purposes. You specifically inquire whether, under these circumstances, the surname must be included on an election ballot. In our opinion the candidate's surname must be included on an election ballot.

Several statutory provisions address the placement of a candidate's "name" on the election ballot. See, e.g., Iowa Code § 49.30 (1983) ("The names of all candidates to be voted for in each election precinct . . . shall be printed on one ballot. . . ."); Iowa Code § 49.33 (1983) ("Upon the left-hand margin of each separate column of the ballot, immediately opposite the names of the candidates for president and vice president, a single square . . . shall be printed in front of a bracket enclosing the names of the said candidates for president and vice president."); Iowa Code § 49.38 (1983) ("The name of a

candidate shall not appear upon the ballot in more than one place for the same office. . . ."). No statutory provision, however, expressly addresses the form of the name to be printed.

In the absence of express statutory direction, we must construe the term "name" as used in these provisions in light of principles of statutory construction. Statutes relating to the same subject matter are in pari materia and must be construed, considered and examined in light of their common purpose and intent so as to produce a harmonious system or body of legislation. Rush v. Sioux City, 240 N.W.2d 431, 445 (1976). A separate, significant statutory provision addressing the arrangement of names on the ballot must be considered under this principle.

Section 49.31 provides for alphabetizing and rotating names on the ballot. Under this section the commissioner of elections prepares a list of the election precincts of the county by arranging the townships and cities in alphabetical order and the wards or precincts in each township or city in numerical order. The statute further provides that "[t]he commissioner then shall arrange the surnames of each political party's candidates for each office to which two or more persons are to be elected at large alphabetically for the respective offices for the first precinct on the list; thereafter, for each political party and for each succeeding precinct, the names appearing first for the respective offices in the last preceding precinct shall be placed last, so that the names that were second before the change shall be first after the change." Iowa Code § 49.31(2) (1983) (emphasis added). Similar alphabetizing and rotating provisions on the basis of surname exist for city, school, or special elections in which any office is to be filled on a nonpartisan basis. Iowa Code § 49.31(3) (1983).

Reading statutes concerning the candidate's name in conjunction with the statutory direction to alphabetize and rotate on the basis of surname, we conclude that the surname must be included on an election ballot. If the surname were not printed, the commissioner of elections could not fulfill the statutory mandate of § 49.31. In order to construe the term "name" to produce a harmonious system or body of legislation, therefore, candidate names on the election ballot must include the surname.

This result is consistent with the practice in other jurisdictions. Some jurisdictions expressly require by statute the inclusion of a candidate's surname on the election ballot. See, e.g., Fine v. Elections Board of Wisconsin, 95 Wis.2d 162, 289 N.W.2d 823 (1980). The goals in establishing the form of a candidate's name on an election ballot should include the avoidance of voter confusion. Id. In our view, inclusion of the

surname, either expressly by a statutory provision or impliedly by a body of legislation, furthers accurate identification by the voters of the candidate.

Accordingly, based on the foregoing analysis, it is our opinion that a candidate's surname must be included on an election ballot.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:cjc

HIGHWAYS: DEPARTMENT OF TRANSPORTATION: Iowa Code §§ 4.7, 306.4, 306.8, 307.24, 308.5, 309.67, 313.2, 331.362 (1983). Section 308.5 concerning the Great River Road should be read together with Chapter 306. The functional review board should consider the legislative intent in § 308.5 in classifying segments of the Great River Road. (Osenbaugh to Huddle, Louisa County Attorney, 2/3/84) #84-2-1(L)

February 3, 1984

Roger A. Huddle
Louisa County Attorney
Louisa County Courthouse
Wapello, Iowa 52653

Dear Mr. Huddle:

You have requested the opinion of this office to determine whether the Iowa Department of Transportation is responsible for the design, construction and maintenance of portions of the Great River Road in Louisa County under Iowa Code § 308.5.

This section states:

> Jurisdiction and control of the great river road shall be vested in the state transportation commission.

The issue before us is whether section 308.5 requires State assumption of the responsibility to construct and maintain a road which is classified as a county road under chapter 306 because that road is designated as a portion of the Great River Road.

The phrase "jurisdiction and control" is the same phrase used in Iowa Code § 306.4 to allocate responsibility for the construction and maintenance of roads. Thus § 308.5 appears on

its face to override the functional classification of roads set forth in § 306.4. Under this view then it would appear that the Department of Transportation would be responsible for construction and maintenance of all portions of the Great River Road.

This construction, however, appears to be inconsistent with both the later legislative history and the administrative interpretation of the statute. Four years after enactment of § 308.5 (1974 Iowa Acts, ch. 1181, § 3), § 312.2(11) was passed. 1978 Iowa Acts, ch. 1019, §§ 28, 29. This section establishes a revolving fund for loans to affected jurisdictions to be utilized for construction of Great River Road projects. This section clearly contemplates that jurisdictions other than the State will be responsible for construction of some portions of the Great River Road. See also I.A.C. 820-[08,E] ch. 2, "Special Great River Road Fund." Additionally, chapter 306 appears to contemplate that every road in the State will be classified as provided therein.

We are advised that, despite the enactment of § 308.5 in 1975, the designation of roads as portions of the Great River Road project has not been treated as resulting in a change in classification of the roads. Counties have applied to have specific projects approved for federal funding. It does not therefore appear that assumption of State responsibility for construction and maintenance of all designated project roads was recognized during the designation or grant process. Counties have obtained funds for projects and assumed responsibility for repayment of loans under § 312.2(11) for specific projects which are part of the Great River Road. Thus the language of § 308.5 and the treatment of many project segments as county roads in § 312.2(11) and in practice appear to be irreconcilable.

Additionally we would note that the statutes authorizing expenditures from the primary road fund refer to the functional classification system established under chapter 306 §§ 313.2, 313.4. An annual appropriation of $100,000 for acquisition and construction of highway-associated project components for the Great River Road is provided in § 308.4 (1983 Supp.). See also § 312.2(10). Thus, although it appears from § 308.5 that the legislature vested responsibility for the Great River Road in the Department of Transportation, it provided no funds for maintenance of portions of the Great River Road which are not primary highways under chapter 306.

Furthermore, the statutes imposing responsibility to construct and maintain roads refer to primary or secondary highways and are thus tied to the functional classification system. See §§ 307.24, 309.67, 331.362.

Applying strict principles of statutory construction, it would be said that § 308.5 is a more specific provision which would be treated as an exception to § 306.4. Iowa Code § 4.7 (1983). Yet § 312.2(11), which indicates contrary legislative intent, is the later provision. See § 4.8. Also to be considered in construing statutes is the administrative construction of the statute, § 4.6(6), the consequences of a particular construction, § 4.6(6), and the object sought to be attained, § 4.6(1).

Reading these statutes in pari materia with chapters 306, 309, 310, 312, and 313, it appears that the legislature contemplated that responsibility for the Great River Road would be in the Transportation Commission but also contemplated that counties would assume responsibility for portions of the Great River Road, §§ 312.2(11), 308.9(3), and further assumed that Great River Road project segments would fit within the functional classification system in chapter 306 when implemented.

The final administrative authority for determining the functional classification of roads is the State Functional Review Board. Section 306.6(2). Should a county and the Department of Transportation be unable to reach agreement concerning jurisdiction, see §§ 306.8, 308.8, 310.2, 313.2, the State Functional Review Board provides the administrative mechanism to determine the functional classification of a specific road. In so classifying a portion of the Great River Road, that body should consider first our opinion that section 308.5 was intended to place responsibility in the Department of Transportation and second whether the county has assumed responsibility for a road segment by agreement, including any loan agreement under § 312.2(11). Until such time as a Great River Road segment currently designated as a county road is reclassified as a primary road by the Department or the Functional Review Board, we would note that the county has the statutory duty to maintain secondary roads, § 308.67.

We also recommend that the legislature examine this issue. The inconsistencies set forth above indicate a need for legislative clarification.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:cjc

TAXATION: Property Tax; Nature of Property Tax Liens On Machinery And Equipment And On Buildings Erected On Leased Land. Iowa Code §§427A.1(1)(e), 445.28, 445.32, 446.7 (1983). Where machinery and equipment is, by law, assessed and taxed as real property, along with other real property, a real property tax lien will attach to that machinery and equipment and to the other real property taxed as a unit. The enforced collection of delinquent real property tax attributable to machinery and equipment will generally be by the tax sale method. The real property tax lien attaches to buildings erected on leased land, but not to the underlying land. (Griger to Senator Berl E. Priebe, 3/26/84) #84-3-7(L)

March 26, 1984

The Honorable Berl E. Priebe
State Senator
State Capitol
L O C A L

Dear Senator Priebe:

You have requested an opinion of the Attorney General as follows:

> Your opinion is needed concerning the status of tax liens on property which was once assessed as personal property, but which now, by statute, is assessed as real estate. Three questions are posed:
>
> 1) Is a lien of machinery and equipment taxes a lien only on the real estate on which it is located, or is it in the nature of a personal property tax lien against all real estate owned by the owner of the machinery and equipment?
>
> 2) If the answer is a real estate lien, how does the County Treasurer enforce collection for a delinquent tax on machinery and equipment?

3) Is the lien status of taxes on buildings on leased land the same as foregoing? If not, how does it differ?

Iowa Code §427A.1(1)(e) (1983) provides that "Machinery used in manufacturing establishments" is to be assessed and taxed as real property. Presumably, your first and second questions are concerned with manufacturing machinery and equipment ("machinery").[1]

Iowa Code §445.28 (1983) provides that "Taxes upon real estate shall be a lien on the real estate against all persons except the state." Iowa Code §445.29 (1983) provides that "All personal property tax due from a person shall be a lien against any real estate owned by the person for ten years from the date of assessment."

Section 445.29, on its face, only applies to liens for personal property taxes. It, therefore, has no application to real property taxes attributable to machinery used in manufacturing establishments. Instead, a lien for real property taxes on such machinery comes within the scope of §445.28. Merv E. Hilpipre Auction Co. v. Solon State Bank, No. 69585 (Iowa Sup. Ct., filed Jan. 18, 1984).

Generally, real property of a manufacturing establishment, of which machinery is one component, is to be valued and taxed as a unit.[2] Maytag Company v. Partridge, 210 N.W.2d 584 (Iowa 1973). Under these circumstances, the machinery is "assessed as part of the real estate." 210 N.W.2d at 588. Since manufacturing real property is taxed as a unit and since real property taxes, under §445.28, are a lien against the real estate, it logically follows that real property taxes attributable to each component of the unit (machinery, land, improvements) would constitute a lien upon the entire unit.

With respect to your second question, the recent decision of the Iowa Supreme Court in Merv E. Hilpipre Auction Co. v. Solon State Bank, No. 69585 (Iowa Sup. Ct., filed Jan. 18, 1984) is instructive. In Hilpipre, the Johnson County assessor, in valuing and assessing the taxpayer's manufacturing establishment, placed separate valuations as of January 1, 1980, upon the taxpayer's land, buildings and machinery. Subsequently, the taxpayer sold the land and buildings, but not the machinery, on April 2, 1981. Due to financial difficulties, the taxpayer engaged an auctioneer who, on September 9, 1981, sold the

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[1]Iowa Code §427A.1(1)(d) (1983) provides that machinery and equipment which is "attached" to real property is assessed and taxed as real property, even if under property law, such machinery and equipment would constitute personal property. The results reached in this opinion would also apply to §427A.1(1)(d) machinery and equipment.

[2]The other components would be the land and improvements (buildings and structures) of the manufacturing establishment.

machinery at public auction. The Solon State Bank had a security interest in the machinery which was transferred to the auction proceeds. Johnson County claimed that it had a superior real property tax lien in the amount of $3,845.63 tax plus interest and penalty on the machinery and that the tax lien transferred to the auction proceeds.[3]

When the property taxes were levied in March, 1981, the taxpayer had owned the land, buildings, and machinery. When the land and buildings were sold on April 2, 1981, the Johnson County assessor, auditor, and treasurer erroneously listed the machinery as belonging to the purchaser. The bank contended that there was no valid tax lien upon the machinery for the 1980-1981 fiscal year since the tax records erroneously reflected the wrong machinery ownership. The Iowa Supreme Court rejected the bank's argument, held that Johnson County had a superior real property tax lien on the machinery, and under the circumstances of this case, held that the lien was transferred to the auction proceeds.

If the taxpayer in Hilpipre had not sold the machinery at auction, delinquent real property taxes attributable to it would have been collectable by selling the machinery at tax sale pursuant to the provisions in Iowa Code chapter 446 (1983). The Court stated:

> We agree no ordinary action is available to the county for the collection of real estate taxes. See Shearer v. Citizen's Bank, 129 Iowa 564, 567, 105 N.W. 1025, 1026 (1906). Although Iowa Code section 445.3 allows the county to bring an action, in addition to ordinary remedies, for the collection of personal property taxes, no statutory provision is made for the collection of real estate taxes except through enforcement of the lien. Where a specific remedy is provided for tax collection, such remedy must be followed; the statutory remedy is exclusive. Hawkeye Life Insurance Co. v. Valley-Des Moines Co., 220 Iowa 556, 567, 260 N.W. 669, 675 (1935). The tax on real estate is not a personal obligation or a debt of any person, and the proceedings for collection of taxes is one in rem. In Re Estate of McMahon, 237 Iowa 236, 239-40, 21 N.W.2d 581, 582-83 (1946). The specific statutory remedy for collection of real estate taxes is by way of the annual tax sale. Iowa Code §446.7.

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[3]This amount only constituted tax attributable to the machinery. Johnson County did not attempt to collect the land and building taxes, or any part of them, from the auction proceeds.

> While our statutory scheme for the collection of real estate taxes is limited to an in rem proceeding and provides no means to transfer the lien from the property to the sale proceeds, we nevertheless conclude the county is not prohibited from asserting its claim against the proceeds in the peculiar facts of this case.

slip.op. at 8-9.

Given that real property taxes constitute a lien against the assessed real property of a manufacturing real property unit, any such delinquent taxes can be satisfied by the chapter 446 tax sale. Depending upon the circumstances, the county treasurer may be able to collect delinquent taxes attributable to the machinery by sale of the machinery only.

In summary, the tax imposed upon machinery is a real property tax and the real property tax lien, pursuant to §445.28, is impressed upon that machinery. Generally, the collection of delinquent real property tax attributable to machinery will involve the tax sale by the county treasurer, as authorized in chapter 446, unles unique circumstances, such as in the Hilpipre case, exist whereby the tax can be collected without resort to the tax sale method.[4] See also United States v. 3 Parcels of Land in Woodbury Co., Iowa, 198 F.Supp. 529 (N.D. Iowa 1961) (Real property tax lien transferred to condemnation award and tax collected from such award).

Your third question concerns the lien status of property taxes attributable to buildings located on leased land.

Iowa Code §428.4 (1983) provides in relevant part:

> Any buildings erected, improvements made, or buildings removed in a year after the assessment of the class of real estate to which they belong shall be valued, listed and assessed and reported by the assessor to the county auditor after approval of the valuations by the local board of review, and said auditor shall thereupon enter the taxable value of such building or taxable improvement on the tax list as a part of real estate to be taxed.

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[4]Chapter 446 authorizes two basic types of tax sales to be conducted by the county treasurer. These are the regular annual tax sale in Iowa Code §446.7 (1983) and the scavenger tax sale in Iowa Code §446.18 (1983).

> If such buildings are erected by any person other than the owner of the land, they shall be listed and assessed to the owner of the buildings or improvements as real estate. (Emphasis supplied).

Iowa Code §445.32 (1983) provides:

> If a building is erected by a person other than the owner of the land on which the building is located, as provided for in section 428.4, the taxes on the building shall be and remain a lien on the building from the date of levy until paid. If the property taxes on the building become delinquent for a tax year the county treasurer shall collect the tax in the same manner as delinquent personal property taxes are collected under section 445.8." (Emphasis supplied).

The provisions of §428.4 require buildings erected on leased lands to be listed and assessed, for real property tax purposes, to the owner of the buildings. Section 445.32 provides that real property taxes attributable to such buildings constitute a lien upon the buildings. Since §445.32 clearly states that this building tax is a lien upon the building, it follows that this tax lien, unlike the tax lien on machinery and equipment, does not attach to the underlying land. In addition, such a result is a necessary implication to be drawn from §445.32 which requires that a delinquent tax associated with a building located on leased land must be collected in the same manner as a delinquent personal property tax is collected under Iowa Code §445.8, as opposed to collection of the delinquent real property taxes under the tax sale provisions in Code chapter 446.

Very truly yours,

Harry M. Griger

Harry M. Griger
Special Assistant Attorney General

WP2

LANDLORD-TENANT: Interest on rental deposits. Iowa Code section 562A.12(2) (1983). After five years of a tenancy, interest earned on a rental deposit is the property of the tenant. The manner of payment of the interest to the tenant is a matter of private contract between the tenant and landlord. (Peters to Baxter, State Representative, 3/26/84) #84-3-6(L)

March 26, 1984

The Honorable Elaine Baxter
House of Representatives
State House
Des Moines, Iowa 50319

Dear Representative Baxter:

You have requested an opinion on Iowa Code section 562A.12(2) (1983) regarding rental deposits. The issue is whether a tenant is entitled to interest, if any, earned on a rental deposit after the first five years of tenancy, and if so, how the interest is to be paid. We conclude that after the first five years of a tenancy, the tenant is entitled to any interest earned on the tenant's rental deposit. The manner in which the interest is paid to the tenant is not regulated by § 562A.12(2) and is therefore a matter of private contract.

Section 562A.12(2) provides:

> All rental deposits shall be held by the landlord for the tenant, who is a party to the agreement, in a bank or savings and loan association or credit union which is insured by an agency of the federal government. Rental deposits shall not be commingled with the personal funds of the landlord. Notwithstanding the provisions of chapter 117, all rental deposits may be held in a trust account, which may be a common trust account and which may be an interest bearing account. Any interest earned on a rental deposit during the first five years of a tenancy shall be the property of the landlord.

The last sentence of § 562A.12(2) clearly provides that interest earned on rental deposits for the first five years of a tenancy is the property of the landlord. The five year

limitation is new to Iowa law. Prior to the effective date of § 562A.12(2), all interest earned on rental deposits was the property of the landlord. Iowa Code section 562.9 (1977). Although § 562A.12(2) does not expressly state that after five years of a tenancy any interest on rental deposits belongs to the tenant, this is the obvious implication from the five year limitation that was placed on the landlord's right to the money.

Section 562A.12(2) is silent on the manner in which any interest on rental deposits must be paid to tenants. The statute in effect makes the landlord a trustee of the rental deposit for the benefit of the tenant by providing that the deposit "shall be held by the landlord for the tenant" and "not be commingled with the personal funds of the landlord." Cf. Cedar Memorial Park Cemetery Association v. Personnel Associates, 178 N.W.2d 343, 351 (Iowa 1970) (funeral home selling prearranged funeral plans was trustee for purchaser's funds that statute required to be trust funds). However, § 562A.12(2), unlike laws of other states, does not establish any specific procedure for paying interest to a tenant entitled to it if the landlord places the rental deposit in an interest bearing account. See, e.g., N.Y. Gen. Oblig. Law § 7-103 (McKinney Supp. 1983).

Because § 562A.12(2) does not provide any specific method for paying a tenant interest on a rental deposit, the landlord and tenant are free to have a rental agreement that covers the manner in which any interest on rental deposits is paid. Iowa Code sections 562A.3 ("Unless displaced by the provisions of this chapter, the principles of law and equity in this state...shall supplement its provisions."); 562A.9(1) ("The landlord and tenant may include in a rental agreement, terms and conditions not prohibited by this chapter or other rule of law... ."). The manner of payment of interest on rental deposits is therefore determined by private contract. See 52 C.J.S. Landlord and Tenant § 472(2)(e) (1968).

Sincerely yours,

JAMES M. PETERS
Assistant Attorney General

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COUNTIES: Authority of county governments to establish a height limitation on vegetation and to regulate weeds not listed as noxious in Iowa Code Chapter 317 (1983). Iowa Const. art. III § 38A; Iowa Const. art. III § 39A; Iowa Code Sections 317.1, 317.3, 317.4, 317.6, 317.9, 317.13, 317.14, 317.15, 317.16, 317.18; 317.21; 331.301(1), 331.301(4), 331.301(5), 331.301(6); 331.302(1), 331.302(3)-(9) (1983). Under County Home Rule, county governments may, through an ordinance, establish a height limitation on vegetation on unoccupied land. The county may, through an appropriate ordinance, provide that weeds not listed in § 317.1 are noxious. A landowner must mow or spray whatever area of the property is necessary to comply with the board's program of weed control under § 317.13. (Benton to Palmer, State Senator, 3/21/84) #84-3-5(L)

March 21, 1984

The Honorable William Palmer
State Senator
State Capitol
L O C A L

Dear Senator Palmer:

In your letter of December 22, 1983, you requested an Attorney General's opinion concerning generally the authority of a county board of supervisors and a county weed commissioner to establish a height limitation on vegetation and to regulate weeds not listed as noxious under Iowa Code Chapter 317 (1983). According to your letter, your questions have been prompted by a situation in which a county weed commissioner has been enforcing a height limitation on all vegetation on unoccupied land in the county. You have specifically asked:

1. Does a county board of supervisors or a county weed commissioner have the authority to establish a height limit for vegetation on unoccupied land?

2. Except in the case where the growth of vegetation renders an adjoining street or highway unsafe for travel, may a county board of supervisors and a county weed commissioner

control the growth of all types of vegetation, or are they limited to enforcement actions against only the primary and secondary noxious weeds listed in Section 317?

3. Does a landowner who has been ordered to destroy noxious weeds have the option of selectively spraying or mowing only the noxious weeds, or must the landowner spray or mow the entire area?

Chapter 317 provides a statutory mechanism for the control of noxious weeds in Iowa and it would be useful to briefly review its provisions before turning to your question.

The responsibility for the enforcement of Chapter 317 rests with the county board of supervisors. Section 317.9. In § 317.1, the legislature has specifically listed those weeds which it has declared to be noxious. To control those weeds, each county board of supervisors is required to appoint, under § 317.3, a county weed commissioner charged with the responsibility of supervising the control and destruction of all noxious weeds in the county, subject to the board's direction. Section 317.4. Each year the board must order and publish a program of weed destruction for the county, designating the dates by which landowners in the county must have destroyed the varieties of noxious weeds. Sections 317.13 and 317.14. It is the responsibility of each owner and each person in the possession or control of any lands in the county to destroy all noxious weeds at the times and in the manner prescribed by the board's order. Section 317.10. In the event that the landowner or other person in control of the property fails to comply with the board's order of destruction, the weed commissioner is authorized to enter upon the property and cause the weeds to be destroyed after appropriate notice has been served. Section 317.16. There are no provisions within Chapter 317 concerning a height limitation on vegetation on unoccupied land. Accordingly, we must turn elsewhere to determine the extent to which a county board and its weed commissioner may impose such a limitation.

Any analysis of the authority of a county to regulate a given subject matter must begin with the Iowa constitutional provision granting Home Rule to counties. Iowa Const. art. III § 39A provides:

> Counties or joint county-municipal corporation governments are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized

> by the general assembly. The general assembly may provide for the creation and dissolution of joint county-municipal corporation governments. The general assembly may provide for the establishment of charters in county or joint county-municipal corporation governments.
>
> If the power or authority of a county conflicts with the power and authority of a municipal corporation, the power and authority exercised by a municipal corporation shall prevail within its jurisdiction.
>
> The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in express words is not a part of the law of this state.

The adoption of county home rule reversed the earlier doctrine in Iowa that counties could exercise only such powers as were expressly granted. Kasparek v. Johnson County Bd. of Health, 288 N.W.2d 511, 514 (Iowa 1980).

After the adoption of this constitutional provision, the legislature in 1981 adopted a statutory scheme designed to implement home rule in Iowa Code Chapter 331 (1983). In § 331.301(1) the legislature has stated in pertinent part that:

> A county may, except as expressly limited by the Constitution, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges and property of the county or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents.

In determining the extent of the county board of supervisors' authority in this context, we must examine the board's authority under both the amendment and the statute implementing it. Our construction of the amendment can be guided by those cases which have construed the Municipal Home Rule Amendment, Iowa Const. art. III § 38A, given its similarity in terms. See 1980 Op.Att'y.Gen. 54, 58.

Turning to your first question as to the authority of a county to establish a height limitation on vegetation on unoccupied land, we have noted that Chapter 317 does not itself grant

such authority. However, under County Home Rule, the relevant inquiry in determining whether the exercise of a power by a county is authorized is not whether there is a specific grant of authority from the State, but rather whether the exercise of the power would contravene one of the express limitations on the county's powers found within the amendment itself. See 1980 Op.Att'y.Gen. 631, 633. There are, within the County Home Rule Amendment, four essential limitations upon a county's powers. Counties have no power to levy any tax unless expressly authorized by the General Assembly. In the event the power or authority of a county conflicts with that of a municipal corporation, the power and authority of the municipal corporation prevails within its jurisdiction. The exercise of home rule power by a county cannot be "inconsistent with the laws of the General Assembly." Finally, home rule power can be exercised only for county and not state affairs. The first two exceptions seem plainly inapplicable to the questions you have raised. The last limitation confining the county's authority to county affairs also does not seem to be implicated by your request. The legislature has given the authority to regulate weeds to county government under Chapter 317. We would conclude therefore that it is a matter of county not state-wide concern.

The fourth limitation proscribing the exercise of a power "inconsistent with the laws of the General Assembly" refers to preemption, meaning that in a given area the state, by broad and comprehensive legislation, has intended to exclusively regulate the subject matter. 1980 Op.Att'y.Gen. 54, 59. When a particular subject matter has been preempted, any county regulation in that area is inconsistent with the pervasive state legislation. In construing the Municipal Home Rule Amendment, the Iowa Supreme Court has found that a local regulation has been preempted where there is an express indication of legislative intent to occupy the field. For example, in Chelsea Theater Corp. v. City of Burlington, 258 N.W.2d 372, 373 (Iowa 1977) the Iowa court found that a city obscenity ordinance had been preempted by the state statute dealing with obscenity, when the court found an express legislative intent to deny political subdivisions the authority to enact an ordinance in this area. By contrast, the Iowa court in Bryan v. City of Des Moines, 261 N.W.2d 685, 687 (Iowa 1978) upheld a city ordinance establishing certain educational requirements for police officers when it found the relevant state statute did not expressly purport to divest the city of authority to enact such an ordinance. More recently, our office in 1982 Op.Att'y.Gen. 27, 28-29 decided that a county cannot levy a fine or other penalty for a violation of a county ordinance, based in part on the rationale that the legislature had manifested an intent to occupy the field of criminal law.

The legislature has in § 317.1 classified certain vegetation as noxious, but has not established a height limitation on vegetation. There is no manifestation of an express legislative intent to exclusively regulate this particular area, and to preclude counties from establishing such a limitation. Therefore the limitation within the County Home Rule Amendment that the county's exercise of power may not be "inconsistent with the laws of the General Assembly" is not implicated in this context. It follows that, under home rule, a county board of supervisors has the authority to establish a height limitation on vegetation on unoccupied land.

However, this conclusion as to a county's authority to adopt such a limitation does not completely resolve the issue. In its statute implementing home rule, the legislature has set down certain procedures under which the county's authority must be exercised. Specifically § 331.302(1) provides that:

> The board shall exercise a power or perform a duty only by the passage of a motion, a resolution, an amendment, or an ordinance.

This section requires that, to exercise a home rule power, a county must act pursuant to a motion, resolution, amendment or ordinance. See Westphal v. City of Council Bluffs, 275 N.W.2d 439, 443 (Iowa 1979). Consequently, while a county board of supervisors retains the authority to establish a height limitation for vegetation on unoccupied lands, it may do so only pursuant to an ordinance. See §§ 331.302(3)-(9) as to the procedure for the enactment of such an ordinance.

Your second question asks whether a county board of supervisors and a county weed commissioner may control the growth of all types of vegetation, or whether they are limited to enforcement actions against only the primary and secondary noxious weeds listed in Chapter 317. Our analysis of this question again must begin with the County Home Rule Amendment and its four limitations upon the authority of counties. The two limitations as to taxation and interference with municipal affairs are not applicable here. Similarly, as we pointed out in response to your first question, the control of weeds is essentially a matter of local, not statewide concern.

The question as to whether, under home rule, a county may act against weeds other than those listed in Chapter 317 turns on whether the exercise of this authority would be "inconsistent with the laws of the General Assembly." The legislature has, in § 317.1 declared certain vegetation to be either primary or secondary noxious weeds. However, the legislature has not expressly declared that local governments may not provide that

weeds not listed in § 317.1 are noxious, and therefore take action against them. See Bryan at 687. Rather than such an express legislative intent to occupy the field, the legislature has, in fact, presently given counties some authority over non-noxious weeds. Under § 317.18, the county board is required to order the destruction of all weeds other than noxious weeds on local county roads and between the fence lines of those roads. Under home rule, we would conclude that counties may regulate weeds other than those specifically listed in § 317.1.

This conclusion is buttressed by an examination of certain provisions within the implementation chapter. For example, § 331.301(4) states:

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

The authority to act against additional weeds is not irreconcilable with the state statute listing noxious weeds. See Green v. City of Cascade, 231 N.W.2d 882, 890 (Iowa 1975). Moreover, § 331.301(6) provides:

> A county shall not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.

A county may, pursuant to this section, set more stringent standards for weed control by including additional weeds for destruction.

Your final question asks whether a landowner who has been ordered to destroy noxious weeds under Chapter 317 has the option of selectively spraying or mowing only the noxious weeds, or whether the landowner must spray or mow the entire area. Section 317.13 states in full that:

> The board of supervisors of each county shall each year, upon recommendation of the county weed commissioner, or commissioners, by resolution prescribe and order a program of weed destruction

> to be followed by landowners or tenants or both, which may be expected to destroy and immediately keep under control any areas infested with any noxious weeds on farm land, and shall designate the destruction dates to prevent seed production of all varieties of noxious weeds. Quack grass in pasture land, rough timbered land or on the highways, railroad rights of way and public lands, when acting as soil binder, may be exempt from such order if approved by the supervisors. (Emphasis supplied.)

The emphasized portion of this statute indicates that, if necessary to comply with the board's program of control, a landowner must mow or spray an entire area without the option of selectivity. Of course, depending upon the methodology of control specified by the board, certain non-noxious vegetation may be damaged in the course of following the board's program. The legislature has intended, however, that landowners follow the program of destruction even if damage to non-noxious vegetation occurs. Section 317.15 states explicitly that:

> The loss or damage to crops or property incurred by reason of such destruction shall be borne by the titleholder of said real estate, unless said real estate shall be sold under contract whereby possession has been delivered to the purchaser, in which event such purchaser shall bear such loss or damage, excepting where a contract has been entered into providing a different adjustment for such loss or damage.

The costs of compliance with the county's program of weed control are apparently to be borne by the affected landowner. See Lingle v. Crawford County, 315 N.W.2d 814, 817 (Iowa 1982). A landowner must mow or spray whatever area is necessary to control noxious weeds.

In summary, county governments may, under their home rule powers, establish a height limitation on vegetation on unoccupied land, but must do so pursuant to a county ordinance. Similarly, the county may, pursuant to a properly enacted ordinance, provide that weeds, in addition to those listed in § 317.1, are noxious weeds. A landowner must mow or spray whatever area of the property is necessary to destroy the noxious weeds in compliance with the statute.

Sincerely,

Timothy Benton

TIMOTHY D. BENTON
Assistant Attorney General

TDB:cjc

SCHOOLS: SPECIAL EDUCATION: School for the Deaf: Iowa Children's Home. Iowa Code chs. 244, 269, 270, 273, 281, 442 (1983); Iowa Code Supp. §§ 273.3; 281.9 (1983). The State Department of Public Instruction is the agency that holds primary responsibility to assure that each child in need of special education receives a free appropriate education. The school district of residence should reimburse a school district that provides educational programs and services, pursuant to an Individual Educational Program, to a child who is enrolled at the Iowa Children's Home or the School for the Deaf. (Fleming to Benton, State Superintendent, 3/12/84) #84-3-4(L)

March 12, 1984

Superintendent Robert D. Benton
Department of Public Instruction
L O C A L

Dear Dr. Benton:

You have asked for our opinion on four issues that relate to the responsibility for providing educational services to certain children in need of special education. It seems appropriate to sketch the background of the current Iowa system for education of those children.

From the beginning, the people of Iowa have demonstrated a deep commitment to education including education of the handicapped. A system of common schools was created while Iowa was a territory. In 1853, the Fourth General Assembly established a school for the deaf and a school for the blind to provide education at the expense of the State. Iowa Code § 2141 et seq. (blind) and § 2155 et seq. (deaf) (1860). (Current version: Iowa Code chs. 269 and 270 (1983). A school census for identifying children of school age was established very early. See Iowa Code § 2764 (1897). Current version: Iowa Code § 291.9 (1983). The school census is the cornerstone for enforcement of the Compulsory Attendance law, Iowa Code ch. 299 (1983), and for assuring that each child in need of special education receives it. See Iowa Code § 291.10 and Iowa Code ch. 281 (1983).

In addition to the programs administered by the Board of Regents for the blind and the deaf, other needs for special education programs and services were recognized with the adoption of a special education system. See 1945 Iowa Acts 183, ch. 131, (current version Iowa Code ch. 281 (1983)). In other words, the fundamental structure for providing educational programs and services to children in need of special education was in place in Iowa long before the enactment of the federal Education for All Handicapped Children Act, Pub. L. No. 94-142 (codified at 20 U.S.C. § 1401, et seq.) (hereafter EAHCA).

When the area education agency, AEA, supplanted the county as the intermediate unit in the Iowa system, the AEA's were assigned important functions with respect to special education. See Iowa Code ch. 273 (1983). The State Board of Public Instruction is vested with rulemaking and supervisory authority for the overall system. See Iowa Code ch. 257 (1983).

Throughout Iowa's history, the local school district has been the unit that is required to provide a free education to school age children who reside in the district. See Iowa Code § 282.6 (1983) (school shall be free of tuition to actual residents). However, non-resident children must be charged the maximum tuition rate. Iowa Code Supp. § 282.1 (1983). The requirement that parents of non-resident children must pay tuition applies with equal force to a child in need of special education who is placed by his parents in another school district even though an "appropriate" education has been made available to the child by the district of residence. See Buckholtz v. Iowa Dept. of Public Instruction, 315 N.W.2d 789 (1982).

Pursuant to federal statutes and rules, the State of Iowa has entered into a contractual relationship with the federal government whereby Iowa receives federal funds for special education and agrees to assure that each Iowa child in need of special education receives a free appropriate education. That contractual relationship between a state and the federal government includes the obligation to fund an appropriate education for children in need of special education. See Kerr Center Parents Ass'n v. Charles, 572 F. Supp. 448 (D. Oregon 1983); VanderMalle v. Ambach, 673 F.2d 49 (2d Cir. 1983); Kruelle v. New Castle County School District, 642 F.2d 687 (3d Cir. 1981).

The federal statute, EAHCA, requires that in order to qualify for federal assistance under that law in any fiscal year the State must demonstrate that a policy is in effect that assures all handicapped children the right to a free appropriate education and that a single state agency is vested with the responsibility to assure that the federal requirements are met.

See 20 U.S.C. § 1412 and Kerr Center Parents Ass'n, 572 F. Supp. at 457. With the overall Iowa structure and the federal requirements in view, we turn to your questions:

> 1. Who has the primary responsibility for providing appropriate special education programs in the "least restrictive environment" for students at the Iowa Juvenile Home?
>
> 2. Who has the primary responsibility for providing appropriate special education programs in the "least restrictive environment" for students at the Iowa School for the Deaf?
>
> 3. What is the appropriate funding mechanism for providing appropriate special education programs for students attending the Iowa Juvenile Home?
>
> 4. What is the appropriate funding mechanism for providing appropriate special education programs in the "least restrictive environment" for students attending the Iowa School for the Deaf?

We think it is very clear that the State of Iowa has the primary responsibility for providing appropriate special education programs and services, pursuant to state and federal law, to each Iowa child in need of such education. The State Department of Public Instruction, DPI, is the agency vested with responsibility to make certain that the statutory purpose is accomplished. The statutory scheme is extremely complex because of the wide diversity of needs of children who need special education. The complexity permits the flexibility that is necessary to meet the unique needs of each individual child. See e.g., Iowa Code Supp. § 281.3 (1983) and Iowa Code § 281.4(3) (1983). The response to the first two questions is that, in our opinion, the State Board of Public Instruction holds primary responsibility for assuring that each child in need of special education receives a free appropriate education. The responsibility exists whether the child receives educational programs and services from the local school district, the Iowa Juvenile Home, the Iowa School for the Deaf, or a combination of these and other entities.

The response to your questions pertaining to funding must be found in the context of the state system of funding educational services. It is clear that the State holds the power to determine the system for financing education. San Antonio School District v. Rodriquez, 411 U.S. 1, 93 S. Ct. 1278, 36 L.Ed.2d 16

(1973). The Iowa system utilizes the school district of residence as the unit that is responsible for financing the education of a particular child. See e.g., Iowa Code §§ 282.6; 281.8; Iowa Code ch. 442 (1983) and Iowa Code Supp. §§ 273.3; 281.9; 282.1; 282.7; 282.20; 282.24; and 442.13 (1983). The special education statutes contain a variety of mechanisms for providing the appropriate educational programs and services to a particular child. See Iowa Code § 281.7 (1983) and Iowa Code Supp. §§ 273.3; 281.9; and 442.13 (1983).[1]

The decision as to what is the appropriate education for a child who has been identified as being in need of special education is formulated in a process that results in an individualized education program, IEP. The IEP is a written statement that is developed at a meeting of representatives of the school district, the teachers and the parents of the child as well as other people such as representatives of the AEA. This process is known as "staffing." Local districts and the AEA "may accept diagnostic and evaluation studies conducted by other individuals, hospitals or centers, . . . " Iowa Code § 281.4 (last unnumbered paragraph). Placement of a child in a residential facility is among the alternatives that may be included in an IEP. If necessary, a child may be placed in an institution outside the State. See Iowa Code Supp. § 273.3(5) (1983).

The Iowa Children's Home, School for the Deaf and the Braille and Sight-Saving School are residential facilities that operate schools on the premises and are funded by state appropriations.[2] As we understand it, the IEP's of certain children who are placed in these institutions may require a portion of their educational services to be obtained in a regular school setting, a practice known as "mainstreaming." We believe the enabling statutes for the School for the Deaf and the Iowa Juvenile Home do not provide for payment by those institutions for special education provided by the school districts in which those institutions are located. The enabling statutes provide for schooling on the premises. We recognize that educational

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[1] The AEA's, through staff and other resources, provide a substantial portion of special educational programs and services to students, but the local district is the funding unit. See e.g., 1983 Iowa Acts 504, 508, ch. 191, Div. III.

[2] The questions raised pertained to the Iowa Juvenile Home and the School for the Deaf. What is said here applies to the Braille and Sight-Saving School as well. See also Iowa Code Supp. § 442.13(5)(n) (1983).

philosophy has changed over time and that the federal and state laws and regulations now emphasize education in the regular school setting as much as possible, mainstreaming. Implementation of the policy of mainstreaming in connection with the development of the IEP for each child is the reason for the circumstances that give rise to your questions.

It is our understanding that all the students at the School for the Deaf and the Braille and Sight-saving School are receiving educational programs and services pursuant to an IEP and with the knowledge and consent of the school district of residence of each student. Children are placed in the Iowa Children's Home by order of a district court. We understand that not all of them are "children requiring special education." Iowa Code § 281.2(1) (1983). Procedures are necessary for identifying which of those children need special educational programs and services, pursuant to state and federal law.

It is our view that Iowa Code Supp. § 273.3(5) (1983), and other provisions of ch. 273 and ch. 281, provide ample authority for a school district to pay another school district, individual, organization, or special school, for educational programs and services provided to a particular student pursuant to an IEP. We note that state aid is allocated for special education to a local school district based on the type of services that are provided to the students of the district. See Iowa Code Supp. § 281.9 (1983). Moreover, the state board of public instruction is required to "make recommendations to the school budget review committee for needed alterations to make the weighting plan suitable for subsequent school years." Iowa Code Supp. 281.9(4) (1983).

We believe that school districts and AEA's have ample authority to make arrangements for children at the School for the Deaf and the Iowa Children's Home to receive a portion of their educational programs and services from the school districts in which those institutions are located and that the school district of residence should reimburse the school district which provides the services.[3] The existence of state appropriations for the

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[3] We note that Iowa Code § 281.12 (1983) provides that the state general fund is the source of funds for education of a child who requires special education and who has been placed in a facility or home by the district court and for whom parental rights have been terminated by the court. Inasmuch as a child's residence is linked, ordinarily, to parental residence, § 281.12 provides a source of funding for a child whose guardian is the State of Iowa.

School for the Deaf and the Iowa Children's Home, pursuant to long standing statutes, is an anomaly in Iowa's system of financing education. School districts are spared most of the burden for funding the education of children who are placed in those institutions. That does not mean those districts are relieved of the cost of funding educational programs and services provided to such children by other school districts where a child is "mainstreamed" pursuant to the child's IEP. Moreover, the Iowa General Assembly has established a special weighting formula to accommodate the variation in the costs of providing special education to Iowa children in need of such education. That formula is subject to change to reflect the shifts in the expenses due to particular needs of children who require special education.

In summary, the State Board of Public Instruction is the Iowa agency that holds primary responsibility to assure that each Iowa child in need of special education receives a free appropriate education. The school district of residence should reimburse the school district that provides educational programs and services, pursuant to an IEP, to a child who is enrolled at the Iowa Children's Home or the School for the Deaf.

Sincerely yours,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF:cjc

TAXATION: Real Estate Transfer Tax; Real Estate Transfers By Shareholders To Existing Corporation. Iowa Code §428A.2(15) (1983). A proposed transfer of real estate which is to be made to an existing corporation by shareholders in exchange for additional stock and which is not to be made in connection with the formation or dissolution of the corporation is not exempt from real estate transfer tax under §428A.2(15). (Griger to Noah, 3/7/84) #84-3-2(L)

March 7, 1984

Ronald K. Noah
Floyd County Attorney
Charles City, IA 50616

Dear Mr. Noah:

You have requested an opinion of the Attorney General pertaining to whether a transfer of real estate to an existing corporation in exchange for additional capital stock is exempt from the Iowa Code chapter 428A (1983) real estate transfer tax pursuant to Iowa Code §428A.2(15) (1983). Your opinion request sets forth the following:

> The corporation is a family farm corporation. It was issued a certificate of incorporation by the Secretary of State on January 26, 1981. The stock was first issued to stockholders by the corporation on March 12, 1981. All stockholders are members of a single family. The original issue of stock was in consideration for personal property. No real estate has previously been transferred to the corporation. The corporation was established expressly for the purpose of creating a family farm corporation, as defined by Section 172C.1(8) of the Iowa Code.

> The stockholders of the corporation now wish to transfer the real property owned by them to the corporation in consideration for additional stock. Is this transfer exempt as a deed between a family corporation and its stockholders for the purpose of transferring real property in an incorporation?

Section 428A.2(15) provides in relevant part for the following tranfer tax exemption:

> Deeds between a family corporation, partnership, or limited partnership and its stockholders or partners for the purpose of transferring real property in an incorporation or corporate dissolution or the organization or dissolution of a partnership or limited partnership under the laws of this state, where the deeds are given for no actual consideration other than for shares or for debt securities of the corporation, partnership, or limited partnership. . . .

The exemption in §428A.2(15) pertaining to real estate transfers to family corporations was enacted in 1980. See 1980 Iowa Acts, ch. 1144. The original proposal, H.F. 741, was introduced in the House of Representatives on April 17, 1979, and provided for the tax exemption in relevant part:

> Deeds between a family corporation or an authorized farm corporation as defined in section one hundred seventy-two C point one (172C.1), subsections eight (8) and nine (9) of the Code, and its stockholders for the purpose of transferring real property in an incorporation or corporate dissolution under the laws of this state, where the deeds are given for no actual consideration other than for shares of stock or for debt securities of the corporation.

The "EXPLANATION" of this bill provided:

> This Act exempts from the real estate transfer tax, deeds between a family corporation or an authorized farm corporation and its stockholders when the deed transfers real property into the corporation when it is formed or out of the corporation when it was dissolved. (Emphasis supplied).

The final version of chapter 1144 (H.F. 741), as enacted, deleted the language associated with authorized farm corporations and provided as follows for the tax exemption in relevant part:

> Deeds between a family corporation and its stockholders for the purpose of transferring real property in an incorporation or corporate dissolution under the laws of this state, where the deeds are given for no actual consideration other than for shares of stock or for debt securities of the corporation.

In 1982, the legislature enacted 1982 Iowa Acts, ch. 1027, §3 which expanded this tax exemption to include transfers made in connection with the organization or dissolution of a partnership or limited partnership.

This office has opined that a transfer of realty to a corporation in exchange for capital stock is subject to the real estate transfer tax imposed in Iowa Code §428A.1. See 1976 Op.Att'yGen. 776. Therefore, if the real estate transfers which you pose are to be exempted from the tax because of being transfers to a family corporation, the transfers must fit within the contours of §428A.2(15).

Section 428A.2(15) does not purport to exempt from tax every real estate transfer between a family corporation and its shareholders. The purview of the exemption requires that the transfer be "in an incorporation or corporate dissolution." We believe that the statute unambiguously covers real estate transfers in connection with the formation or dissolution of a family corporation. Even if, however, the statute was somehow ambiguous on coverage, the explanation to H.F. 741, previously quoted, clearly states that only real estate transfers associated with corporate formation or dissolution are to be exempted from the transfer tax. This explanation would be consistent with the "incorporation or corporate dissolution" language in the statute. Iowa Auto Dealers Association v. Iowa Department of Revenue, 301 N.W.2d 760, 763 (Iowa 1981).

In the situation which you posed, the corporation was formed in 1981. The proposed transfer of real estate to the existing corporation by the shareholders in exchange for additional stock is not to be made in connection with the formation or dissolution of the corporation. Therefore, the proposed real estate transfer is not within the scope of the tax exemption in §428A.2(15).

Very truly yours,

Harry M. Griger
Special Assistant Attorney General

WP2

COUNTIES, MENTAL HEALTH, COUNTY LIABILITY, COUNTY REIMBURSEMENT, INTERSTATE MENTAL HEALTH COMPACT. Ch. 218A, § 218A.1, Ch. 229, §§ 229.1(2), 229.6, 230.10, 230.15. Pursuant to Iowa Code § 229.6, the residents of other counties and states may be involuntarily committed in whatever Iowa county they may be located. While the county may elect to bill other states for the costs of mental health commitment, liability for those costs is governed by Iowa Code Ch. 230. Chapter 230 does not expressly impose such liability on other states. (Williams to McCormick, Woodbury County Attorney, 3/6/84) #84-3-1(L)

Mr. Patrick C. McCormick
Woodbury County Attorney
Third Floor, Courthouse
Sioux City, Iowa 51101

March 6, 1984

Dear Mr. McCormick:

You ask two questions:

1. May residents of other counties and states be involuntarily committed in Woodbury County pursuant to Iowa Code Chapter 229?

2. May Woodbury County seek reimbursement for the cost of care for out-of-state individuals from the individual's home state?

The answer to your first question is yes. As you noted, Iowa Code § 229.6 expressly provides that involuntary hospitalization procedures may be commenced in whatever county "the respondent is presently located..." Id. No exception is provided within the statute for out-of-state or out-of-country individuals.

We note that the clear purpose of Iowa Code §§ 229.6 et. seq. is to provide for the detention and treatment of individuals who are "likely to physically [or emotionally] injure [themselves] or others if allowed to remain at liberty without treatment." Iowa Code § 229.1(2). We note from your question that Woodbury County residents are not the only persons who become so situated within the boundaries of Woodbury County. To ensure that the objects of Chapter 229 are fulfilled, § 229.6 must "be liberally construed with a view to promote its objects and assist the parties in obtaining justice." Iowa Code § 4.2. Thus,

§ 229.6 should be read as authorizing the involuntary commitment of out-of-state or out-of-county individuals in Woodbury County.

This analysis is supported by the provisions of the Interstate Mental Health Compact. Iowa Code Chapter 218A. The compact recognizes that:

> ...the necessity and desirability for furnishing [proper and expeditious treatment for the mentally ill and mentally deficient] bears no primary relation to the residence or citizenship of the patient but that, on the contrary, the controlling factors of community safety and humanitarianism require that facilities and services be made available for all who are in need of them.

Iowa Code § 218A.1(I).

Accordingly, the compact provides that "[w]henever a person physically present in any party state shall be in need of institutionalization by reason of mental illness or mental deficiency, he [sic] shall be eligible for care and treatment in an institution in that state irrespective of his [sic] residence, settlement or citizenship qualifications." Iowa Code § 218A.1(III)(a). The clear import of this provision is to place out-of-state individuals on the same footing as Iowa residents for the purposes of § 229. As the "compact shall be liberally construed so as to effectuate the purposes thereof", Iowa Code § 218A.1(XIV), we must conclude that statutory authority exists to involuntarily commit out-of-state individuals. See also, 1978 Op.Att'yGen. 546; 1972 Op.Att'yGen. 328.

With regard to your second question, we conclude that Woodbury County may seek reimbursement from any source it feels may be liable. Our statutes expressly require the county of legal settlement to reimburse the county of admission or commitment. Iowa Code § 230.10. Further, the mentally ill person and those legally liable for that person's support are, within specified limits, personally liable to the county which advances funds pursuant to Chapter 230. Those who are legally liable include "the spouse of a mentally ill person, any person bound by contract for support of the mentally ill person, and ... the father and mother of [a] mentally ill person" under eighteen years of age. Iowa Code § 230.15.

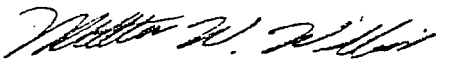
Where an out-of-state person is "admitted or committed to a state hospital, veteran's administration hospital or other agency

of the United States government", the State of Iowa is responsible for the "[c]osts and expenses attending the taking into custody, care, and investigation ... including cost of commitment". Iowa Code § 230.11. Further, the State of Iowa is responsible for the actual and necessary expenses of transferring out-of-state patients from state hospitals to the state of legal settlement. Iowa Code § 230.8.

There is no provision in the Iowa Code that specifically purports to impose liability on other states. However, Iowa Code §§ 218A.1 (Art. VII and Art. XI), and 218A.3 authorize the State of Iowa to enter into cost-allocation agreements with other states which have adopted the Interstate Mental Health Compact. Such agreements allow the contracting states to transfer to one state the costs of services provided by another state.

In sum, we conclude that Iowa Code § 229.6 authorizes the involuntary mental commitment in Woodbury County of residents of other counties and states. Further, while the county may elect to bill other states, Iowa law does not expressly impose liability upon other states for the costs relating to the commitment in Iowa of their residents.

Sincerely,



Matthew W. Williams
Assistant Attorney General

MWW/jaa

CRIMINAL LAW, FINES, CONTEMPT: Iowa Code chapter 665 and Section 909.5 (1983). Failure of a criminal defendant to make a payment of a fine or an installment of a fine may be enforced only under the contempt provisions of Iowa Code chapter 665, requiring an Order to Show Cause or, if necessary, a warrant. (Hansen to Lloyd, Clarke County Attorney, 4/26/84) #84-4-7(L)

April 26, 1984

John D. Lloyd
Clarke County Attorney
200 W. Jefferson
Osceola, Iowa 50213

Dear Mr. Lloyd:

You have requested an opinion of the Attorney General concerning the appropriate procedure for implementation of contempt proceedings envisioned in Iowa Code section 909.5 (1983). You pose the following question for our consideration:

> When a criminal defendant has failed to make a payment of a fine or an installment of a fine, when those installments or that payment were deferred by written agreement with the Court, may the failure to comply with that agreement be enforced by issuance of a warrant alleging a violation of Iowa Code section 909.5 (1983), or must the contempt provisions of Iowa Code chapter 665 (1983), requiring service of an Order to Show Cause be followed?

The answer to your question is that the procedures specified in Iowa Code chapter 665 must be complied with to implement contempt proceedings for nonpayment of fines.

A Court has inherent power to punish for disobedience of its order. Larue v. Burns, 268 N.W.2d 639, 642 (Iowa 1979); Knox v. Municipal Court of City of Des Moines, 185 N.W.2d 705, 707 (Iowa 1971). This power, however, must be exercised in accordance with statutory procedural requirements. Id. at 709. These procedural requirements are contained in chapter 665 of the Iowa Code.

Iowa Code section 665.2 lists the acts or omissions that are punishable as contempt. Included are sections 665.2(3), "[i]llegal resistance to any order or process made or issued by [the Court]," and section 665.2(6), "[a]ny other act or omission

specifically declared a contempt by law." One act or omission specifically declared a contempt is the nonpayment of fines. Iowa Code section 909.5 (1983) states: "Any person who is able to pay a fine, or an installment of a fine, and who refuses to do so, or who fails to make a good faith effort to pay his or her fine, or any installment thereof, shall be held in contempt of Court." Therefore, a person who fails to pay an installment of a fine may be punished for contempt in accordance with the procedural rules contained in chapter 665.

Chapter 665 recognizes two kinds of contempt. Direct contempt consists of acts committed in the presence of the court, and indirect contempt consists of acts committed out of the presence of the court. Knox v. Municipal Court, 185 N.W.2d at 707; Lutz v. Darbyshire, 297 N.W.2d 349, 353 (Iowa 1980). The failure to pay an installment of a fine is a contemptuous act which does not occur in the immediate view and presence of the court and thus is an indirect contempt.

In the case of indirect contempt, sections 665.6 and 665.7, inter alia, have particular requirements. Section 665.6 states: "Unless the contempt is committed in the immediate view and presence of the Court, or comes officially to its knowledge, an affidavit showing the nature of the transaction is necessary as a basis for further action in the premises." Section 665.7 states: "Before punishing for contempt, unless the offender is already in the presence of the Court, he must be served personally with a Rule to Show Cause against the punishment, and a reasonable time given him therefore; or he may be brought before the court forthwith, or on a given day by warrant if necessary . . . ." (Emphasis added).

Section 665.7, containing alternative provisions for serving an offender, allows either service of a Rule to Show Cause or service by warrant. In both cases, the other procedural requirements contained in Chapter 665 must be satisfied. Thus, the law does not envision a separate warrant procedure outside of chapter 665 for commencing contempt proceedings. Section 665.7 provides that the primary procedure for bringing a person before the court for contempt proceedings is an Order to Show Cause. Only "if necessary", can the contempt proceedings be implemented through the warrant process.

Sincerely,

Steven K. Hansen

STEVEN K. HANSEN
Assistant Attorney General

SKH/cla

ZONING: Developmentally Disabled Family Homes. Quarter-mile restriction. Iowa Code Supp. §§ 358A.25, 358A.25(2)(b), 358A.25(3), and 414.22 (1983). The quarter-mile restriction in Iowa Code § 358A.25(3) (1983) does not apply to a home for more than eight developmentally disabled persons. (Walding to Haverland, State Representative, 4/26/84) #84-4-6(L)

April 26, 1984

Honorable Mark A. Haverland
State Representative
State Capitol
L O C A L

Dear Representative Haverland:

We are in receipt of your request for an opinion of the Attorney General regarding developmentally disabled group homes. You state that a children's convalescent home in Johnston is planning an expansion of its present facilities to provide a home for more than eight developmentally disabled persons. You inquire as to the applicability of the quarter-mile restriction in Iowa Code Supp. § 358A.25(3) (1983) to that expansion.

Iowa Code Supp. § 358A.25 (1983), along with a similar provision in Iowa Code ch. 414, Iowa Code Supp. § 414.22 (1983), was added in 1983 by the 70th General Assembly. 1983 Iowa Acts, ch. 11. The intent of the section, as we have previously indicated, is to remove existing barriers to the establishment of group homes for developmentally disabled persons in residential areas. Op.Att'yGen. #83-6-12(L).

The quarter-mile restriction prohibits a "new family home" from locating within one-fourth of a mile of an existing "family home." Iowa Code Supp. § 358A.25(3) (1983). A "family home" is defined as a community-based residential home licensed as a residential or child foster care facility for not more than eight developmentally disabled persons and any necessary support staff. Iowa Code Supp. § 358A.25(2)(b) (1983). Thus, the quarter-mile restriction does not apply to a home for more than eight developmentally disabled persons. As such, the expansion of the Johnston convalescent home, because it would house more than eight developmentally disabled persons, is not subject to the quarter-mile restriction.

The provision in § 358A.25(3) that a family home shall be treated as a permitted use in all residential zones or districts of a county, because of the definition of a family home, is equally inapplicable to a home for more than eight developmentally disabled persons. Thus, the expansion of the convalescent home would be subject to local zoning ordinances.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:rcp

NEWSPAPERS: Official Publications. Eligibility of Additional Publication. Iowa Code Ch. 349; Iowa Code §§ 349.1, 349.2, 349.3, 362.3, 618.3, 618.4 and 618.5 (1983). Factors supporting a finding that an additional publication of a newspaper is, for the purpose of selecting an official newspaper for mandatory publication of notices and reports of proceedings, a separate newspaper include the appeal to separate reading interests and the maintenance of distinctive identities, as reflected in part by the existence of different editorial policies and articles or features. Joint ownership and the situs of production and publication are not determinative. (Walding to Copenhaver and Blanshan, State Representatives, 4/23/84) #84-4-5(L)

April 23, 1984

The Honorable Paul Copenhaver
The Honorable Gene Blanshan
State Representatives
State Capitol
L O C A L

Dear Representatives Copenhaver and Blanshan:

We are in receipt of your requests for opinions of the Attorney General regarding the selection of official newspapers. Representative Blanshan poses a general question as to whether: "two weekly newspapers, published on separate days but owned and operated by the same company and which have over ninety percent identical subscribers [are] one or two newspapers (for the purpose of designating official county newspapers)?" Representative Copenhaver's request is more specific in that he has asked whether a particular new edition of a newspaper is eligible for designation as a newspaper[1] for mandatory publication of notices and reports or proceedings.

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[1] The request does not indicate whether it concerns a designation as an official county newspaper or for municipal publication, governed by Iowa Code Chapter 349 and § 362.3 (1983), respectively. Although not determinative, the

The latter request, we are told, concerns a newspaper which has been known as "The Sun" and has for more than the required two years had a "bona fide paid circulation." Representative Copenhaver states that this newspaper has begun publication of another edition to be known as the "Cedar Falls Sun" which will be circulated through the same post office in Waterloo and will contain more than half of what is in the Black Hawk edition. Publication of the Cedar Falls edition will be weekly, while the Black Hawk edition will be published twice weekly. We combine our reply to your requests because of the similarity of the subject matter.

These requests ask us to determine whether, given certain facts, the newspapers are to be treated as separate newspapers for purposes of Chapter 613. However, this issue is ultimately a question of fact which cannot be resolved by this office. See 1982 Op. Att'y Gen. 353. The factual determination is for the governing body to determine, subject to review by a court. Our function then is limited to resolution of questions of law.

Under Iowa Code § 618.3 (1983), a newspaper to be designated as a mandatory publication must be: (1) of general circulation; (2) published regularly and mailed through the post office of current entry for more than two years; and (3) for the same period had a bona fide paid circulation recognized by the postal laws. See Widmer v. Reitzler, 182 N.W.2d 177, 180 (Iowa 1970). See also Op. Att'y Gen. #83-4-4(L) and 1974 Op. Att'y Gen. 102.

For purposes of both requests, we will presume that the original publication, in each instance, satisfies the requirements of § 618.3 and, thus, is eligible for designation as an

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n.1 continued

distinction does affect the number of newspapers selected as well as the method of selection. While a single designation is often used for municipal publications, two or three newspapers, depending upon county population, are selected for designation as official county newspaper. Iowa Code § 349.3 (1983). As to the method of selection, an official county newspaper is selected in January for the ensuing year, Iowa Code § 349.1 (1983), and is selected based upon the number of subscriptions to a newspaper. Iowa Code § 349.2 (1983). No similar methodology is statutorily imposed upon a municipality.

official newspaper. The narrow issue, therefore, becomes whether the additional publication is a separate newspaper or, rather, whether it is a separate edition of the same newspaper.[2]

In 1974 Op. Att'y Gen. 513, we examined the distinction between separate newspapers and separate editions of the same newspaper. According to that opinion:

> If, in fact, the two newspapers present distinctly different editorial policies or carry different kinds of syndicated articles or features so as to attract separate reading interests and to maintain two distinctive identities, then there would be two newspapers, regardless of the fact that they both are published by a single corporate identity. On the other hand, an absence of such facts would probably indicate publication of two editions of the same newspapers.

1974 Op. Att'y Gen. at 513-14. The opinion continues:

> If the two newspapers are organized as separate corporations, it is immaterial whether the ownership of such corporations is identical and whether or not they are housed in the same offices and have the same subscribers. In such case, both newspapers could be the official newspapers.

1974 Op.Att'y.Gen. at 514. Factors supporting a finding that the publications are, in fact, separate newspapers include the appeal to separate reading interests and the maintenance of distinctive identities, as reflected in part by the existence of different editorial policies and articles or features. That opinion concluded that joint ownership and the situs of production and publication were not determinative.

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[2] The term "edition", as used in this opinion, refers only to a regularly published edition of a newspaper. Publication in an extra edition of a daily newspaper, and the distribution of 50 to 100 copies of such edition by interested parties, was held not to be a publication in a newspaper of general circulation in State ex rel. Bump v. Omaha & C.B. Ry. & Bridge Co., 113 Iowa 30, 84 N.W. 983 (1873).

In a recent ruling of the Iowa District Court for O'Brien County, Creative House Enterprises, Inc. v. O'Brien County, Law No. 16656, the Court determined that the Sheldon Mail and the Sheldon Sun, both publications of Creative House Enterprises, Inc., should be treated as one newspaper for purposes of selecting the three official county newspapers under Iowa Code § 349.3(4). The plaintiff, publisher of the Northwest Iowa Review, contended that the defendant was engaged in the publication of a single newspaper and, thus, only eligible for one of the two designations as official county newspaper for O'Brien County. The District Court, upon citing the 1974 opinion, concluded that the defendant's newspapers were too closely aligned to reach a finding that the publication constituted separate newspapers. Factors given in support of the trial court's ruling included common ownership and operation, the existence of nearly identical subscribers, similarities in articles and features, the sharing of letters to the editors, and various other examples of plaintiff's failure to maintain distinctive identities. In determining whether the Sheldon Sun and the Mail were in fact and law one newspaper, the Court examined all of the factors tending to show similarity versus all factors tending to show that the papers were divergent. The Court found that the fact of 90 to 96 percent duplication of subscribers was significant because the purpose for selection of official newspapers is to reach the largest numbers of subscribers, citing Ashton v. Stoy, 96 Iowa 197, 64 N.W. 804 (1895), and Times-Guthrian Pub. Co. v. Guthrie County Vedette, 256 Iowa 302, 125 N.W.2d 829 (1964).

Our response would not be complete without a discussion of the practical effects of a determination that an additional publication is either a separate newspaper from, or a separate edition of, the original publication. A finding that the two publications are separate newspapers would qualify both newspapers for designation as official newspapers, provided each newspaper satisfies the requirements of § 618.3 separately. Of course, a newspaper which has not been in existence for two years cannot qualify as an official newspaper. See 1980 Op. Att'y Gen. 101, 1940 Op. Att'y Gen. 273. Conversely, a finding that one publication is merely an edition of another would mean that the publisher of the two publications is eligible only for a single designation as an official newspaper.

In response to Representative Copenhaver's request, we will address the concern as to the name change, from "The Sun" to the "Cedar Falls Sun", and the change in the frequency of publication, from twice weekly to weekly. First, a change of name, provided it does not affect the general circulation of a publication, does not disqualify a newspaper from selection of an

official newspaper. Iowa Code § 618.4 (1983). Similarly, a change in frequency of publication, provided a newspaper is published at least weekly, does not alter a newspaper's eligibility for designation as a newspaper for mandatory publication of notice and reports of proceedings. Iowa Code § 618.5 (1983). Finally, we note that similar advice was provided in a previous opinion which concerned a contest between the Waterloo Daily Courier and the Cedar Falls News for designation of an official county newspaper nearly half a century ago. 1938 Op. Att'y Gen. 448.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:cjc

TRANSPORTATION: Iowa Railway Finance Authority Act: Chapter 307B. Chapter 307B does not authorize the Iowa Railway Finance Authority to finance a rail tourist passenger operation. (Hunacek to Dunham, Secretary, Iowa Railway Finance Authority, 4/16/84) # 84-4-4(L)

Mr. Warren B. Dunham
Secretary, Iowa Railway
Finance Authority

April 16, 1984

Dear Mr. Dunham:

You have requested an opinion from this office regarding the following question: "Does Iowa Code Chapter 307B permit the Iowa Railway Finance Authority to help finance a rail tourist passenger operation?" Your question deals with a request of the Boone Railroad Historial Society, a non-profit corporation, seeking assistance to repair its 11-mile section of track between Boone and Wolf, Iowa. The Society plans to develop the former branch line into a tourist rail passenger railroad, The Boone and Scenic Valley Railroad. For the reasons set forth below, we answer your question in the negative.

Iowa Code Chapter 307B, the Iowa Railway Finance Authority Act, provides in section 307B.7(6) that the Railway Finance Authority may provide financial assistance "under this chapter" to any railway facility to "acquire, construct, reconstruct, renovate, rehabilitate, improve, extend, replace, maintain, repair and lease the facility." However, this section cannot be read as a blanket authority for the Railway Finance Authority to provide financial assistance to any railway facility for any purpose. The statute only justifies financial assistance when "necessary for the performance of [the Authority's] purposes and duties." Id. We do not believe that providing financial assistance to a non-profit tourist railroad so qualifies.

The legislature, in enacting Chapter 307B, set forth the purpose of this chapter as follows:

> The purpose of this chapter is to benefit the citizens of Iowa by improving their general health, welfare and prosperity and insuring the economical and commercial development of the state and by promoting agricultural and industrial improvement. Access to adequate railway transportation facilities is essential to the economic welfare of the state. One purpose of this chapter is to preserve or provide for the citizens of Iowa those railway services now in existence or needed in the state which have a viable future but which for a variety of economic and legal reasons may not exist if the state does not provide the financing or other mechanisms referred to in this chapter. It is the intent of the chapter that any public ownership and control of railway facilities provided for in this chapter be transferred to private ownership as promptly as economically practicable subject to financing requirements. It is further intended that the authority created in this chapter be vested with all powers to enable it to accomplish the purposes of this chapter except the power to operate rolling stock.
>
> It is the further intent of this chapter and of the General Assembly that, in order to preserve rail competition and to provide for railway service in the state, the Authority work primarily with railroad carriers already providing service in the state based upon their willingness and ability to meet these objectives.

Iowa Code §307B.2 (1983). It thus appears from this statute that Chapter 307B is principally concerned with the development of railroads in order to improve transportation. The creation and maintenance of scenic railways as tourist attractions, although a laudable idea, does not appear to be contemplated by this statute.

Our conclusion is bolstered by additional statutory language and the administrative rules which have been promulgated pursuant to this chapter. Iowa Code §307B.3 sets forth numerous legislative findings which refer to the necessity of having viable railway facilities serving the urban, rural, agricultural, and industrial communities of the state, and the serious trans-

portation problems caused by the abandonment and possible abandonment of such facilities. Nowhere in these fairly detailed legislative findings does there appear any concern at all with the promotion of tourism.

Similarly, the administrative rules promulgated by the Railway Finance Authority appear to focus on railroads as a means of transportation rather than tourism. Iowa Administrative Code §695-4.3 provides that prior to funding of any given project, an economic analysis will be prepared which, inter alia, shall consider the public benefit of the project. The administrative provision states that "[p]ublic benefits shall include the savings in road construction and maintenance costs resulting from diverting traffic from public roads to the railroad." Iowa Administrative Code §695-4.3(1)(A) (1984). Possible tourism development is not mentioned. The only provision in the Iowa Administrative Code which even arguably supports a conclusion that development of a non-profit tourist attraction is contemplated by Chapter 307B is Iowa Administrative Code §695-4.3(3)(a)(2), which speaks of "increase in employment opportunities or increase in industrial development" as a benefit "with no determinable precise monetary value." However, reading this section in conjunction with the statute, we believe that this provision does not authorize payment of funds to a non-profit tourist railroad.

We are not unmindful that Iowa Code §307B.18 (1983) provides for the liberal construction of Chapter 307B to effect its purposes. However, since we have concluded that preservation of tourism is not one of the purposes contemplated by Chapter 307B, it follows that this section does not change the analysis.

Sincerely,

Mark Hunacek

Mark Hunacek
Assistant Attorney General

MH/jlf2

CONSERVATION; Docks; Preemption by State Conservation Commission over Inspection of Commercial, Public, and Private Docks. Iowa Code Sections 106.17, 106.32(2), 107.24(5), 111.4, 111.5, 111.18, and 331.301(1), (3), (6) (1983); 1972 Iowa Acts, ch. 1088, § 199. Jurisdiction of the Conservation Commission does not totally preempt counties from inspecting privately-owned docks. State law would preempt a county ordinance where the county ordinance was less stringent than state law or it interfered with navigation and state ownership. (McGuire to Johnston, Polk County Attorney, 4/16/84) #84-4-3(L)

Mr. Dan L. Johnston
Polk County Attorney
Polk County Courthouse
Des Moines, Iowa 50309

April 16, 1984

Dear Mr. Johnston:

This is in response to your request for an opinion from the Attorney General on the issue of preemption in regard to jurisdiction over inspections of commercial, public, and private docks in Polk County. Specifically you ask:

> 1) Does the Iowa Conservation Commission's jurisdiction and inspection authority over commercial, public, and private docks preempt Polk County from continuing to inspect these docks;
>
> 2) If concurrent jurisdiction exists, does state law preempt county ordinances where the two conflict;
>
> 3) If concurrent jurisdiction exists, would the county have a duty to inspect facilities already inspected by the state.

You stated that Polk County has previously inspected public docks and private docks that are open to the public, including those located at the Saylorville Marina. The Conservation Commission has asserted authority to adopt and enforce rules and regulations for the construction and use of commercial, private and public docks.

It is our opinion that: (1) the jurisdiction of the Conservation Commission does not totally preempt Polk County from

inspecting privately-owned docks; (2) state law would preempt a county ordinance when they conflict only so long as the county ordinance was less stringent than state law and did not interfere with navigation and state ownership; (3) the county would not have a duty to inspect facilities already inspected by the state.

I. Does the Iowa Conservation Commission's jurisdiction and inspection authority over commercial, public, and private docks preempt Polk County from continuing to inspect these docks?

In Iowa, the state is owner in trust of the beds of navigable streams from the ordinary high water mark to the boundary on our boundary rivers and of the entire bed of navigable lakes and streams within the state. Nielsen v. Stratbucker, 325 N.W.2d 391 (Iowa 1982); Peck v. Alfred Olson Constr. Co., 245 N.W. 131 (Iowa 1932). "[S]uch title is not proprietary but is in the nature of a trusteeship, which confers upon the state a burden rather than a benefit; that the power and duty conferred upon the state under such title is to maintain and promote the navigation and navigability of such lake. . . ." Peck v. Alfred Olson Constr. Co., 245 N.W. at 132-33. The state thus has jurisdiction over navigable waters and, subject only to the national government's power to regulate interstate commerce, its dominion is supreme. Id. at 134. Although the ordinary high water mark is the dividing line between public and private ownership, private riparian owners may construct docks below the ordinary high water mark provided they meet any state requirements and regulations. Iowa Code § 111.4 (1983); 1968 Op.Att'yGen. 106.

The legislature has expressly conferred jurisdiction over navigable waters in the state to the Conservation Commission subject only to specific grants made to the Department of Water, Air, and Waste Management. "Jurisdiction over all meandered streams and lakes of this state and of state lands bordering thereon . . . is conferred upon the commission." § 111.18. Along with this jurisdiction, the Commission is empowered to adopt rules and regulations to exercise its authority. Section 107.24(5) empowers the Commission to "adopt and enforce such departmental rules governing procedure as may be necessary . . . to carry out any other laws the enforcement of which is vested in the commission."

The powers of the Commission specifically relating to docks are stated in §§ 106.32 and 111.4. These two sections require that a permit be obtained from the Commission before building a dock "upon or over any state-owned land or water under the jurisdiction of the commission." § 111.4. The Commission also has the power to "order the removal of any . . . erection or building of any kind above or over any state-owned lands or waters under their supervision and direction . . . ." § 111.5.

The dock inspection authority of the Commission is thus derived from these powers.

Since the Conservation Commission has jurisdiction over meandered lakes and streams, it could thus choose to regulate this area in any manner consistent with its authority. In the area of dock inspections, the Commission has not adopted specific regulations for inspecting, but obviously could if it chose to do so. Thus the question of preemption is whether the legislature, in empowering the Commission, intended to preclude local authority.

Before addressing the question whether Polk County's authority to inspect docks is preempted, the existence of the county's authority over docks needs to be examined. Ownership of the docks affects this authority. As you stated in your letter, there is no concern about federal preemption regarding the docks at Saylorville due to the terms of the lease between the Corps and the marina operator. Docks in Polk County that are owned by the state, however, need to be addressed differently than privately-owned docks.

A local ordinance does not apply to a state with reference to its own property when performing a governmental function. See 5 McQuillin, Municipal Corporations § 15.31a (3d Ed.); Paulus v. St. Louis, 446 S.W.2d 144 (Mo. 1969); Board of Trustees v. Los Angeles, 122 Cal. Rptr. 361, 49 Cal. App.3d 45 (1975). Thus an ordinance adopted by the county regarding inspecting docks to conform to its own regulations would not apply to a state-owned dock.

To determine whether the Commission's authority preempts the county's authority regarding privately-owned docks, whether public or commercial, the authority given by the state legislature needs to be examined. Iowa Code Section 331.301 (1983) delineates the power and limitations of counties under county home rule. Section 331.301(1) specifies that the "county may, except as expressly limited by the Constitution, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate . . . to preserve and improve the peace, safety, health . . . of its residents." Similarly, § 331.301(3) states that a county can exercise its general powers subject only to "limitations expressly imposed by a state law." Unless the county ordinance comes within those express limitations, the county has authority to enact and enforce its ordinance.

Shortly after the county home rule amendment was passed, we addressed the extent of the counties' powers under this amendment. See 1980 Op.Att'yGen. 54. Drawing on prior interpreta-

tions concerning municipal home rule, the 1980 Attorney General's opinion stated that "it would seem fair to conclude that the counties should liberally construe their powers except in the areas of taxation, exclusive state control, express state prohibition against county involvement, or in matters that are not local affairs." 1980 Op.Att'yGen. at 62.

According to the county home rule statute, an express limitation on the exercise of local authority is that such exercise may not be "inconsistent with the laws of the general assembly." § 331.301(1). We interpreted this phrase to refer to the limitation of preemption and to mean that local authorities have power unless there is a clear legislative implication to give exclusive jurisdiction to the state. 1980 Op.Att'yGen. 54. The legislature must expressly state its intention to preempt local authority. See City of Council Bluffs v. Cain, 342 N.W.2d 810, 812-813 (Iowa 1983); Bryan v. City of Des Moines, 261 N.W.2d 685 (Iowa 1978); Chelsea Theater Corp. v. City of Burlington, 258 N.W.2d 372 (Iowa 1977). Although these cases concern municipal home rule, they are helpful in interpreting the county home rule statutes, as they are similar and there is, as yet, minimal case law on county home rule.

Examining the legislative authority of the Conservation Commission does not reveal an intent by the legislature to preempt the authority of local governmental bodies to inspect privately-owned docks. Section 106.32(2) gives the Commission authority to issue permits in order to maintain an "obstruction of any kind" in the "waters of this state under the jurisdiction of the commission." This section imposes no express limit on local authority. The declaration of policy of this chapter refers to the uniformity of laws regarding the "use, operation, and equipment of vessels." Although this expression of policy could arguably be deemed to show a legislative intent to have uniformity by state regulation, it specifies "vessels" which does not encompass docks. § 106.2(1). Therefore, there is no express language on preemption under this section.

Section 107.24 enumerates specific powers of the Commission. In § 107.24(5), the Commission is authorized to adopt and enforce rules to carry out the laws which the Commission has power to enforce. Nowhere in this section is there expressed any intent to remove authority to inspect docks from local governmental bodies.

Section 111.4 requires a permit from the Commission before building any kind of structure over waters under the jurisdiction of the Commission. However, this section reveals no legislative intent to limit local authority regarding inspection of docks.

Another aspect of the legislation, which merits scrutiny in ascertaining an intent to preempt, is the statutory scheme itself. None of the above Code sections sets forth a specific statutory scheme giving the Commission sole authority to regulate this area. Rather, it is left up to the Commission to devise rules and regulations regarding these areas. This lack of a statutory scheme evidences an intent not to preempt local authority.

Moreover, in examining prior enactments by the legislature it is apparent that exclusive jurisdiction over docks was not delegated to the Conservation Commission. Former Iowa Code Chapter 372 (1971) dealing with Riverfront Improvement Commissions gave cities whose corporate limits were divided by meandered or non-meandered streams the power to set up such commissions with the authority to regulate docks within their corporate limits. § 372.15. While this chapter dealt only with cities and later was repealed by the municipal home rule act, 1972 Iowa Acts, ch. 1088, § 199 (effective July 1, 1975), it demonstrates that regulation of docks was not exclusively a state matter.

It thus appears that there is no preemption regarding inspection of docks, but that there is concurrent jurisdiction. It is our opinion that both the Conservation Commission and Polk County have authority to inspect privately-owned docks within the county.

II. If concurrent jurisdiction exists, does state law preempt county ordinances where the two conflict?

As discussed previously, control over navigation is the exclusive domain of the state subject to the federal government's authority to regulate interstate commerce. Regulation of navigation is not intended to come within the counties' powers under Home Rule. Where the ordinance would interfere with the state's sovereign ownership of the bed of navigable lakes and streams or control of navigation, the ordinance must yield to state regulation.

The state law is the minimum that must be met but the county could impose more stringent standards provided they do not infringe the State's interests as pointed out above. § 331.301(6). If the county should adopt an ordinance regulating docks, it should carefully balance the interests involved. The ordinance should be strictly drawn to eliminate any interference with the state's sovereign ownership and its control over navigation.

If a conflict arose between the state law and the county ordinance, it is our opinion that a county ordinance would be

preempted where the ordinance imposed less stringent standards than the state law or where the ordinance infringed on the state's sovereign ownership and control of navigation. An ordinance which unduly impeded navigation could be preempted as interfering with the State's duties toward navigation.

III. If concurrent jurisdiction exists, would the county have a duty to inspect facilities already inspected by the state?

It is our opinion that, with concurrent jurisdiction, the county would not have a duty to inspect the facilities already inspected by the state. The state law and Conservation Commission's rules regarding inspections of docks contain no requirement that the county inspect docks.

According to § 331.301(1), a county may exercise its powers to enact ordinances. Thus, if it does not choose to enact ordinances regarding inspecting docks, it has no obligation to do so. However, if the county did choose to enact such ordinances, it would be up to the county to enforce them. The commission would only be required to inspect for compliance with its own rules and laws.

Conclusion

It is our opinion that there is no preemption by the Iowa Conservation Commission over Polk County regarding inspection of privately-owned docks. There appears to be no express legislative intent to deprive counties of authority to regulate this area concurrently with the state. Given the existence of concurrent jurisdiction in this area, there would be no state law preemption unless a conflict occurred with a county ordinance being less stringent than the state law or in instances when the county ordinance interfered with the state's sovereign ownership of the bed of navigable lakes and streams and its control over navigation. The existence of concurrent jurisdiction does not obligate the county to inspect facilities already inspected by the State.

Sincerely,

Maureen McGuire

MAUREEN McGUIRE
Assistant Attorney General

MM:rcp

CITIES: COUNTIES: RACING COMMISSION: Ownership and financing of racetracks. Iowa Code §§331.442, 384.24, 384.26, 346.27 (1983), Iowa Code supplement §§99D.2, 99D.7, 99D.8, 99D.9 and 331.441 (1983). §§2, 7, 8 and 9. (1) Unless the Iowa State Racing Commission provides otherwise by rule, a private investor may construct a racetrack and lease it to a pari-mutuel licensee so long as all aspects of racing and wagering were under the sole control of the licensee. (2) A private investor who constructs a racetrack may operate concessions at that track so long as the investor meets all licensing requirements therefor set by the racing commission. (3) A pari-mutuel licensee may not issue any bonds, or create any obligations, on which the return is based or contingent in any manner upon the monies received as admissions to the track or pari-mutuel wagers. (4) Unless the racing commission requires that a pari-mutuel licensee own the track facility where it runs races, counties and cities may issue general purpose general obligation bonds for the construction of a racetrack. (5) Iowa Code §346.27 (1983) does not provide a vehicle for a joint county/city project for the construction of a racetrack. (Hayward to Michael Connolly, State Representative, 4/16/84) #84-4-2(L)

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

GARY L. HAYWARD
ASSISTANT ATTORNEY GENERAL

ADDRESS REPLY TO:
3RD FLOOR
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DES MOINES, IOWA 50319
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The Honorable Michael Connolly
Iowa State Representative
3458 Daniels Street
Dubuque, Iowa 52001

April 16, 1984

Dear Representative Connolly:

You have asked this office for an opinion concerning several aspects of the financing and operation of race tracks under Iowa's new pari-mutuel law. Iowa Code Supplement Ch. 99D (1983), hereinafter referred to as Chapter 99D. Specifically you have asked the following questions:

1. May a private investor build the track facility and lease it in its entirety to a non-profit corporation holding a pari-mutuel license?

2. May private investors build and operate track concessions and lease only the pari-mutuel operation to a non-profit corporation holding a pari-mutuel license?

3. May the pari-mutuel licensee issue participating bonds, e.g. paying a set percentage on the principal plus a proportionate share of track profits?

4. May a city or county issue general obligation bonds for the construction of a race track, assuming voter approval is given?

5. May a city-county authority under Iowa Code §346.27 (1983) construct a race track?

I.

Your first two questions will be considered together. There are a number of sections of Chapter 99D which are applicable to your first two questions. Section 99D.2 states in pertinent part:

> As used in this chapter unless the context otherwise requires:
>
> * * * * *
>
> 3. "Holder of occupational license" means a person licensed by the commission to perform an occupation which the commission has identified as requiring a license to engage in within the racing industry in Iowa.
>
> 4. "Licensee" means a nonprofit corporation licensed under section 99D.8.
>
> * * * * *

Section 99D.7, states in pertinent part:

> The [racing] commission shall have full jurisdiction over and shall supervise all race meetings governed by this chapter. 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 and to select among competing applicants for a license the applicant which best serves the interests of the citizens of Iowa.
>
> 2. To identify occupations within the racing industry which require licensing and adopt standards for licensing the occupations including establishing fees for the occupational licenses.
>
> * * * * *

> 19. To take any other action as may be reasonable or appropriate to enforce this chapter and the commission rules.

Section 99D.8 states in pertinent part:

> A qualified nonprofit corporation as defined in section 99B.1, subsection 10, organized to promote those purposes enumerated in section 99B.7, subsection 3, paragraph b, or a nonprofit corporation which conducts a livestock exposition for the promotion of the livestock, horse, or dog breeding industries in this state, may apply to the commission for a license to conduct horse or dog racing.

Section 99D.9(1) states in pertinent part:

> The commission shall decide the number, location, and type of all racetracks licensed under this chapter.

Section 99D.2(1) states:

> The nonprofit corporation or association shall not by lease, contract, understanding, or arrangement of any kind grant, assign, or turn over to a person the operation or management of a race meeting licensed under this section or of the pari-mutuel system of wagering described in section 99D.10. [Senate File 92, §11.]

The first point to be made is that the Iowa State Racing Commission has broad discretion in deciding to whom and under what circumstances a pari-mutuel license will be issued. It decides where tracks may be built and which entities applying for a license will best serve the people of Iowa. Iowa Code Supplement §§99D.7 and 99D.9(1) (1983). Thus, it could decide that the interests of the State would be better served by issuing a license to an applicant with full control of the track year round and that decision could be made in the context considering competing applications for a license or in the context of a policy decision through the promulgation of a rule. With this in mind, we turn to the question of whether Chapter 99D requires that a licensee own the track

on which it runs its races, and, if not, whether the owner of the track facility may retain the right to operate concessions.

With respect to the question of whether the pari-mutuel licensee must own the physical plant of the race track, Chapter 99D gives conflicting signals. Section 99D.8 describes the license as a "license to conduct horse or dog racing." This seems to imply that the licensee is licensed as to the operation of the races only. Section 99D.9(1) refers to "racetracks licensed in this state." This implies a unity of identity between the licensee and the track itself. However, the pari-mutuel license is not the only type of license authorized by the statute. Iowa Code Supplement §§99D.2(3) and 99D.7(2) (1983). Because Section 99D.8 specifically addresses the nature of the pari-mutuel license we believe that it is the provision which describes the nature of the license, (i.e., a license to conduct races). There is no statutory requirement that the licensee own the physical plant on which the race is run.

Ownership of the track facility could be an occupation subject to licensing by the racing commission. The commission could then by rule limit the persons or entities eligible for such a license and regulate the terms and conditions of any contract or agreements between the owner of the facility and the pari-mutuel licensee. The same authority exists in relation to whether the owner of the facility can retain control of concessions.

The answers to your first two questions then are as follows. The racing commission may permit a private investor to build a track facility and lease it in its entirety to a pari-mutuel licensee, or to do so and retain control of concessions at the facility. However, the commission may legally forbid such arrangements as well. It should be noted that under Section 99D.9(2), any such arrangement must be arranged so that the pari-mutuel licensee has complete unfettered control over all aspects of the operation of the races and pari-mutuel system and rents cannot be in any manner whatsoever tied to or contingent upon monies received through admissions and wagers.

II.

A pari-mutuel licensee may not issue participating bonds if the return thereon is in any manner contingent upon the amount of money received as admissions or wagers. Section 99D.9(2) states:

> 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.

The issuance of any participating bonds on which the return is in any manner contingent upon these monies is grounds for the immediate revocation of the pari-mutuel license.

III.

Assuming that all statutory requirements are met, and that the Iowa State Racing Commission does not prohibit such financing by rule, a city or county can pursuant to Iowa Code §§331.442 and 384.26 (1983) issue general purpose general obligation bonds to finance the construction of a race track for pari-mutuel purposes. As is noted above, the racing commission has the authority to either require that the pari-mutuel licensee own the facility or to set other licensing requirements which would preclude this sort of financial arrangement.

Counties and cities may issue general obligation bonds for "general county purposes" or "general corporate purposes" respectively. Iowa Code §§331.442 and 384.26 (1983). Iowa Code Supplement §331.441(2)(c)(2) (1983) defines "general county purposes" to include, in pertinent part:

> Acquisition and devlopment of land for a . . . recreation or conservation purpose to be managed by the county conservation board. The board shall submit a proposition under this subparagraph only upon receipt of a petition from the county conservation board asking that bonds be issued for a specific amount.

Iowa Code §384.24(4)(b) (1983) defines "general corporate purposes" for cities to include, in pertinent part:

> The acquisition, construction, reconstruction, enlargement, improvement, and equipping of community. . .recreation grounds, recreation buildings,. . .recreation centers, . . . and the acquisition of real estate for.

Both of these provisions would seem to permit the issuance of bonds. It should be noted that a racetrack would not constitute an "essential county purpose", as defined in Iowa Code Supplement §331.441(2)(b) (1983), or an "essential corporate purpose" for cities as defined in Iowa Code §384.24(3) (1983). For this reason, the procedures for issuing general obligation bonds for "essential" purposes are not applicable to racetracks. See, Hamilton v. City of Urbandale, 291 N.W. 2d 15 (Iowa 1980) (softball fields not "essential corporate purpose".) The issuance of such bonds depends of course upon voter approval pursuant to Iowa Code §§331.442 and 384.26 (1983).

IV.

Iowa Code §346.27 (1983) does not authorize the formation of a city-county authority for the construction of a racetrack. That section provides for the construction of a building "for the joint use of the county and city or any school district which is in or is a part of the county or city." Iowa Code §346.27(9)(h) (1983) only permits the "incorporating units" (i.e. the city and county involved) to "lease all or any part of [the] building". There is no provision which would permit a city-county structure under this statute to be leased to a third party, such as a pari-mutuel licensee. Iowa Code §346.27 (1983) only permits a county and city to jointly construct buildings necessary or desireable to conduct governmental operations. Because counties and cities are not "non-profit corporations or associations" eligible for a pari-mutuel license, a racetrack would not be the sort of building which can be constructed pursuant to this section. See Iowa Code Supplement §99D.8 (1983).

Nothing in this opinion should be construed as a comment on the authority granted counties and cities under Iowa Code Ch. 28E (1983). Also, any projects authorized under Chapter 28E for the construction of a racetrack will be subject to the regulatory authority of the Iowa Racing Commission described in response to your other questions.

V.

In summary we are of the following opinion:

1. The Iowa State Racing Commission may prohibit ownership of a track facility by a private investor, may license and regulate such ownership, or may permit such ownership without regulation under its rule making authority.

2. If the commission allows a private investor to construct a racetrack and rent it to a licensee, the licensee must have absolute control over all aspects of the operation of races and the pari-mutuel system.

3. If separate ownership of racetracks is permitted, and the track owner wishes to operate concessions, the owner must meet whatever licensing requirements are set by the Racing Commission for operation of such concessions.

4. A pari-mutuel licensee may not issue bonds, or create any obligations, on which the return is based or contingent in any manner upon monies received as admissions to the track or pari-mutuel wagers.

5. Counties and cities may issue general obligation bonds for the construction of a racetrack if the Iowa State Racing Commission does not prohibit persons other than the pari-mutuel licensee from owning the track facilities.

6. Iowa Code §346.27 (1983) does not give counties and cities authority to construct a racetrack as a joint county/city building.

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General

GLH:dkl

COUNTIES AND COUNTY OFFICERS: Drainage Districts. Iowa Code Sections 455.4, 455.7, 455.10, 455.70, 455.92, 455.133, 455.135, 455.136, 455.164 (1983); Iowa Code Section 7559 (1939); 1949 Iowa Acts Ch. 202 §§ 21, 24. Preliminary expenses incurred by the governing body of a drainage district to determine whether to undertake an improvement to an already established district should be paid from drainage district funds pursuant to § 455.136. 1980 Op.Att'y.Gen. 904 holding that petitioners for such preliminary expenses should bear liability for these costs if the improvement is not undertaken is overruled. (Benton to Lounsberry, 4/2/84) #84-4-1(L)

April 2, 1984

The Honorable R. H. Lounsberry
Iowa Secretary of Agriculture
Wallace State Office Building
L O C A L

Dear Mr. Lounsberry:

In your letter of January 16, 1984, you have asked that our office review an earlier Attorney General's opinion, 1980 Op.Att'y.Gen. 904, concerning the liability for certain preliminary expenses incurred when a drainage district determines not to construct an improvement in the district. The dispute which generated the 1980 opinion was in Kossuth County, and a restatement of the factual background would be useful. A portion of Drainage District No. 65 in Kossuth County lies within the city of Burt. Certain residents of Burt, also landowners within District No. 65, filed a petition with the Kossuth County Board of Supervisors, the governing body of this district, requesting that the Board construct an improvement to enhance the drainage in their area. The landowners who petitioned for the improvement posted no bonds. The Board contracted with an engineer to determine the feasibility and cost of the improvement. The Board determined, after examining the engineer's report, that the cost of the requested improvement would exceed the benefits received, and therefore decided not to proceed with the work. The engineer submitted a bill of $5,000.00 to the Board representing the costs

of the preliminary feasibility study. Pursuant to Iowa Code section 455.136 (1979), the Board assessed this $5,000.00 expense against all of the landowners within District No. 65, including those who had not petitioned for the improvement. Many of those property owners within District No. 65 who did not petition for the work were assessed costs ranging from $200.00 to in excess of $600.00. The petitioners, in contrast, were assessed the statutory minimum assessment under § 455.136 of $2.00.

This factual situation generated a controversy within Kossuth County as to the fairness of assessing the costs of this preliminary work in this manner. The Kossuth County Attorney then requested an Attorney General's opinion to resolve the matter asking specifically:

> Where petitioners have filed a request for a repair or improvement to the drainage district and the engineer studies the situation and does not file a report but verbally tells the Board what the cost will be, and the Board decides that the cost would be too great in proportion to the benefits to be received and dismisses the proceedings, should the cost of the engineer's services be assessed against all of the land in the drainage district pursuant to § 455.136, or should they be assessed to the petitioners in accordance with § 455.132, or is there still an alternative method of assessing the cost?

In our response to this question we found in 1980 Op.Att'y.Gen. 904 that the petitioners for an improvement to a drainage district are ultimately liable for the preliminary expenses incurred when the improvement is not completed even though they have posted no bonds. We decided that under § 455.164 the county should initially pay these preliminary expenses out of the county general fund, and then seek reimbursement from the petitioners for the amount of the expense.

As we understand it, the Citizen's Law Study Committee, to which your letter alludes, has been established to study Iowa's drainage statutes and recommend legislative changes where problems are noted in those laws. Your letter notes that the Committee, after examining 1980 Op.Att'y.Gen. 904 and the dispute in Kossuth County, has recommended that the result in this opinion should be reviewed. We can garner from the Committee's recommendation that 1980 Op.Att'y.Gen. 904 has not resolved the basic controversy within Kossuth County, and accordingly its result should be re-examined as requested by the Committee.

Iowa Code section 455.135 (1983) concerning repairs and improvements to drainage districts does not specify a procedure through which landowners may request repairs or improvements, nor does it specify who bears the liability for preliminary expenses should the Board determine not to complete the improvement. In 1980 Op.Att'y.Gen. 904, we basically analogized the petition for an improvement to the proceedings for the creation of a district, and concluded that since in the latter situation the petitioners are liable for the initial costs, and must post bonds to cover those expenses, petitioners for drainage improvements after the district was established should also be liable for preliminary expenses. We believe now that, after a re-examination of the relevant provisions and with the opportunity to study the various written comments submitted with your letter, that this result was clearly erroneous and should be reversed.

Section 455.135 prescribes the duties of the governing Boards of drainage districts as to repairs and improvements and sets forth the procedure through which the Boards should accomplish the repairs or improvements. The Board's procedures for repairs are set forth in § 455.135(1) through (3). Governing Boards have a duty to keep their districts in repair, which duty may be enforced by an action in mandamus. Board v. Iowa Natural Resources Council, 247 Iowa 1244, 1251, 78 N.W.2d 798 (1956). Section 455.135(4) defines an "improvement" as a

> . . . project intended to expand, enlarge or otherwise increase the capacity of any existing ditch, drain or other facility above that for which it was designed.

In contrast to the duty of the governing body to make repairs, the decision to order an improvement to an existing drainage district is discretionary with the Board. Section 455.135(4)(a) provides in pertinent part:

> When the board determines that improvements are necessary or desirable, it shall appoint an engineer to make surveys as seem appropriate to determine the nature and extent of the needed improvements, and to file a report showing what improvements are recommended and their estimated costs, which report may be amended before final action.

If the governing body exercises its discretion and orders that the improvement be completed, Iowa Code section 455.136 (1983) clearly provides that the expense be paid from drainage district funds. In Kossuth County, the Board chose not to order the improvement, leaving the issue as to how the engineer's bill for the preliminary study should be paid.

The term "costs of improvements," as used in § 455.135(4), had been defined elsewhere within Chapter 455. Iowa Code section 455.4 states in part that:

> The term "cost of improvements" means the costs of any improvement which is subject to assessment, including but not limited to, the costs of engineering, preliminary reports, property valuations, estimates, plans . . .

The study ordered by the Kossuth County Board here would seem to fall within this definition of cost of improvements as a preliminary report or estimate. Section 455.136 states that the costs of improvements shall be paid for out of the funds of the district, and if the funds at hand are not sufficient to pay such expenses, the Board must levy an assessment to pay the indebtedness. The $5,000.00 engineering bill in Kossuth County was a preliminary report and should be paid pursuant to § 455.136 and not assessed against those who requested the improvement.

The legislative history of the statute concerning improvements to established drainage districts supports the conclusion that these preliminary expenses should be paid from the district's funds, rather than being assessed against the petitioners. Iowa Code section 7559 (1939) provided that:

> If the cost thereof does exceed ten percent of the original cost of the improvements in the district, and the nature and/or amount of work proposed differs from mere repairs as defined in section 7561, then the board shall order a new apportionment of, and assessment upon, the lands in the district to be made; and the same proceedings shall be had and the same rules shall be applied as are provided in this chapter for an original establishment and assessment; and the same right to appeal shall be given to any interested party.

It was clear that under this provision, the same procedures should be followed in an improvement as were followed in the creation of the district. Consequently, landowners could petition for improvements and would bear responsibility for preliminary expenses if the improvement were not accomplished. In Maasdam v. Kirkpatrick, 214 Iowa 1388, 1397 243 N.W. 145 (1932) the Iowa Supreme Court found that under § 7559 when a drainage district contemplated an improvement it must proceed with petition, notice and bond as provided for in new construction.

However, in 1949 Iowa Acts Ch. 202, § 24, the legislature repealed the former § 7559. As a part of this major revision of the drainage chapter, the legislature enacted a new provision, 1949 Iowa Acts. Ch. 202, § 21, which combined the provisions concerning repair and improvement. This statute is now found at § 455.135. However, in recodifying these provisions, the legislature deleted the language in the former § 7559 which had provided that in improvements to drainage districts the governing Boards should follow the same procedures as in the creation of the districts. We would conclude from this deletion that the legislature intended to change the law that had existed providing that improvements be treated as proceedings for the establishment of the district. As a result of this change, those requesting improvements to drainage lines would no longer bear financial responsibility for preliminary expenses.

As we have noted, the present version of § 455.135 contains no language providing for a petition to the drainage Board for the establishment of an improvement. However, there are other provisions in which the legislature has found a petition and bond should be required. To establish a drainage district, a petition and bond are required to be filed under Iowa Code sections 455.7 through 455.10 (1983). The bonds are to be conditioned upon the payment of all costs and expenses incurred in case the district is not established. Section 455.10. There are other situations, after the establishment of the district, in which the legislature has provided that the same procedure as is utilized in the establishment of a drainage district should be followed. For example, Iowa Code section 455.70 (1983) concerns the establishment of a subdrainage district within an established district. This statute states in pertinent part:

> After the establishment of a drainage district, any person, company, or corporation owning land within such district which has been assessed for benefits, but which is separated from the main ditch, drain, or watercourse for which it has been so assessed . . . may file a petition for the establishment of a subdistrict and thereafter the proceedings shall be the same as provided for the establishment of an original district. (Emphasis supplied)

Presumably, under this language, if the proposed subdistrict is not established any preliminary expenses would be collected from the bonds of the petitioners. Similarly, Iowa Code section 455.133 (1983) deals with the establishment of a new drainage district which includes a part of an older, previously established district. Section 455.133 states

> If any levee or drainage district or improvement established either by legal proceedings or by private parties shall be insufficient to properly drain all of the lands tributory thereto, the board upon petition as for the establishment of an original levee or drainage district, shall have power to establish a new district covering and including such old district or improvement together with any additional lands deemed necessary. (Emphasis supplied)

Again, the implication from this provision is that the procedure for the creation of a new district under this statute should follow the procedures in the establishment of an original district. Accordingly, the petitioners would bear responsibility for the preliminary expenses if the new district were not established.

In these situations the legislature has indicated that it is appropriate for the proceedings to mirror those followed in the creation of an original district. The legislature has not chosen, in § 455.135 to include language, as is found in §§ 455.70 and 455.133, that the procedure should be the same as for the creation of a district. This omission indicates that the legislature did not believe that proceedings for an improvement under § 455.135(4) should follow procedures similar to those in §§ 455.7 through 455.10. It follows that those who petition for an improvement should not bear responsibility for preliminary expenses such as this engineer's bill. Moreover, those situations in which petitioners bear financial responsibility for preliminary expenses are distinguishable from a proceeding for an improvement under § 455.135(4). In the establishment of an original district, or in the situations contemplated in §§ 455.70 or 455.133, if the governing body declines to grant the requested relief, there would be no party other than the petitioners from whom the body could collect the preliminary expenses. Obviously, if a proposed drainage district is not established, there are no other landowners from whom the preliminary expenses could be collected. Under § 455.70, if the proposed sub-district is not established, there would be no entity to assess property owners within the sub-districts for the costs of the preliminary work. Similarly, under § 455.133, if the new district is not created, there would be no way to assess any costs against landowners in the new area. By contrast, an improvement or a study of the feasibility of an improvement under § 455.135(4) is undertaken by an already established district with the authority to assess costs against landowners within the district. On this basis, the requirement that under certain circumstances petitioners for the creation of new entities should bear financial responsibility should the entity not be established is logical. By the same token, where an established district with the power to assess costs undertakes a study of a proposed improvement, it would be

contrary to the legislative scheme to impose liability on those who request the improvement. In our consideration of these provisions, we are required to construe Chapter 455 so as to produce a harmonious system of legislature. Rush v. Sioux City, 240 N.W.2d 431, 455 (Iowa 1976).

Although § 455.135(4) does not provide a formal mechanism through which landowners may request that an improvement be undertaken, landowners within Kossuth County petitioned the Board for an improvement to District No. 65. We would not conclude, however, that merely by filing a petition the procedure should be treated as analogous to the creation of a new district. Landowners should approach governing Boards on a much more informal basis to notify them that problems exist and request that work is undertaken. In fact, unless landowners are willing to report problems to their managing boards, those governing bodies would have no way to monitor the condition of all drainage lines in a district which could encompass thousands of acres. To impose a requirement that those who request that a Board study the feasibility of an improvement are solely responsible for the preliminary costs could seriously jeopardize the landowners' willingness to report problems to the Board. Perhaps in some instances, it might be sound policy for a Board to conduct an informal hearing and notice before undertaking to study an improvement to insure that landowners within the district are cognizant that preliminary expenses could be incurred. Such a procedure could mitigate the seeming inequity which arose in Kossuth County. However, in no event, should those who request that such an improvement be undertaken solely bear the costs of the engineer's preliminary study. We should point out, in this context as well, that the decision to undertake the preliminary study, as well as the decision to undertake the improvement itself, are appealable by those parties aggrieved. See Iowa Code section 455.92 (1983); Johnson v. Monona Harrison Drng. Dist., 246 Iowa 537, 555 68 N.W.2d 512 (1955).

In summary, preliminary expenses such as an engineer's report incurred by the governing Board of a drainage district to determine whether to undertake an improvement to an already established drainage district should be paid from drainage district funds, under § 455.136, if the improvement is not undertaken, and not from those who have requested that the work be accomplished. Our prior opinion on this issue, 1980 Op.Att'y.Gen. 904, which held that petitioners for such improvements are liable for these preliminary expenses, is overruled.

Sincerely,

Timothy Benton

TIMOTHY D. BENTON
Assistant Attorney General

TDB:cjc

HAZARDOUS WASTES/Department of Water, Air and Waste Management: Iowa Code §§ 455B.415, 455B.417, 455B.420, 455B.301 (1983). Department of Water, Air and Waste Management is not authorized to allow disposal of small quantities of hazardous wastes at sanitary disposal projects which do not have hazardous waste permits under 455B.415. Nor is the Department authorized to create a new permit allowing such disposal. (Ovrom to Ballou, Executive Director, Iowa Department of Water, Air and Waste Management, 5/30/84) #84-5-5(L)

May 30, 1984

Mr. Stephen W. Ballou
Executive Director
Iowa Department of Water, Air &
Waste Management
Wallace State Office Building
L O C A L

Dear Mr. Ballou:

You have asked our opinion whether the Department of Water, Air and Waste Management (DWAWM) is authorized to allow generators of small quantities of hazardous wastes to dispose of their wastes in sanitary landfills either under current rules or by developing a new permit. In our opinion DWAWM is not authorized to do so.

DWAWM is currently allowing small quantities of hazardous wastes to be transported to and disposed of at solid waste disposal facilities under one statute while a more recent Iowa law prohibits transportation to, or treatment, storage or disposal of, hazardous wastes at facilities which do not have hazardous waste permits. DWAWM rule 900 I.A.C. 102.14 allows disposal of small quantities of hazardous waste at a landfill without a hazardous waste permit.[1] However, Code Section 455B.417(1)(b) prohibits treatment, storage or disposal of a hazardous waste without a hazardous waste permit, and 455B.417(1)(a) prohibits transportation of hazardous waste to a disposal site that has no hazardous waste permit.

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[1] One of the criteria for determining whether a waste is a "hazardous waste" is quantity. Iowa Code § 455B.411(2)(a) (1983). For the purposes of this opinion we assume that the wastes we are discussing are of sufficient quantity to be classified as "hazardous wastes" under Section 455B.411(2)(a).

In 1977 the Department of Environmental Quality, predecessor to DWAWM, enacted a rule allowing for disposal of "special wastes" at sanitary disposal projects. That rule was originally contained in 400 I.A.C. 27.14, and is now in 900 I.A.C. 102.14. "Sanitary disposal projects" are solid waste disposal facilities for disposal of garbage and rubbish, etc. See Iowa Code § 455B.301 (1983). "Special wastes" included many wastes that are now listed by the Department as hazardous wastes. DEQ's authority for the "special waste" authorization permits was its solid waste disposal authority, now codified in Section 455B.301 through 455B.308 of the Iowa Code.

In 1981 the legislature passed the hazardous waste management bill which prohibits transportation to, or treatment, storage, or disposal of, any hazardous waste at a facility which does not have a hazardous waste permit. Iowa Code §§ 455B.411-455B.422 (1983). Subsequently the Department, in enacting rules to create a state hazardous waste management program which would be consistent with the federal program as required by federal and state law, adopted by reference a federal regulation which allows for disposal of small quantities of hazardous wastes at solid waste disposal facilities licensed by the state. 900 I.A.C. 141.6, incorporating 40 C.F.R. 261.5. The hazardous waste permit is different from the solid waste disposal permit. Thus the solid waste disposal facilities which are accepting small quantities of hazardous wastes do not have permits for hazardous wastes.

In our opinion, the later enacted statute, Sections 455B.411-455B.422, which specifically concerns hazardous wastes, overrides the special waste authorization rule enacted pursuant to the general solid waste disposal authority. Rule 900 I.A.C. § 141.6, in exempting small quantity treatment, storage or disposal from the hazardous waste permit requirement, is also inconsistent with Iowa Code Sections 455B.415 and 455B.417.

We do not think that Section 455B.420, which requires DWAWM rules to be consistent with and no more stringent than federal rules, requires DWAWM to maintain the federal small quantity exemption incorporated in DWAWM rule 900 I.A.C. 141.6. Section 455B.420 does not require DWAWM to maintain a rule when it is in direct conflict with another statutory provision. (Op.Att'yGen. 83-3-19(L), Ovrom to Ballou, p. 5). Statutory provisions are to be read together when possible, and specific provisions control over general ones. Where the legislature specifically prohibits treatment, storage, or disposal of a hazardous waste at a facility which does not have a hazardous waste permit, we do not think the legislature intended the general consistency requirement of Section 455B.420 to force

DWAWM to allow disposal of some hazardous wastes at unpermitted facilities.

Your second question asks if the Department can develop a permit under the hazardous waste management statute, Sections 455B.411-455B.422, to allow solid waste disposal facilities to accept hazardous wastes, which permit would be separate from the hazardous waste permit required by Section 455B.415. We find no authority which would allow the Department to do this.

Section 455B.415 prohibits a person from operating a facility for treatment, storage or disposal of a hazardous waste identified by the commission without obtaining a permit from the director. Section 455B.417 prohibits treatment, storage or disposal of a hazardous waste without having obtained a permit under 455B.415. There is no exception for small quantities of hazardous wastes.[2] Nor is there another provision authorizing a hazardous waste permit apart from that in 455B.415. The legislature clearly intended that all hazardous wastes be disposed of at facilities which have permits from DWAWM.

Your letter cites three other exemptions allowed under federal regulations which have been adopted by reference in the Iowa regulations. See 900 I.A.C. 141.2, incorporating 40 C.F.R. 261.4(c) (exemption for hazardous wastes generated in a manufacturing process unit or associated nonwaste-treatment-manufacturing unit); 40 C.F.R. 261.6 (exemption for hazardous wastes which are used, reused, recycled, or reclaimed); and 40 C.F.R. 261.7 (exemption for hazardous wastes in empty containers). Our reasoning with respect to small quantities of hazardous waste would apply to these exemptions as well. Absent specific exemption in the Iowa statute, treatment, storage or disposal of these wastes requires a permit.

As we stated over a year ago in a letter of informal advice on this same issue, the most desirable solution to this situation might be an amendment to Iowa's hazardous waste statute which would allow DWAWM to set minimum thresholds for the hazardous waste permit requirement. This would bring the issue before the legislature and allow it to determine how it wants to handle

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[2] There are two exceptions from Section 455B.415's permit requirement: one for preexisting facilities which are given a grace period to obtain a permit, and one for storage of hazardous wastes up to 90 days to accumulate sufficient quantities for transportation, treatment, or disposal. See Iowa Code §§ 455B.415(2) and (4). Neither of these exemptions is applicable to small quantity treatment, storage, or disposal.

small quantity generators or other exemptions allowed under federal regulations.

Sincerely,

ELIZA OVROM
Assistant Attorney General

EO:rcp

ELECTIONS: Qualification of Candidate; Mandatory Retirement. Ch. 97B; §§ 97B.42, 97B.46(3). No statutory procedures exist in the election process to disqualify a candidate for county sheriff on the basis of an impendent mandatory retirement. Aggrieved citizens may challenge a nominee's right to be placed on the ballot by an appropriate action in the courts where factual and legal issues concerning the application of § 97B.46(3) can be resolved. (Pottorff to Franklin, Wayne County Attorney, 5/30/84 # 84-5-4(L)

May 30, 1984

Monty Franklin
Wayne County Attorney
P. O. Box 467
Humeston, Iowa 50123

Dear Mr. Franklin:

You have requested an opinion of the Attorney General concerning age restrictions applicable to candidates seeking nomination to run for the office of county sheriff. You state that a candidate for the nomination to run for the office of county sheriff will turn seventy (70) before the general election. You point out that Chapter 97B requires a publicly elected official of a political subdivision of the state to become a member of the Iowa Public Employees' Retirement System (IPERS) and prohibits a member of IPERS from employment as a peace officer after age sixty-five. Iowa Code §§ 97B.42, 97B.46 (1983). In light of these provisions, you specifically pose the following questions:

1. Are there any age restrictions or qualifications regarding a candidate who is seeking nomination as County Sheriff and if so, what age restrictions are applicable?

2. If age restriction is applicable to a candidate for County Sheriff, when and how should the restrictions be enforced? If age is in question should the Auditor ascertain a potential candidate's age prior to providing him or her with nomination papers or refuse to accept the nomination papers or accept the nomination papers but refuse to put the candidate's name on the ballot, etc.?

In a previous letter we informally advised in partial response to question number two that the county auditor's function is processing nomination papers is ministerial. If the papers appear regular on their face, therefore, the county auditor must file the papers and place the candidate's name on the ballot. It is, further, our opinion that no statutory procedures exist in the election process to disqualify a candidate for county sheriff on the basis of an impendent mandatory retirement. Aggrieved citizens may challenge a nominee's right to be placed on the ballot in court where factual and legal issues concerning the application of § 97B.46(3) can be resolved.

Initially, it is necessary to distinguish between an age restriction applicable to a candidate and a mandatory retirement age applicable to a public official. There are no statutory provisions which prohibit, on the basis of age, any person from seeking the office of county sheriff. See Iowa Code §§ 331.651-660 (1983). No statutory prohibition exists, therefore, which disqualifies a person on the basis of age from candidacy for the office of county sheriff.

Statutory provisions do prohibit employment as a peace officer after attaining the age of sixty-five. Any publicly elected official of a political subdivision of the state, except students who devote their time and efforts chiefly to their studies, "shall become a member" of IPERS on the first day of employment. Iowa Code § 97B.42 (1983). A member of IPERS, in turn, "shall not be employed as a peace officer . . . after attaining the age of sixty-five." Iowa Code § 97B.46(3) (1983). The term peace officer includes a county sheriff. Iowa Code § 801.3(7) (1983). A statutory basis does exist, therefore, to challenge employment as a county sheriff after the age of sixty-five.

Enforcement of this mandatory retirement age through disqualification of the candidate is not statutorily provided in the election process. In a previous opinion, this office opined that no statutory procedure exists to challenge prospectively the eligibility of a candidate to hold the office for which he or she seeks nomination by primary election. See 1978 Op. Att'y Gen.

672, 673-74. But cf. Iowa Code §§ 44.4-44.8 (1983) (statutory procedures provided for resolution of objections to eligibility of candidates nominated under Chapters 44 and 45). Since election processes, moreover, are generally ministerial, there are no mechanisms by which state or county officials could sua sponte act to eliminate a candidate on the basis of an impendent mandatory retirement.

The ministerial nature of election processes has been examined in a variety of contexts. This office, for example, has stated that the process of accepting nomination petitions by the Secretary of State is ministerial and, therefore, the Secretary of State would take no action to reject nomination papers which are prima facia valid but appear to contain more than one signature in the same handwriting. 1972 Op. Att'y Gen. 578, 578-79. The Iowa Supreme Court, moreover, has ruled that the process of certifying the results in a primary election is ministerial and, therefore, the State Board of Canvassers must certify as the nominee the person who received the highest number of votes although the nominee to be certified died after the primary but before the statutory date for canvassing the votes. Davies v. Wilson, 229 Iowa 100, 104-05, 294 N.W. 288, 290-91 (1940). See also 1976 Op. Att'y Gen. 863, 866 (State Board of Canvassers not empowered to determine inhabitancy under the Iowa Constitution).

Some authority suggests that aggrieved citizens may challenge a nominee's right on the ballot by appropriate action in the courts. Qualified electors may be disenfranchised when they vote for a candidate who cannot legally hold the office which he or she seeks. See, generally, In Re O'Pake, 422 A.2d 209, 211 (Pa. Conmw. Ct. 1980). Under this theory, qualified electors may have standing to sue for removal from the ballot of a candidate who cannot legally hold office. See id at 210. This office, moreover, has noted the possibility of a suit by aggrieved citizens to challenge a nominee's right to be placed on the ballot based on alleged irregularities in the nominating petition which election officials, in their ministerial capacity, have no authority to resolve. See 1972 Op. Att'y Gen. 578, 579.

In light of the lack of any statutory procedure to resolve the eligibility of a candidate to hold the public office which he or she seeks and the ministerial nature of election processes, we consider the courts to be the appropriate forum to resolve this issue. In an adversarial setting, a court may fully consider whether an impendent mandatory retirement is sufficient ground to disqualify a candidate for county sheriff. We point out that significant legal issues exist concerning whether § 97B.46(3) may be enforced without violation of federal statutes prohibiting age discrimination. See 29 U.S.C. §§ 621-32 (1983). Involved in

this determination is the factual issue of whether retirement at age sixty-five is a bona fide occupational qualification for county sheriff. See Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122, 95 S.Ct. 805, 42 L.Ed.2d 22 (1975). The courts are suited to resolve these legal and factual issues.

In summary, it is our opinion that no statutory procedures exist in the election process to disqualify a candidate for county sheriff on the basis of an impendent mandatory retirement. Aggrieved citizens may challenge a nominee's right to be placed on the ballot by an appropriate action in the courts where factual and legal issues concerning the application of § 97B.46(3) can be resolved.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:cjc

TAXATION: Value of real property subject to tax levy. Iowa Code ch. 441 (1983); Iowa Code §§ 441.21, 441.38, and 441.47 (1983). Assessment limitations contained in § 441.21 are applicable to the actual value of all parcels of locally assessed realty. An equalization order of the director of revenue issued pursuant to § 441.47 for a class of property would be applicable to a parcel of property whose actual value was established by a district court in the assessment appeal process. (Schuling to Glaser, Delaware County Attorney, 5/01/84) #84-5-2 (L)

Mr. Robert G. Glaser
Delaware County Attorney
Delaware County Courthouse
Manchester, IA 52057

Dear Mr. Glaser:

You have requested an opinion of this office concerning the value on which tax will be levied pursuant to Iowa Code ch. 441 (1983). Specifically, you asked the following:

1. Whether the practice of the local assessor in applying the roll-back to the value of a piece of property established by the District Court is correct?

2. Whether the practice of not applying the equalization order to property whose value is established by the District Court in assessment appeal proceedings is correct?

With regard to your first question, the term roll-back refers to the assessment limitations provided by Iowa Code §441.21 (1983). Section 441.21 contains specific provisions limiting the real property annual valuation increase against which taxes are levied on a statewide basis. As a result, all classes of locally assessed realty are restricted for property tax levies to an annual statewide growth due to revaluation or equalization of four percent.

An assessment limitation is a procedure separate and distinct from the determination of actual value. The department of revenue, using the assessors' annual abstracts of assessment and following specific statutory computations, determines annually the percentage of actual value upon which taxes are to be levied. Iowa Code §441.21(5), (6) and (10) (1983). The statewide percentages are then certified to each county auditor who is responsible for applying the percentage to the actual value of each individual parcel of property. Iowa Code §441.21(10) (1983).

These assessment limitations were enacted to prevent large increases and shifts in the property tax tax burden between classes of property due to valuation increases or decreases to classes of property. The assessment limitations do not affect the determination of actual value of a parcel of property. A parcel of property is always valued at its actual value by the assessor. Iowa Code §441.21(2) (1983). The assessment limitations are intended to affect the value upon which taxes are to be levied. As a result, the assessment limitations, as determined by the director of revenue, are to be applied to each parcel of locally assessed realty. Your first question is answered in the affirmative.

Your second question requests an opinion on whether a final value determined through litigation pursuant to Iowa Code §441.38 (1983) is dispositive of value despite a subsequent equalization order. In order to make a proper determination, it is necessary to examine the assessment appeal and assessment equalization processes in ch. 441 for the purposes for which they were enacted.

In regard to the assessment appeal process, the assessor is required to determine the actual value of all property subject to assessment and taxation. This value is defined for nonagricultural realty as market value or "the fair and reasonable exchange in the year in which the property is listed and valued between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and each being familiar with the facts relating to the particluar property." Iowa Code §441.21(1)(b) (1983). For agricultural realty, the actual value is based upon productivity and net earning capacity. Iowa Code §441.21(1)(e) (1983).

The assessor is required to notify each taxpayer whenever there is a change in the assessment of the taxpayer's property, and should indicate how the assessment may be appealed. Iowa Code §441.23 (1983). A taxpayer who is dissatisfied with the assessment of property may appeal the assessment to the local board of review between April 16 and May 5. Iowa Code §§441.31 - .43 (1983).

Protests must be premised on one or more of the following six grounds: (1) the assessment is not equitable with similar properties; (2) the property is assessed at more than its actual value; (3) the property is exempt from taxation; (4) there is an error in the assessment; (5) the assessment is fraudulent; and (6) there has been a

change in the property's value since the last assessment. Iowa Code §§441.35 and .37 (1983). The decision of the board of review is appealable to district court. Iowa Code §§441.38 - .43 (1983). The final determination of value as a result of the assessment appeal process is the actual value of that property.

Separate and distinct from the assessment appeal process is the assessment equalization process. The purpose of assessment equalization is to ensure that each class of property in each assessing jurisdiction is assessed at actual value as required by law. Iowa Code §§441.47-49 (1983). This equalization among classes is necessary for several reasons. First, the property in one taxing district may be valued by two or more local assessors. Second, state aid to local schools is based in part upon the assessment base of each school district. Therefore, inequities in levels of assessment among school districts can have an adverse effect upon the equitable distribution of state aid. Third, equalization is necessary to ensure that each class of property is assessed at the statutory level of actual value, therefore, maintaining an equitable assessment base among classes of property and among assessing jurisdictions. Equalization is accomplished by increasing or decreasing the aggregate valuations for certain classes of property within assessing jurisdictions by the percentage necessary to adjust the level of assessment to actual value. A percentage adjustment in the valuations of any class of property will be ordered if the reported valuation is more than five percent above or below the actual values as determined by the Director of Revenue. Iowa Code §441.47 (1983).

An equalization order is issued to the county auditor on or before October 1, in the equalization year. The auditor is to apply the order to all property within the class in order to raise or lower the aggregate valuations of the class to the appropriate level of assessment as determined by the director of revenue. Iowa Code §441.49 (1983).

Assessors may request permission to implement the equalization orders in accordance with an alternative method. Iowa Code §441.49 (1983). For example, an equalization order which requires an aggregate increase in agricultural values of ten percent (10%), could be implemented by the assessor for internal equalization purposes by applying a greater percentage increase on agricultural structures and a lesser percentage on agricultural land. Any alternative method must, however, result in equivalent aggregate values required by the final equalization order.

Any taxpayer whose property valuation, if adjusted pursuant to an equalization order, will result in a value greater than market value may protest to the local board of review. Iowa Code §441.49 (1983). The local board of review reconvenes in special session for the sole purpose of hearing these protests.

Assessment equalization must not be confused with the assessment of property. Assessment equalization involves the adjustment of aggregate valuations of entire classes of property, not the adjustment of valuations of individual properties.

This brings us to the crux of your second question: Does a determination of market value by a district court in the assessment appeal process render inapplicable an equalization order of the director of revenue as to that particular parcel of property?

As a result of an examination of ch. 441 and relevant Iowa Supreme Court decisions, it must be determined that the equalization order is to be applied to all parcels of property within the class.[1] Utica Realty Co. v. Board of Rev., 231 Iowa 380, 1 N.W.2d 213 (1941); Des Moines Gas Co. v. Severude, 190 Iowa 165, 180 N.W. 193 (1920).

In Utica Realty, the Court reviewed a situation where the district court had decreed valuations for certain parcels of property. Utica Realty Co. v. Board of Rev., 231 Iowa 380, 385, 1 N.W.2d 213, 215-216 (1941). The Court in its opinion stated:

> The obtaining of the decree was a part of the assessment and valuation proceedngs and it was not until it became effective that the original assessment proceedings were terminated. This final valuation naturally relates back to the time of the original assessment. It was all a part of the machinery to ascertain as to what the true value of the properties was for the year in question. (Citations omitted).
>
> Our study of all the cited cases herein has caused us to reach the conclusion that the decree valuation should be the basis upon which the reduction should be made as previously ordered by the state board of assessment and review.
>
> The decree is merely a finding as to what the original valuation should have been. We do not see any reason why this final valuation should not be the basis upon which the reduction as ordered by the state board of assessment and review should be made.

Id. at 387-388, 1 N.W.2d at 217.

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[1]An inequitable result may be remedied by the taxpayer protesting the adjustment pursuant to Iowa Code §441.49 (1983), or by the assessor requesting permission to implement the equalization order through an alternative method pursuant to Iowa Code §441.49 (1983). (Supra p. 3).

In Des Moines Gas Co., the Court reviewed a situation where the district court decreed a value stipulated to by the parties as the true value of the property. Des Moines Gas Co. v. Saverude, 190 Iowa 165, 166, 180 N.W. 193, 193 (1920). The Court held:

> [T]he valuation as finally fixed would relate back to the time of the original assessment. Had the case been tried in the district court, instead of being disposed of under the stipulation, the court would simply have found the value of the property, without taking into consideration any reduction ordered by the state board. As said, the question was the value of the property, and, when that was fixed, the 9 per cent reduction ordered by the state board would be deducted. . . .
>
> The duty of the state board of equalization is to adjust the value of property of the several kinds, adding to or deducting from the valuation of each kind or claim such percentage in each case as will bring the same to its reasonable value. Its function is the equalization of the value of property between the several counties, not to review the action of the assessor or of the local board of review, or of the district court on appeal.

Id. at 169-170, 180 N.W. at 195.

The function of the director of revenue in the assessment equalization process is the equalization of property values between assessing jurisdictions. As a result, an equalization order issued for a class of property to an assessing jurisdiction should be applied to all parcels of property within that class. Under the above case law, the equalization order would be applied to the values established by the district court in the assessment appeal process.

Therefore, it is the opinion of this office that assessment limitations, contained in §441.21, and equalization orders of the director of revenue, issued pursuant to §441.47, are processes separate and distinct from the process of valuing an individual piece of property at true value, and are to be applied to all parcels of property within the class.

Yours truly,

Mark R. Schuling
Assistant Attorney General

WP2

SCHOOLS: 1983 Iowa Code Supp. §§ 257.28, 282.1, 282.7(1), 282.7(2) and 282.24 and 442.9(1)(a). When grades seven through twelve are discontinued, the tuition reimbursement figure for the school district receiving a nonresident pupil is determined by § 282.24(2) and negotiation is limited by the extent to which the actual cost exceeds the maximum tuition rate. However, when a student is taking a course in another school district or when two districts combine their enrollment for a grade, the terms of § 257.28 place no limit on their ability to negotiate for cost sharing. (Fleming to Benton, State Superintendent, 5/01/84) 84-5-1 (L)

Mr. Robert D. Benton
State Superintendent
Department of Public Instruction
Grimes State Office Building
L O C A L

Dear Mr. Benton:

We have received your letter requesting the opinion of this office as to the proper arrangement for the reimbursement of expenses to the receiving school district when one or more grade levels have been discontinued in the district where the student resides.

This would appear to be a question of statutory construction. However, it is well established that where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and we may not search for its meaning beyond the statute itself. State v. Sunclades, 305 N.W.2d 491, 494 (Iowa 1981). Thus, the first step that must be taken in addressing the question raised is a review

of the pertinent statutes.[1] The Code sections that pertain to an agreement between school districts with respect to reimbursement for expenses incurred by a nonresident pupil are 1983 Iowa Code Supp. §§ 257.28, 282.1, 282.7(1), 282.7(2) and 282.24.

Section 257.28 provides, in general, for agreements between boards of directors of different school districts with respect to reimbursement for courses to be attended by nonresident pupils. It also provides for combined enrollment for one or more grades. It is stated that ". . . such agreements may provide for sharing the costs and expenses of such courses." Thus, when making arrangements for tuition reimbursement for nonresident children in a course or for nonresident children in a combined grade, the resident and receiving school districts may negotiate as to the rate of reimbursement.

Section 282.7(1) states that a "board of directors of a school district by record action may discontinue any or all of grades seven through twelve and negotiate an agreement for attendance of the pupils enrolled in those grades in the schools of one or more contiguous school districts having approved school systems." (emphasis added) While the statute provides for the inclusion of terms as to tuition, transportation and authority and liability of the affected boards within the agreement, negotiations with respect to tuition are specifically limited to the scope of 1983 Iowa Code Supp. § 282.24(2).

The board of directors of a receiving school district is instructed by the terms of § 282.24(2) to charge a tuition fee for nonresident pupils attending under § 282.7(1) which "shall not exceed the actual cost of providing the educational program" but "shall not be less than the maximum tuition rate in that district." (emphasis added)

It is possible that a situation may occur where the actual cost exceeds the maximum tuition rate. The maximum tuition rate, calculated pursuant to § 442.9(1)(a), is an average figure for the enrollment of the entire district, elementary school and high school. We understand, however, that the actual cost of providing one student with a high school education tends to be

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[1] While we recognize that Iowa Code sections 28E.4 and 28E.12 enable public agencies to enter into agreements and contracts, we believe that those sections do not apply where specific statutes authorize particular types of contracts. Therefore, we will limit our discussion to the statutes that are directly related to the subject matter.

greater than the actual cost[2] of providing one student with an elementary school education. Thus, the actual cost of providing a high school education may exceed the district's maximum tuition rate.

Section 282.24(2) would suggest that to the extent the actual cost exceeds the maximum tuition rate, negotiation is allowed in the determination of the tuition portion of an agreement between the school district where the student resides and the school district where the student is enrolled. It should be noted that this tuition rate negotiation is limited to those instances when an entire grade, seven through twelve, is discontinued. There is no provision for discontinuing an entire grade below the seventh grade. However, § 257.28 does permit combining of grades. Again, under that provision, negotiation between the school districts as to sharing costs is allowed.

It is therefore the opinion of this office that when grades seven through twelve are discontinued, the tuition reimbursement figure for the school district receiving a nonresident pupil is determined by § 282.24(2) and negotiation is allowed only to the extent that the actual cost exceeds the district's maximum tuition rate. If there is no difference, there can be no negotiation. However, when a student is simply taking a course in another district or when two districts have combined a grade there is no limit placed on the power to negotiate.

Sincerely,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

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[2] We note that the term "actual cost" is not defined in the statutes that apply to public schools. We, therefore, give that term its ordinary meaning.

TAXATION: Property Tax Refunds; Taxes Mistakenly Assessed To And Paid By Taxpayer On State-Owned Property. Iowa Code §§427.1(1), 441.37, 441.38, and 445.60 (1983). Where assessor mistakenly sent assessment notices to taxpayer after taxpayer's property had been condemned by State and where taxpayer did not appeal such assessments pursuant to available remedies in §§441.37 and 441.38, but instead voluntarily paid property taxes attributable to that property, taxpayer could not obtain a refund of the taxes under §445.60. (Griger to John S. Sandy, Dickinson County Attorney, 6/27/84) #84-6-10(L)

June 27, 1984

Mr. John S. Sandy
Dickinson County Attorney
1710 Hill Avenue
Box 445
Spirit Lake, IA 51360

Dear Mr. Sandy:

You have requested the opinion of the attorney general as follows, according to your letter of May 7, 1984:

> The taxpayer, prior to 1962, owned a parcel of property. In 1962 a condemnation process was commenced. After condemnation, the Department of Transportation of the State of Iowa became the title owner of said parcel of property. The records of said condemnation were filed with the recorder, however, the recorder failed to send notification to the assessor that the condemnee who previously owned the property no longer had legal title to said parcel. Based on this failure, the parcel of property was condemned and was never taken off the tax records of the taxpayer. The taxpayer was assessed taxes on this parcel of property from 1962 to 1979. The taxpayer paid said taxes without going through procedure set out

> in Sections 441.37 or 441.38 for a parcel of property he did not own. There is no controversy that taxpayer did not resist this tax until 1979. In 1979 said taxpayer contacted the county and inquired as to why he had been assessed taxes on property which he did not own. The property was taken off the tax records thereafter and from 1979 to the present the taxpayer is only being taxed for property which he presently owns.
>
> The issues presented are these: Whether taxes imposed against the person from 1960 to 1979 for property he did not own constitute taxes and if this tax is an erroneous tax in what circumstances would the taxes be considered illegal and refundable pursuant to Section 445.60?

Iowa Code §427.1(1)(1983) exempts from property tax the property of the State of Iowa. Iowa Code §445.60 (1983) provides:

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

Sections 427.1 and 445.60 were also in effect during the time period (1962 to 1979) concerned with your opinion request.

In 1980 Op.Att'yGen. 83, the attorney general opined that an institution which claimed to be exempt from property tax under Iowa Code §427.1(9) and which did not appeal an adverse ruling of a board of review to district court under Iowa Code §441.38 was not entitled to a refund of property taxes pursuant to §445.60. The attorney general stated at p. 88:

> In summary, starting in 1888, the Iowa Supreme Court has made it clear that the words 'erroneously or illegally' as used in §445.60 have no application to a situation whereby the assessor has the power and jurisdiction to determine whether all or any part of the property of the taxpayer is taxable if the taxpayer fails to pursue its legal remedies as provided for in §§441.37 and 441.38. Even if erroneously assessed by the assessor because the statute was misapplied, the tax is still

> applied under color of statutory authority and the failure of the taxpayer to protest the erroneous assessment by following the legal remedies set forth in §§441.37 and 441.38 will result in a waiver of any irregularities or illegalities in the assessment.
>
> Based upon the foregoing, it is the opinion of the Attorney General that the assessor had the power and jurisdiction under the provisions of §427.1(23) to determine whether all or any part of the property of the taxpayer was taxable and, thereafter, when the taxpayer failed to appeal to the district court under §441.38, the board of review's determination that the taxpayer did not qualify for an exemption within the provisions of §427.1(9), it waived its right to seek a refund for any taxes paid from the board of supervisors.

In City of Council Bluffs v. Pottawattamie County, 254 N.W.2d 18 (Iowa 1977), the Iowa Supreme Court held that a city whose urban development property was assessed to it for property tax purposes and which did not appeal to the board of review under §441.37 could not seek judicial review.[1] It is clear, therefore, that even if the assessor erroneously subjects property of the State of Iowa and its political subdivisions to taxation, such error does not obviate the need to exhaust an available remedy as provided by §§441.37 and 441.38.

The fact that the taxpayer no longer had title to the property from and after the condemnation process in 1962 does not make the assessment invalid. Merv E. Hilpipre Auction Co. v. Solon State Bank, 343 N.W.2d 452 (Iowa 1984). "[T]axes are levied on the property rather than upon the titleholder." Id. at 455.

In the situation which you posed, the type of property (real property) is subject to taxation. There is no allegation that the property tax was levied without statutory authority or by officers having no authority to make the levy. The only errors alleged were that the State, and not the taxpayer, owned the property assessed and that State-owned property is exempt from taxation. Where property is assessed to the wrong person or where the property assessed is

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[1]Where a taxpayer does not appeal an assessment, pursuant to Iowa Code §§441.37 and 441.38 (1983), the assessment becomes a finality for that year. Farmers Grain Dealers Association v. Woodward, 334 N.W.2d 295 (Iowa 1983).

entitled to tax exempt status under §427.1, such conditions do not, according to the aforementioned authorities, render a property tax "erroneously or illegally exacted or paid," so as to authorize tax refund under §445.60, if the appeal procedures in §§441.37 and 441.38 were available.[2] Accordingly, the taxes in question are not refundable.[3]

Very truly yours,

Harry M. Griger

Harry M. Griger
Special Assistant Attorney General

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[2]While this opinion takes the position that the taxes in question are not refundable, it is not irrelevant to point out that there is a five year statute of limitation applicable to actions for refunds authorized by §445.60. Murphy v. Board of Supervisors of Johnson County, 205 Iowa 256, 215 N.W. 744 (1927); Callanan v. Madison County, 45 Iowa 561 (1877); 1934 Op.Att'yGen. 275; Iowa Code §614.1(4). Depending upon the circumstances, therefore, either a large portion or all of the refund claimed could be barred even if the taxes in question could be said to be within the scope of §445.60.

[3]Voluntarily paid taxes are not refundable in the absence of a refund statute. This common law rule is in effect in Iowa. Kraft v. City of Keokuk, 14 Iowa 86 (1862). Since §445.60 does not authorize the refund in question, there is an absence of statutory authority to refund these taxes.

STATE DEPARTMENTS AND OFFICERS: Appointment of Mental Health Advocates. Iowa Code Chapter 229.19, § 25A.2(3). Mental health advocates appointed pursuant to provisions of Chapter 229 are "employees of the state" within the meaning of § 25A.2(3) and, as such, the state is obligated to defend and hold harmless those appointed as advocates for any acts or omissions by them while acting within the scope of their employment. See § 25A.21. (Lavorato to Kimes, Clarke County Attorney, 6/27/84) #84-6-9(L)

June 27, 1984

Mr. Gary G. Kimes
Clarke County Attorney
Osceola, Iowa 50213

Dear Mr. Kimes:

This will acknowledge receipt of your request for an opinion regarding the following questions which you have posed:

1. Is a mental health advocate, duly appointed pursuant to § 229.19, Code of Iowa, a state employee for purposes of Chapter 25A, Code of Iowa, and, in particular, the indemnity provision, § 25A.21?

2. If not, is such a duly appointed mental health advocate an employee of the county for whom the person is appointed to act and by whom that person is paid, and especially for purposes of the indemnity provisions, § 613A.8, The Code?

3. If the duly appointed mental health advocate is neither a state nor county employee, may the county properly expend funds for the

> purchase of liability insurance coverage to insure against liability arising from the actions or activities of the mental health advocate?

Section 229.9 provides for appointment of a mental health advocate, hereinafter referred to as the advocate, by the district court and sets out their duties and mode of compensation.[1]

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[1] Advocate appointed. The district court in each county shall appoint an individual who has demonstrated by prior activities an informed concern for the welfare and rehabilitation of the mentally ill, and who is not an officer or employee of the department of social services nor of any agency or facility providing care or treatment to the mentally ill, to act as advocate representing the interests of all patients involuntarily hospitalized by that court, in any matter relating to the patients' hospitalization or treatment under section 229.14 or 229.15. The advocate's responsibility with respect to any patient shall begin at whatever time the attorney employed or appointed to represent that patient as respondent in hospitalization proceedings, conducted under sections 229.6 to 229.13, reports to the court that his or her services are no longer required and requests the court's approval to withdraw as counsel for that patient. However, if the patient is found to be seriously mentally impaired at the hospitalization hearing, the attorney representing the patient shall automatically be relieved of his or her responsibility in the case and an advocate shall be appointed at the conclusion of the hearing unless the attorney indicates an intent to continue his or her services and the court so directs. If the court directs the attorney to remain on the case he or she shall assume all the duties of an advocate. The clerk shall furnish the advocate with a copy of the court's order approving the withdrawal and shall inform the patient of the name of the patient's advocate. With regard to each patient whose interests the advocate is required to represent pursuant to this section, the advocate's duties shall include all of the following:

1. To review each report submitted pursuant to sections 229.14 and 229.15.
2. If the advocate is not an attorney, to advise the court at any time it appears that the services of an attorney are required to properly safeguard the patient's interests.

The act sets out with specificity those duties which the mental health advocate undertakes. These duties include the review of reports submitted by the chief medical officer under Iowa Code §§ 229.14 and 229.115;[2] to advise the court any time it appears that the services of an attorney are required to protect the interests of the patient;[3] to communicate with the patient;[4]

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n.1 continued

> 3. To make himself or herself readily accessible to communications from the patient and to originate communications with the patient within five days of the patient's commitment.
> 4. To visit the patient within fifteen days of the patient's commitment and periodically thereafter.
> 5. To communicate with medical personnel treating the patient and to review the patient's medical records pursuant to section 229.25.
> 6. To file with the court quarterly reports, and additional reports as the advocate feels necessary or as required by the court, in a form prescribed by the court. The reports shall state what actions the advocate has taken with respect to each patient and the amount of time spent.

The hospital facility to which a patient is committed shall grant all reasonable requests of the advocate to visit the patient, to communicate with medical personnel treating the patient and to review the patient's medical records pursuant to section 229.25. An advocate shall not disseminate information from a patient's medical records to any other person unless done for official purposes in connection with the advocate's duties pursuant to this chapter or when required by law.

The court shall from time to time prescribe reasonable compensation for the services of the advocate. Such compensation shall be based upon the reports filed by the advocate with the court. The advocate's compensation shall be paid on order of the court from the county mental health and institutions fund of the county in which the court is located.

[2] Section 229.19(1)

[3] Section 229.19(2)

[4] Section 229.19(3).

to visit the patient;[5] to review the medical records of the patient;[6] and to make reports from time to time regarding the advocate's activities.

The court, by order, sets the compensation to be paid to the advocate based on the reports of activities submitted by him or her and those funds come from the[7] county mental health and institution fund.[8] Section 25A.2(3) sets out three categories of persons who are considered employees for purposes of Chapter 25A. These include: (1) Officers, agents, or employees of the state or any state agency including members of the general assembly. (2) Persons acting on behalf of the state or any state agency in any official capacity. These persons may be temporary or permanent employees and are employees irregardless of the fact they do not receive compensation from the state for the services they render. (3) The third category includes professional personnel, including health care practitioners, who render services to patients and inmates of state institutions under the jurisdiction of the Department of Social Services. These employees, like those in category two (2), are employees

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[5] Section 229.19(4).

[6] Section 229.19(5).

[7] Section 229.19.

[8] Section 25A.2(3) states:

> "Employee of the state" includes any one or more officers, agents, or employees of the state or any state agency, including members of the general assembly, and persons acting on behalf of the state or any state agency in any official capacity, temporarily or permanently in the service of the state of Iowa, whether with or without compensation. Professional personnel, including medical doctors, osteopathic physicians and surgeons, osteopathic physicians, optometrists and dentists, who render services to patients and inmates of state institutions under the jurisdiction of the department of social services are to be considered employees of the state, whether such personnel are employed on a full-time basis or render such services on a part-time basis on a fee schedule or prepayment, but shall not include any contractor doing business with the state.

notwithstanding the fact that their employment may be temporary and the compensation based on a fee arrangement or schedule. Section 25A.21[9] requires the state, except in cases of malfeasance in office or willful and wanton conduct, to defend and, if need be, indemnify state employees against whom a Chapter 25A claim is filed.

Section 25A.2(5)(b)[10] defines "claim" as a claim for money damages arising from property damages, personal injury, or wrongful death as a result of the negligence or wrongful acts or omissions of any employee of the state while acting within the scope of their employment except for conduct constituting malfeasance in office or willful and wanton conduct.

Section 25A.(4)[11] defines "acting within the scope of office or employment" as acting in the line of duty as a state employee.

Although Chapter 613A (the Municipal Tort Claims Act) does not specifically define "employee," it does impose liability on the governmental subdivision for the torts committed by its officers and employees acting within the scope of their employment.

With regard to the above quoted sections of the Code, analysis must necessarily start with the application of § 25A.2(3) in order to determine whether an advocate is an "employee" within the meaning of § 25A.2(3). If it is determined that § 25A.2(3) includes mental health advocates, then further

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[9] Senate File 2271 amended § 25A.21 to allow indemnification of state employees even though the employees' acts constitute wanton and willful conduct or constitute malfeasance in office. However, the state is entitled to seek restitution from the employee in the event the state is required to pay a claim resulting from the employee's malfeasance in office, or willful and wanton conduct.

[10] Senate File 2271 has amended § 25A.2(5)(b) to broaden the term "claim" to include conduct which would constitute malfeasance in office or willful and wanton conduct. The amendment brings it in time with the recent amendment of § 25A.21.

[11] Section 25A.(4) states:

"Acting within the scope of his office or employment means acting in his line of duty as an employee of the state."

inquiry regarding the additional issues posed will be unnecessary.

Few, if any, Iowa Supreme Court decisions have considered the application of § 25A.2(3). Resort, therefore, may be made to federal court decisions interpreting analogous provisions of the Federal Tort Claims Act. See Lewis v. State, 256 N.W.2d 181 (Iowa 1977) (Federal interpretations of phrases which are within the Federal Tort Claims Act may be utilized in interpreting the same or similar phrases in the State Tort Claims Act). The Federal Tort Claims Act, 28 U.S.C. § 2671 has language which corresponds to language found in § 25A.2(3). Under 28 U.S.C. § 2671, the term "employee" includes:

> ". . . persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."

In interpreting § 2671, the federal courts have indicated that resort will be made to common law characteristics of master-servant, more particularly those criteria as set out in Restatement of Agency § 22.0(2).[13] The Iowa Supreme Court has, on a number of occasions, used a five (5) factor test in determining whether an employer-employee relationship existed. See Hjerleid v. State, 229 Iowa 818, 295 N.W.2d 139 (1940) (Whether a director investigator of a social welfare program was a county or state employee for purposes of worker's compensation); Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981) (worker's compensation case); Gabrielson v. State of Iowa, 342 N.W.2d 867 (Iowa 1984) (court reporter as state employee for purposes of state disability program - five (5) factor test applied). This five (5) factor test is similar to and incorporates many of the criteria the federal courts use in determining whether persons

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[13] At common law, those characteristics include such matters as: the extent of control exercised over the work; whether the one employed is employed in distinct occupation or business; nature of the occupation, with reference to whether the work is usually done under the directions of the employer or by a specialist without supervision; the skills required in the particular occupation; whether the employer supplies the tools, equipment and the place of work; length of time for which the person is employed; the method of payment; whether the parties believe they are creating the relationship. See United States v. Orleans, 425 U.S. 807, 96 S.Ct. 1971, 48 L.Ed.2d 390 (1976); Loge v. United States, 412 U.S. 521, 93 S.Ct. 2215, 37 L.Ed.2d (1973).

are employees under the Federal Tort Claims Act. These five (5) factors include: (1) the right to selection or to employ at will, (2) the responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) the identity of the employer as the authority in charge of the work or for whose benefit it is performed. The intention of the parties is also a factor to take into consideration. See Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981).

Having determined that the five (5) factor test, as announced in the above quoted decisions, should be utilized in applying § 25A.2(3) in this instance, analysis will now be directed towards application of those principles.

The Right to Selection: There is no question but that the district court has the exclusive right of selection of the mental health advocate under § 229.19. The plain language of the statute vests with the district court of each of the counties the exclusive right to appoint the mental health advocate.

Responsibility for Payment of Wages: Although compensation for a mental health advocate comes from the county mental health and institutions fund, the district court determines and fixes the amount of compensation to be paid to the advocate. Secondly, responsibility for payment of wages is only one of the factors to be considered in determining whether the relationship existed. See Gabrielson v. State of Iowa, 342 N.W.2d 867 (Iowa 1984) (responsibility for payment of wages only one of the factors considered in determining whether the relationship of employer-employee exists. Citing Erickson v. Erickson, 250 Iowa 491, 94 N.W.2d 728 (1959)). Finally, and more importantly, this factor would have little or no impact in defining the contours of the employer-employee relationship in the context of § 25A in light of the fact that under the definition of "employer" under § 25A.4(3), a person may be an "employee" with or without compensation if found to be acting on behalf of the state in an official capacity.

The Right to Discharge or Terminate the Relationship: The district court under § 229.19 has the right to order the appointment of a mental health advocate for the county in which it sets. Impliedly, therefore, the court would also have the power to terminate the appointment.

The Right to Control the Work: Some authorities make this factor the principal test for determing whether an employer-employee relationship exists. See Lembke v. Fritz, 223 Iowa 261, 272 N.W. 300. A reading of § 229.19 makes plain the fact that the district court has exclusive control over the work done by a

mental health advocate. A review of duties that a mental health advocate must carry out involves the district court and calls into play the district court's supervision of the mental health advocate, i.e., the mental health advocate must file quarterly reports to the court specifically setting out all actions the advocate has taken with respect to the patient and the amount of time spent with each patient. See § 229.19(6). It is also plain from the reading of the statutes that the advocate's duties, as set out, are primarily for the purpose of aiding the district court with regard to its responsibilities under § 229. Finally, there is no mention of any other authority in Chapter 229 that has responsibility for supervision of the mental health advocate.

The Party Sought to be Held as the Employer is the Responsible Authority in Charge of the Work or for Whose Benefit the Work is Performed: Again, a plain reading of § 229.19 makes clear that the duties imposed on the mental health advocate under § 229.19 are primarily for the benefit of the court in enabling the court to carry out its duties.

Conclusion: Chapter 25A.2(3) provides a broad based application of the term "employee." Although there have been few, if any, Iowa Supreme Court decisions applying the term in specific factual situations, an analogous provision in the Federal Tort Claims Act has been interpreted by the federal courts to include the applications of traditional criteria of "master-servant." Following this line, the Iowa Supreme Court has, on a number of occasions, applied a five (5) factor test in a variety of employment situations in determing the existence of employer-employee relationships. This five (5) factor test is similar to, and incorporates many of the criteria used by federal courts in applying an analogous provision defining "employee" under the Federal Tort Claim Act. Applying the "test," in light of the provisions of § 229.19, makes clear that a mental health advocate falls within the definition of § 25A.2(3) and, as such, the state would be obligated to defend, indemnify and hold harmless those employees who are sued for their acts or omissions while in the course of their employment. See § 25A.21

Sincerely,

CHARLES S. LAVORATO
Assistant Attorney General

CSL/cjc

COUNTIES; Home Rule Authority; Provision of representation for indigent criminal defendants; Public defender system. Iowa Code §§ 331.301(1), (3), (4), and (5); 331.776; 331.777; 331.778 (1983). A county's home rule authority to create an independent system for providing representation for indigent criminal defendants is preempted by §§ 331.776-778, which authorize the county to either create a public defender system or use the court-appointment system. However, the public defender system does allow the board of supervisors the discretion to appoint a private attorney as part-time public defender. This person could, with board approval, maintain a part-time private practice, operate the public defender officer out of the private law firm's office, and appoint a member of the firm as assistant public defender. (Weeg to Sandy, Dickinson County Attorney, 6/27/84) #84-6-8(L)

June 27, 1984

Mr. John Sandy
Dickinson County Attorney
1710 Hill Avenue
Box 445
Spirit Lake, Iowa 51360

Dear Mr. Sandy:

You have requested an opinion of the Attorney General on several questions arising from the following situation, which you describe in your request letter:

> Presently Dickinson County, like many small Iowa counties, utilizes the procedure set forth in Section 331.778 of the Code in handling representation of indigent persons indicted for criminal acts. The cost of this representation is not only unpredictable but expensive. An alternative to this method as set forth in Section 331.776 is not financially viable for a small county such as Dickinson.
>
> A hybrid of the two methods has been suggested which could save Dickinson County taxpayers money and provide the necessary legal services to the indigent criminal defendant. This suggestion is to contract with a Law Firm who would represent all indigent criminals (banning any ethical conflicts) for a set dollar amount for a 12 month period.

> Insofar as the County is concerned, they will be able to budget with a degree of accuracy the costs to be incurred for this service. Where a single entity is providing a service, the amount of work will lower the per client cost to the County of this service. The indigent person will be represented by an attorney or firm which will gain or have an expertise in the criminal field.
>
> The suggestion merges the concept of having criminal matters handled out of one office without directly incurring the costs of operating that office.

Your questions are as follows:

> 1. Whether the legislature by its enactments in Section 331.775 and Section 331.778 has expressly imposed limitations on methods to handle the representation of indigent persons.
>
> 2. Whether the above mentioned procedure is irreconcilable with procedures set forth in Sections 331.775 and 331.778 of the Code.
>
> 3. Whether the above mentioned procedures substantially comply with the established procedure set forth in Sections 331.775 and 331.778 of the Code.

We shall address each question in turn.

Introduction

Iowa Code §§ 331.776 and 331.777 (1983) expressly provide for the creation of the office of public defender. Relevant portions of these sections are as follows:

> 331.776 Office of public defender.
> 1. The board, by resolution, may establish or abolish the office of public defender. Two or more counties within the same judicial district, by agreement executed under chapter 28E, may establish an office of public defender to serve the counties.[1]

---

[1] Iowa Code § 28E.19 (Code Supplement 1983) was recently enacted to authorize Ch. 28E agreements for joint county indigent

* * *

4. The board shall determine the compensation of the public defender.

5. The board shall provide office space, furniture, equipment, and supplies for the use of the public defender suitable for the business of the office, but an allowance may be provided in lieu of facilities. Each item is a charge against the county in which the defender's services are provided. If the public defender serves more than one county, expenses that are properly allocable to the business of more than one of the counties shall be prorated among the counties concerned.

6. The board may require a public defender or assistant public defender to devote full time to the discharge of the duties of office and not engage in the private practice of law. A public defender or assistant public defender may be a member of a law partnership or a professional corporation on leave of absence.

* * *

331.777 Powers and duties of a public defender. The public defender:

1. Shall represent without fee each indigent person who is under arrest or charged with a crime if the indigent person requests it or the court orders it. . . .

* * *

(emphasis added)

An alternative procedure for representation of indigent criminal defendants is provided for in the following section,

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[1] (cont'd) defense funds. This provision was later amended by 1984 Iowa Acts, S.F. 2129, § 10. Review of this section may provide another alternative for your consideration in deciding how best to provide indigent defense in your county.

§ 331.778. That section provides in relevant part as follows:

> 331.778 Court-appointed attorneys.
> 1. The court, for cause and upon application of an indigent person or the public defender or on its own option, may appoint an attorney, other than the public defender, to represent an indigent person at any stage of legal proceedings or on appeal. The appointed attorney shall be compensated as provided in section 815.7.
>
> * * *

Section 815.7 provides in part:

> 815.7 Fees to attorneys. An attorney appointed by the court to represent any person charged with a crime in this state shall be entitled to a reasonable compensation which shall be the ordinary and customary charges for like services in the community to be decided in each case by a judge of the district court, including such sum or sums as the court may determine are necessary for investigation in the interests of justice and in the event of appeal the cost of obtaining the transcript of the trial and the printing of the trial record and necessary briefs in behalf of the defendant. . . .

We turn now to your specific questions.

I.

It is our opinion that the legislature has expressly imposed limitations on the procedures available to counties for providing representation to indigent criminal defendants.

The Iowa Constitution, Art. III, § 39A, granted counties home rule power and authority, "not inconsistent with the laws of the general assembly, to determine their local affairs and government." Section 331.301 sets forth counties' statutory home rule authority, and states in relevant part as follows:

> 1. A county may, except as expressly limited by the Constitution, and <u>if not inconsistent with the laws of the general assembly</u>, exercise any power and perform any

> function it deems appropriate to protect and preserve the rights, privileges and property of the county or its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents. . .
>
> * * *
>
> 3. The enumeration of a specific power of a county, the repeal of a grant of power, or the failure to state a specific power does not limit or restrict the general grant of home rule power conferred by the Constitution and this section. A county may exercise its general powers subject only to limitations expressly imposed by a state law.
>
> 4. An exercise of a county power is not inconsistent with a state law unless it is irreconcilable with the state law.
>
> 5. 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.
>
> * * *

(emphasis added)

In 1979 Op.Att'yGen. 54 we discussed the general impact of the county home rule amendment. In particular, we addressed the question of when a state law would be inconsistent with exercise of a county's home rule power. We stated that this limitation on a county's home rule authority:

> . . . can be termed one of "preemption." That is to say that in any given area the state, by broad and comprehensive legislation, has intended to exclusively regulate the subject matter. Where "preemption" is applicable, any local government regulation regardless of content, is inconsistent with the pervasive legislation. (citation omitted)

1979 Op.Att'yGen. at 59. Though this opinion was issued prior to the enactment of § 331.301, we looked to the Supreme Court's interpretation of an identical act, which is now found in § 364.2(3) and provides:

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

We cited the decision of Green v. City of Cascade, 231 N.W.2d 882 (Iowa 1973), in which the Supreme Court stated that pursuant to this provision, state laws are to be interpreted "in a way to render them harmonious with [municipal] ordinances unless the court or other body considering two measures cannot reconcile them, in which event the state law prevails." 231 N.W.2d at 890. In sum, we concluded that pursuant to home rule, a county should liberally construe its powers except in the area of, inter alia, exclusive state control. 1979 Op.Att'yGen. at 61-62.

As set forth above, §§ 331.776 and 331.777 create the public defender system, and § 331.778 provides for court-appointed attorneys. It is our opinion the legislature has thus created a comprehensive scheme for the provision of legal representation for indigent criminal defendants. This scheme contemplates use of one of two designated statutory alternatives, and does not expressly provide for any other method of providing this representation. We believe that state law has thereby preempted a county's authority to substitute its own plan for providing representation for indigent criminal defendants. Accordingly, it is our opinion that the county has no independent home rule authority to enact the plan you propose in your opinion request because such a plan would be inconsistent with state law.

However, we believe it is possible to implement a plan similar to that you propose under the provisions of §§ 331.776 and 331.777. Section 331.776(1) allows the board to establish the office of public defender. While nominations for that position are to be submitted by the district court judges of the district pursuant to § 331.776(2), the board has final appointment power pursuant to this same subsection. The board also determines appropriate compensation for this position. § 331.776(4). While the board may provide an office for the public defender pursuant to § 331.776(5), the board does have the option under this subsection of paying a set allowance for overhead expenses. Finally, while § 331.776(6) allows the board to require the public defender "to devote full time to the discharge of the duties of office and not engage in the practice of law," this provision is not mandatory.

Some question exists as to the meaning of the last sentence of § 331.776(6), which provides:

> A public defender or assistant public defender may be a member of a law partnership or a professional corporation on leave of absence.

This language simply authorizes a public defender or an assistant public defender to remain associated with, but on leave of absence from, his or her private law firm upon assuming a position in the public defender's office. Arguably, this section prohibits a part-time public defender or assistant from continuing to practice privately with his or her law firm. However, it is our opinion that this language applies only to full-time public defenders or their assistants who have been prohibited by the supervisors from continuing in private practice. See § 331.776(6). We believe the sole purpose of this language is to eliminate any confusion by expressly authorizing a full-time public defender to remain on leave of absence from his or her firm rather than requiring the public defender to sever all ties with the firm.

We base our conclusion on the fact that the above-quoted language is contained in a section immediately preceded by language vesting the supervisors with the discretion to require a public defender or an assistant to devote full time to that position. We therefore do not believe the legislature intended this language to apply to part-time public defender positions, and that such part-time persons may continue to practice law privately. A contrary result would likely deter many qualified persons from surrendering full-time employment for a part-time public defender position, and correspondingly eliminate for many smaller counties the option of providing indigent criminal defense through a part-time public defender system. We do not believe the legislature intended this result.

Accordingly, the county could appoint a member of a private firm to serve as public defender without requiring that person to surrender his or her position with that firm, and provide that person with a set allowance for operating expenses rather than providing an actual office. Because this expense, as well as the amount of compensation, would be fixed, the county could avoid the cost and budgeting problems your county has faced with the court appointment system. Finally, § 331.777(4) authorizes the person appointed as public defender to appoint the number of assistants and other personnel as approved by the board; the board is to determine the compensation for these positions. Again, these salaries would be fixed expenses. In sum, we believe that §§ 331.776 and 331.777 provide for either a full or

part time public defender system, depending on the needs of particular counties.[2] As with the county attorney system, the public defender system allows members of a private law firm to assume the duties of the office of public defender without surrendering the ability to engage in the private practice of law, so long as there is full compliance with §§ 331.776 and 331.777. The legislature clearly provided for such flexibility because in many Iowa counties, as there is no need for a full-time county attorney, there is no need for a full-time public defender.

We note that 1983 Iowa Acts, Ch. 186, the court reorganization bill, amends many portions of the existing law relating to the office of public defender (see Ch. 186, §§ 10092-10095) and the provision of representation for indigent defendants (see, e.g., Ch. 186, §§ 10135-10139, 10143-10147). These provisions do not go into effect until July 1, 1987, when the state assumes responsibility for and the costs of indigent defense. Ch. 186, § 10301(6). This opinion does not attempt to address your questions in light of these future changes in the law.

In conclusion, it is our opinion that a county's home rule authority to create an independent system for providing representation for indigent criminal defendants is preempted by §§ 331.776-778, which authorize the county to either create a public defender system or use the court-appointment system. However, the public defender system does allow the board of supervisors the discretion to appoint a private attorney as part-time public defender. This person could, with board approval, maintain a part-time private practice, operate the public defender officer out of the private law firm's office, and appoint a member of the firm as assistant public defender.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

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[2] We do not address the question of whether, after a public defender system is created, the district court retains the authority to appoint counsel pursuant to § 331.778 in situations the court deems appropriate.

JUDGES: Judicial Retirement System; Interest on Purchased Coverage. H.F. 2528 § 28. Ch. 605A; § 605A.5. A district associate judge who exercises the option to join the Judicial Retirement System and to cease to be a member of IPERS pursuant to House File 2528 is not obligated to pay interest in addition to the amount specified in House File 2528. (Pottorff to O'Brien, Court Administrator, 6/19/84) #84-6-7(L)

June 19, 1984

William J. O'Brien
Court Administrator
State Capitol
L O C A L

Dear Mr. O'Brien:

You have requested an opinion of the Attorney General concerning House File 2528 which authorizes district associate judges to become members of the Judicial Retirement System. You point out that House File 2528, which was passed in the 1984 legislative session, authorizes district associate judges to become members of the Judicial Retirement System and to be credited with past service as a district associate judge or full-time magistrate by contributing a specific amount based on the basic salary for the entire period of service before July 1, 1984, as well as accumulated contributions previously made to the Iowa Public Employees Retirement System (IPERS). You ask whether a district associate judge who exercises this option to join the Judicial Retirement System must also pay interest in addition to the amount specified in House File 2528. In our opinion a district associate judge who exercises the option to join the Judicial Retirement System and to cease to be a member of IPERS pursuant to House File 2528 is not obligated to pay interest in addition to the amount specified in House File 2528.

House File 2528 provides three retirement benefit options for a full-time judicial magistrate who became a district associate judge on January 1, 1981 pursuant to statute or a person who was appointed a district associate judge between January 1, 1981 and June 30, 1984 and is a member of IPERS on June 30, 1984:

> 1. To remain covered under the Iowa public employees' retirement system pursuant to chapter 97B.
>
> 2. To commence coverage under the judicial retirement system pursuant to chapter 602, article 9, part 1, effective July 1, 1984, but to become an inactive member of the Iowa public employees' retirement system pursuant to chapter 97B and remain eligible for benefits under section 97B.49 for the period of membership service under chapter 97B.
>
> 3. To commence coverage under the judicial retirement system pursuant to chapter 602, article 9, part 1, retroactive to the date the district associate judge became a district associate judge or a full-time judicial magistrate, whichever was earlier, and to cease to be a member of the Iowa public employees' retirement system, effective July 1, 1984.

H.F. 2528 § 28. Your inquiry focuses on option number three which authorizes district associate judges to join the Judicial Retirement System and to cease to be a member of IPERS.

House File 2528 specifically delineates the contribution to the judicial retirement fund required under the exercise of option number three. Additional language under subsection three expressly states:

> The Iowa department of job service shall transmit by January 1, 1985 to the state court administrator for deposit in the judicial retirement fund the district associate judge's accumulated contributions as defined in section 97B.41, subsection 13 for the judge's period of membership service as a district associate judge or full-time judicial magistrate, or both. Before July 1, 1986, or at retirement previous to that date, a district associate judge who becames a member of the judicial retirement system pursuant to this subsection shall contribute to the judicial retirement fund an amount equal to the difference between four percent of the district associate judge's total basic salary for the entire period

> of service before July 1, 1984 as a district associate judge or judicial magistrate, or both, and the district associate judge's accumulated contributions transmitted by the department of job service to the state court administrator pursuant to this subsection. The district associate judge's contribution shall not be limited to the amount specified in section 602.9104, subsection 1. The state court administrator shall credit a district associate judge with service under the judicial retirement system for the period of service for which contributions at the four percent level are made.

H.F. 2528 § 28(3) (emphasis added). Under this language a district associate judge who elects to commence coverage under the Judicial Retirement System and to cease to be a member of IPERS shall contribute to the judicial retirement fund an amount equal to the difference between four percent of the district associate judge's total basic salary for the entire period of service before July 1, 1984, as a district associate judge or judicial magistrate, or both, and the district associate judge's accumulated contributions transmitted by the Department of Job Service to the State Court Administrator.

We find no authority in House File 2528 to include interest in the contribution required to purchase coverage for past service. When the language of a statute is clear and plain, there is no room for construction and the statute should be applied according to its terms. Hinders v. City of Ames, 329 N.W.2d 654, 655 (Iowa 1983). House File 2528 has clearly and plainly delineated the factors for determining the contribution required to purchase coverage for past service. House File 2528 has not included interest among these factors. Applying the principle that, when the language of a statute is clear and plain, there is no room for construction and the statute should be applied according to its terms, we conclude the factors for determining the contribution set out in House File 2528 should be applied as provided without including interest.

We are aware that the omission of interest as a factor in the determination of the contribution required to purchase coverage for past service is a departure from past practice. In 1968 this office issued an opinion stating that a judge who has voluntarily withdrawn from the Judicial Retirement System and seeks readmission must make contributions equal to that required for the entire period of service and pay interest on the delayed contributions. 1968 Op. Att'y Gen. 635, 636. This opinion was based on a statutory requirement that no person receive an annuity "unless he shall have contributed . . . to the judicial

retirement fund for the entire period of his service." Iowa Code § 605A.5 (1963). This statute still exists in substantially similar form. Iowa Code § 605A.5 (1983). House File 2528, however, is a later statute that addresses the terms under which a specific class of persons may purchase coverage for past service. Ordinarily, a later, specific statute prevails in a conflict with an earlier, general statute. Peters v. Iowa Employment Security Commission, 248 N.W.2d 92, 96 (Iowa 1976). Accordingly, the provisions of House File 2528, which do not include interest, should prevail.

In summary, it is our opinion that a district associate judge who exercises the option to join the Judicial Retirement System and to cease to be a member of IPERS pursuant to House File 2528 is not obligated to pay interest in addition to the amount specified in House File 2528.

Sincerely

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP/cjc

UNCLAIMED PROPERTY: Safe deposit boxes. Iowa Code Ch. 556; Iowa Code §§ 556.1, 556.2, 556.11, 556.12, 556.13 (1983). Based on the provisions of the Iowa Unclaimed Property Act, the state treasurer has the authority to assume custody of the contents of unclaimed safe deposit boxes presently in the possession of the Comptroller of the Currency. (Lyman to Fitzgerald, State Treasurer, 6/19/84) #84-6-4(L)

June 19, 1984

The Honorable Michael L. Fitzgerald
State Treasurer
State Capitol
L O C A L

Dear Treasurer Fitzgerald:

In a recent letter to this office, you requested an opinion concerning the status of the contents of unclaimed safe deposit boxes which were removed from failed national banks located in Iowa during the 1930s. These safe deposit boxes are currently in the possession of the United States Comptroller of the Currency.

I.

Pursuant to the provisions of the Garn-St. Germain Depository Institutions Act of 1982 (hereinafter referred to as the "Garn Act"), 12 U.S.C. § 216, a state may take custody of the contents of safe deposit boxes of closed national banks in the possession of the Comptroller of the Currency (hereinafter referred to as the "United States Comptroller").

Section 733(b)(1) of the Garn Act, 12 U.S.C. § 216b(a)(1), expressly requires the United States Comptroller to deliver unclaimed property to a state after receiving proof therefrom it is entitled to the property. Section 732(3) of the Act, 12 U.S.C. § 216a(3), allows states to claim the unclaimed property

". . . under applicable statutory law, asserting a demonstrable legal interest in title to, or custody or possession of, unclaimed property."

Iowa Code Chapter 556 (1983), which embodies much of the 1954 Uniform Disposition of Unclaimed Property Act as revised in 1966, gives the State of Iowa a demonstrable legal interest in title to, custody, and possession of abandoned property as set forth therein. Section 556.2 of the Iowa Code expressly presumes that the contents of unclaimed safe deposit boxes are abandoned:

> The following property held or owing by a banking organization . . . is presumed abandoned: (4) any funds or other personal property, tangible or intangible, removed from a safe deposit box or any other safekeeping repository [or agency or collateral deposit box] in this state on which the lease or rental period has expired due to nonpayment of rental charges or other reason, or any surplus amounts arising from the sale thereof pursuant to law, that have been unclaimed by the owner for more than seven years from the date on which the lease or rental period expired.

A "banking organization" means any bank and thus includes a national bank. Iowa Code § 556.1(1) (1983).

The provisions of the state's abandoned property law apply to property in the possession of the United States Comptroller. Iowa Code § 556.1 (1983), subsections 4 and 6, state respectively that:

> § 1(4) "Holder" means any person in possession of property subject to this Act. . . .
>
> § 1(6) "Person" means any government or political subdivision, public corporation [or] public authority. . . .

II.

The 62nd Iowa General Assembly adopted the Uniform Disposition of Unclaimed Property Act. 1967 Iowa Acts Ch. 391. While there are no Iowa cases under the Act, numerous cases from other jurisdictions have construed the operation and effect of custodial unclaimed property legislation. All decisions have concluded that one of the primary purposes is to reunite the missing owner with the unclaimed property.

In the first Supreme Court case to review a state's unclaimed property law, the court upheld the constitutionality of Massachusetts' legislation reasoning as follows:

> The statute deals with accounts of an absent owner, who has so long failed to exercise any act of ownership as to raise the presumption that he has abandoned his property. And if his representative appears to claim it; or failing that, until it should be escheated to the state. The right and power so to legislate is undoubted. Provident Institution for Savings v. Malone, 221 U.S. 660, 652, 31 S.Ct. 661, 55 L.Ed. 899, 903 (1911).

Similarly the Supreme Court in considering the provisions of New York's abandoned property law concluded:

> There is ample provision for notice to beneficiaries and for administrative and judicial hearing of their claims and payment of same. There is no possible injury to any beneficiary. Connecticut Mutual Life Insurance Co. v. Moore, 333 U.S. 541, 547, 68 S.Ct. 682, 92 L.Ed. 863, 869, 870 (1947).

Numerous state courts have reviewed the provisions of their custodial abandoned property legislation. For example, the purpose of the 1954 Uniform Disposition of Unclaimed Property Act has been explained as follows:[1]

> The objectives of the Act are to protect unknown owners by locating them and restoring their property to them and to give the state rather than the holders of unclaimed property the benefit of the use of it. . . . Douglas Aircraft Co. v. Cranston, 58 Cal.2d 462, 463, 24 Cal.Rptr. 851, 374 P.2d 819 (1962).

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[1] In accord, Cory v. Public Utility Commission, 33 Cal.3d 522, 658 P.2d 749, 189 Cal.Rptr. 386 (1983); Blue Cross of Northern California v. Cory, 120 Cal.App.3d 723, 174 Cal.Rptr. 901 (1981); Screen Actors Guild, Inc. v. Cory, 91 Cal.App.3d 111, 154 Cal.Rptr. 77 (1979); State v. Pacific Far East Line Inc., 261 Cal.App.2d 609, 68 Cal.Rptr. 67 (1968); People ex rel. Callahan v. Marshal Field & Co., 83 Ill.App.3d 811, 404 N.E.2d 388 (1980); Anderson Nat'l Bank v. Reeves, 293 Ky. 735, 170 S.W.2d 350 (1942); aff'd 294 Ky. 674, 172 S.W.2d 575 (1943), aff'd sub nom. Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed 692 (1944); Louisiana Hosp. Serv., Inc. v. Collector of Revenue, 293 So.2d 663 (La. Ct. App. 1974); Minnesota v. First Nat'l Bank of St. Paul, 313 N.W.2d 390 (Minn. 1981); U.S. appeal dismissed for lack of jurisdiction, 456 U.S. 967, 102 S.Ct. 2226,

Accordingly, pursuant to Iowa Code § 566.12 (1983), the state treasurer, in attempting to locate the lawful owners of the unclaimed property, will advertise their names in newspapers of general circulation in the county which includes the last known address of any person to be named in the notice, or if no last known address exists, the notice is to be published in the county in which the holder of the abandoned property has or had its principal place of business in the state. Section 556.12 also requires the state treasurer to mail a notice to each person who appears to be entitled to abandoned property, provided that such persons' addresses are available and the unclaimed property involved has a value of $25 or more. On occasion, the state treasurer has taken further, albeit discretionary, steps to locate missing owners of unclaimed property, including advising the media of the existence of such property.

III.

Unclaimed property legislation has always been construed to apply retroactively to property in existence at the time of adoption of the legislation. The only limitation which has been placed on the retroactive operation of such legislation is that in most states the statutory provisions will not be construed so as to revive claims on which the statute of limitations as between the holder and the owner has expired.

In Security Savings Bank v. California, 263 U.S. 282, 44 S.Ct. 108, 68 L.Ed. 301 (1923), the Supreme Court held that application of California's unclaimed property law to deposits more than 30 years old did not violate the Contracts Clause in the Federal Constitution. The Court reasoned that "The contract of deposit does not give the banks a tontine right to retain the

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n.1 continued

72 L.Ed.2d 840 (1982); In re Montana Pac. Oil and Gas Co., 614 P.2d 1045 (1980); State v. Jefferson Lake Sulphur Co., 36 N.J. 577, 178 A.2d 329 (1962); State v. Sperry & Hutchinson Co., 23 N.J. 38, 127 A.2d 169 (1956); Pennsylvania v. Kervick, 114 N.J. Super. 1, 274 A.2d 626 (Ch. Div. 1971), rev'd per curiam, 60 N.J. 289, 288 A.2d 289 (1972); In re Menschefrend's Estate, 283 A.D. 463, 128 N.Y.S.2d 738 (1954); aff'd, 8 N.Y.2d 1093, 208 N.Y.S.2d 453, 179 N.E.2d 902 (1960); In re Application of New York Univ., 271 A.D. 131, 63 N.Y.S.2d 556 (1946); In re Philadelphia Elec. Co., 39 Pa.D.&C. 53 (C.P. 1940); South Carolina Tax Comm'n v. York Elec. Coop., Inc., 275 S.C. 326, 270 S.E.2d 626 (1980); In re Monks Club, Inc. v. State, 64 Wash.2d 845, 394 P.2d 804 (1964).

money in the event it is not called for by the depositor," 263 U.S. at 286, 68 L.Ed. at 306.

Similarly in Anderson National Bank v. Reeves, 293 Ky. 735, 170 S.W.2d 350 (1942), aff'd, 294 Ky. 674, 172 S.W.2d 575 (1943), aff'd sub nom. Anderson National Bank v. Luckett, 321 U.S. 233, 64 S.Ct. 399, 88 L.Ed. 692 (1944), the Kentucky abandoned property law was held to be valid in its application to deposits in a national bank "made both prior and subsequent to the effective date of the Act," 293 Ky. at 744.

In Pennsylvania v. New York, 407 U.S. 206, 92 S.Ct. 2075, 32 L.Ed.2d 693 (1972), the Supreme Court held that its 1965 ruling in Texas v. New Jersey, 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed.2d 596 (1965), regarding which state could claim abandoned property applied retroactively to money orders issued by Western Union in 1930. The court then noted that, "Insofar as the invocation of any provision of the Revised Uniform Disposition of Unclaimed Property Act [1960] would be inconsistent with this decree, the decree prevails," 407 U.S. at 215 n.8, 85 S.Ct. at 2080 n.8. Thus, the Court in addressing itself to the Uniform Act promulgated in 1966 necessarily assumed its provisions applied to property abandoned 30 years prior to adoption of the Act.

The 1954 Uniform Disposition of Unclaimed Property Act, a revised version of which was adopted by the Iowa Legislature and codified at Iowa Code Chapter 556, provides a typical example of the retroactive operation of abandoned property legislation. Section 2(d) of the Uniform Act, which is identical to Iowa Code § 556.2(4) (1983) with the exception of holding periods, presumed the abandonment of the contents of safe deposit boxes which have been unclaimed for "more than seven years." Several cases have construed the Uniform Act to make all existing abandoned property subject to the Uniform Act provided only that the property was not time-barred on the effective date of the legislation. See, Douglas Aircraft Co. v. Cranston, 58 Cal.2d 469, 374 P.2d 819, 24 Cal.Rptr. 851 (1962) ("existing abandoned property is subject to the Act"); Country Mutual Insurance Co. v. Knight, 40 Ill.2d 425, 240 N.E.2d 612 (1968) ("existing abandoned property subject to the Act").

In accord, State v. Standard Oil, 5 N.J. 281, 74 A.2d 565 (1950), aff'd, 341 U.S. 428, 71 S.Ct. 822, 95 L.Ed. 1078 (1951); Treasurer and Receiver General v. John Hancock Mut. Life Ins. Co., 388 Mass. 410, 446 N.E.2d 1376 (1983); State v. Marshall & Ilsley Bank of Milwaukee, 234 Wis. 375, 291 N.W. 361 (1940); Pennsylvania v. Woodlands Cemetary Co., 9 Pa. D.&C.2d 589 (C.P. 1956); State v. Northwestern National Bank of Minneapolis, 219 Minn. 471, 18 N.W.2d 569 (1945).

Congress intended that states would be entitled to claim the unclaimed property pursuant to existing abandoned property laws whenever adopted. The Report of the Committee on Banking, Housing and Urban Affairs, United States Senate, accompanying the Garn Act, provided:

> A state may assert a right to possession of any unclaimed property during the twelve month claim period if it has a law, whenever adopted, that permits it to take custody of such property.
>
> Any state with such a law shall be deemed to have provided adequate proof that it is entitled to such property, which was removed from a closed national bank located in that state, unless a claim by another person or entity to such property is determined by the Comptroller to take precedence. The Comptroller is not expected to require a state to bring suit to obtain possession or to provide further documentary evidence of entitlement. All claimant,s including states, shall be required to comply with regulations consistent with the above. (emphasis added)

Senate Report No. 97-536, 97th Cong., 2nd Sess. 29, reprinted in [1982] U.S. Code Cong. & Ad. News 3054, 3083.

Federal legislation intended to promote the return of abandoned property to missing owners should be construed consistent with the Uniform Act and other unclaimed property legislation. Recently another federal act designed to facilitate the disposition of unclaimed property received judicial consideration. In the case of Travelers Express Co. Inc. v. Minnesota, 506 F.Supp. 1379 (D.Minn. 1981), aff'd, 664 F.2d 691 (8th Cir. 1981), cert. dismissed, 456 U.S. 920, 102 S.Ct. 1780, 721 L.Ed.2d 181 (1982), the court construed legislation which prescribed the rules for which states could claim unpresented money orders. The court stated that the federal law was

> plainly designed to interact with the Uniform Act. It is presumed that a lawmaking body acts with existing law in mind and that new statutes will harmonize rather than conflict with existing statutes. 506 F.Supp. at 1384 (emphasis added).

IV.

As discussed above, abandoned property legislation applies to all obligations except those which are time-barred as of the effective date of the law. In the case of the property now in

the custody of the Comptroller, no such impediment bars the claim of the missing owners.

The Garn Act, Section 733(a)(1), 12 U.S.C. § 216b(a)(1), expressly allows all claimants, including states, a period of twelve months within which to file claims to the property. Thus, Congress has expressly established a period of limitations which will not expire until June 30, 1984. In the absence of such a provision the result would be the same. The relationship between that of the bank and the safe deposit box owner is that of bailee and bailor. Cussen v. So. California Savings Bank, 133 Cal. 534, 65 Pac. 1099 ("depositary for hire"). See, 10 Am.Jur.2d § 475. Accordingly, the statute of limitations would not run until the United States Comptroller denied the bailment and converted the property to his own use, 8 Am.Jur.2d § 305.

V.

Iowa Code § 556.14 (1983) expressly relieves the United States Comptroller from all liability for any abandoned property delivered to the state:

> Upon the . . . delivery of abandoned property to the state treasurer, the state shall assume custody and shall be responsible for the safekeeping thereof. Any person who . . . delivers abandoned property to the state treasurer under this act is relieved of all liability to the extent of the value of the property so . . . delivered for any claim which then exists or which thereafter may arise or be made in respect to the property.

VI.

Based on the provisions of Iowa Code Ch. 556 (1983), it is the opinion of this office that unclaimed property in the possession of the United States Comptroller of the Currency is subject to the claim of this state. Accordingly, such property should be reported and delivered pursuant to the requirements of Iowa Code §§ 556.11 and .13 (1983).

Sincerely,

Lynden Lyman

LYNDEN LYMAN
Assistant Attorney General

LL/cjc

PREARRANGED FUNERAL PLANS: COUNTY RECORDER. Iowa Code Ch. 523A (1983); Iowa Code §§ 523A.2(1), 523A.2(6); Iowa Code Ch. 331 (1983); Iowa Code §§ 331.602, 331.604, 331.605, 331.606. 1) Documents filed with the county recorder under § 523.2(1)(c) must be filed with the recorder but need not be recorded, and the proper recording fee must be paid. 2) When sellers and financial institutions give notice of documents to the recorder under § 523A.2(1)(d) and (e), these documents do not have to be recorded. 3) Recording fees for documents filed under § 523A.2(1)(c) should be paid by the seller. 4) If a seller refuses to pay the recording fees for documents filed under § 523A.2(1)(c) this constitutes noncompliance with the Act. (Lowe to Tullar, 6/7/84) #84-6-3(L)

Mr. Lon Tullar
Sac County Attorney
P. O. Box 92
Sac County Courthouse
Sac City, IA 50583

June 7, 1984

Dear Mr. Tullar:

In your letter of March 16, 1984, you requested an opinion of the Attorney General regarding questions arising under Iowa Code Chapter 523A (1983), Prearranged Funeral Plans. Your questions concerned the record keeping requirements imposed on the county recorder by § 523A.2(1).

You first asked whether under §§ 523A.2(1)(c), 523A.2(1)(d) and 523A.2(1)(e) the county recorder must actually record the forms which the sellers of prearranged funeral plans and the financial institutions holding prearranged funeral plan trust funds are required to provide to the county recorder. Secondly, you asked what charges the county recorder should assess for any such documents; and thirdly, you asked if a charge must be assessed, who is responsible for payment of the charges. Finally, you asked if recording fees are required of a party under § 523A.2(1) and the party refuses or fails to pay the fees, does such a failure or refusal constitute a violation of § 523A.2(6) which provides that any known failure to comply with § 523A.2 is a serious misdemeanor.

It is our opinion that § 523A.2(1)(c) which requires the seller to file copies of each trust agreement with the recorder also requires that the county recorder maintain the forms filed by the seller; however, the forms do not actually have to be recorded. Under § 523A.2(1)(d) and § 523A.2(1)(e), sellers and financial institutions are required to give yearly notice of each receipt of funds, and of funds actually deposited with the financial institution. Under these two sections, there is no requirement that the forms be either recorded or filed; therefore no recording fee should be assessed. The recorder is to charge a fee for those forms filed by sellers under § 523A.2(1)(c) and such fees would be charged to the seller. If the

seller who files trust agreement forms pursuant to § 523A.2(1)(c) fails to pay the necessary recording fees, as long as the seller has been advised by the recorder at the time of filing that the fees are required by §§ 331.602 and 331.604 such a refusal would, pursuant to § 523A.2(6) constitute a failure to comply with § 523A.2.

Chapter 523A mandates that certain records must be provided yearly to the county recorder and county attorney by sellers of prearranged funeral plans and by financial institutions which hold funds in trust for such sellers. However, the statutory scheme of Chapter 523A also provides, under the express confidentiality provision of § 523A.2(1)(f), that information, which is to be "maintained by" the county recorder, is confidential.

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

523A.2(1)(f), The Code.

The confidentiality provision for information provided to the county recorder is apparently based on the fact that some of the information provided to the county recorder is detailed, financial information while the information provided to the county attorney is not. (See Op.Att'y.Gen. #83-7-4.)

As you note in your inquiry, this statute distinguishes between categories of information which must be provided to, and be maintained by, the county recorder. The seller must file copies of each trust agreement with the county recorder pursuant to § 523A.2(1)(c). In contrast, under § 523A.2 (1)(d) the seller must give notice to the county recorder of "each receipt of funds held in trust," and under § 523A.2(1)(e), the financial institution holding trust funds must give notice yearly "of all funds deposited under the trust agreement" and interest earned. In summary, only the copies of the trust agreements are actually filed with the county recorder.

Chapter 523A uses the term "file" and not the term "record." Therefore, on its face, it does not address the question of whether the documents in question must be recorded. In answering such an inquiry, the county recorder is bound by § 331.602(1) which provides that the recorder shall: "Record all instruments presented to the recorder's office for recordation upon payment of the proper fees." This section does not require the recorder to record documents which are presented for filing; however, when dealing with documents filed under § 523A.2(1), the

method of filing must maintain the confidentiality of the documents as required by § 523A.2(1)(f).

Under §§ 331.602(1) and 331.604, documents which are either filed or recorded are treated alike for purposes of assessment of fees. Regardless of whether the document is filed or recorded, the fee must be paid as required by § 331.604 which provides that:

> Except as otherwise provided by state law or section 331.605, the recorder shall collect a fee of three dollars for each page or fraction of a page of an instrument which is filed or recorded in the recorder's office. [Emphasis Added]

Chapter 523A does not provide for recording or filing fees for prearranged funeral plan documents, nor does § 331.605 apply to Chapter 523A; accordingly, it must be concluded that the trust agreements filed under § 523A.2(1)(c) must be assessed the standard fee pursuant to § 331.604.

> .... Where a statute provides the fee which may be charged for recording an instrument, such a fee is an arbitrary charge. Under such a statute, it is the duty of the recording officer to charge such a fee for recording every instrument, and no officer has the authority to change the fees or to depart from the terms prescribed.

76 C.J.S., Records, § 20, p. 125.

Under the plain language of the statute, the documents referred to in § 523A.2(1)(d), which give notice of the seller's receipt of funds, and the documents referred to in § 523A.2(1)(e) which give notice of the financial institutions deposit of funds, are not to be treated in the same manner as the trust agreements filed under § 523A.2(1)(c) by the county recorder. The use of the term "give notice" in § 523A.2(1)(d) and (e) in place of "file" indicates that the proper information need only be served in the proper written form to the county recorder and need not be filed or recorded. The term "notice" means the "statutory instrumentality of knowledge...served in a manner prescribed by statute." Bird v. McGuire, 31 Cal.Rptr. 386, 393; 216 Ca.2d 702 (1963). To give notice does not mean "to record" or "to file."

The fees which are collected pursuant to § 331.604 should be assessed to the party whose interests are protected by filing with the recorder. 76 C.J.S., Records, § 21, p. 125. Under § 523A.2(1), the seller is protecting his own interests by complying with the filing requirements. This does not mean that the fees paid to the county recorder could not be assessed as

expenditures to the trust since § 523A.2(1)(b) contemplates there may be expenditures.

Finally, it is clear that a knowing failure to comply with any of the requirements of § 523A.2(1) constitutes a failure to comply pursuant to § 523A.2(6).

> A seller or financial institution that knowingly fails to comply with any requirement of this section or knowingly submit false information in a document or notice required by this section commits a serious misdemeanor.

A failure to pay the filing fee would result in a failure to file because § 331.604 mandates that the recorder charge the fee. Accordingly, a seller who files trust agreements with the county recorder, who has knowledge that the fee must be paid and who fails to pay the recording fee, could be guilty of knowing failure to comply with § 523A.2(1).

In summary, trust fund agreements filed with the county recorder by the seller of prearranged funeral plans pursuant to § 523A.2(1)(c) must be assessed the standard recording fee. The fee should be paid by the seller. Documents provided to the county recorder pursuant to § 523A.2(1)(d) and (e) do not have to be recorded or filed and therefore no fee should be assessed. If a seller refuses to pay the recording fees for trust fund agreements filed with the recorder under § 523A.2(1)(c), this constitutes noncompliance with the Act.

Sincerely,

Linda T. Lowe

LINDA THOMAS LOWE
Assistant Attorney General

cf

BEER AND LIQUOR CONTROL. Nature of Permit or License. Iowa Code §§ 123.1 and 123.38 (1983). A receiver cannot operate a business selling alcoholic beverages or beer with a debtor's permit or license. (Walding to Gallagher, Director, Iowa Beer and Liquor Control Department, 6/7/84) #84-6-2(L)

June 7, 1984

Rolland A. Gallagher, Director
Iowa Beer and Liquor Control Department
L O C A L

Dear Mr. Gallagher:

We are in receipt of your request for an opinion of the Attorney General regarding the nature of a liquor license or beer permit. Specificially, you ask:

> Are receivers who operate licensees' or permittees' businesses required by the first paragraph of section 123.38, Iowa Code, to obtain their own liquor license or beer permit?

Stated otherwise, you inquire as to the authority of a receiver to operate a business selling alcoholic beverages or beer under the debtor's permit or license.[1] You indicate that it is the Department's practice to advise receivers that a receiver must obtain its own liquor license or beer permit and may not operate a business selling alcoholic beverages or beer with a debtor's license or permit.

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1 The opinion is limited to the situation in which a receiver has assumed the operation of a licensee's or permittee's business. We do not consider the applicability of a permit or license where, despite the presence of a receiver, the permittee or licensee continues in the operation of the business. Nor is this opinion intended to address the authority of a federal bankruptcy trustee. Nor should this opinion be taken as advice as to how to proceed should a court order under Iowa Code Ch. 680 appear to authorize a receiver to operate a liquor establishment under an existing permit or license. In any of these events, the Department should seek legal advice from our office.

We concur in the Liquor Department's advice. According to 45 Am. Jur. 2d, Intoxicating Liquors, § 117:

> Wherever the courts consider a liquor license as transferable property, it will be held subject to execution, attachment, or garnishment, and will be considered an asset of the estate of the licensee which passes to the trustee in bankruptcy or to a receiver, or, in case of the licensee's death, to his personal representative. But wherever the courts consider a liquor license primarily as a privilege, and not a property right, they hold it not subject to execution or attachment, and not property which can be mortgaged, or which becomes an asset of the licensee's estate upon death. [Footnote omitted]

Iowa Code § 123.38 (1983) narrowly restricts the transfer of a permit or license. Neither alienable nor assignable, a permit or license is not subject to attachment or execution. Iowa Code § 123.38 (1983). A permit or license does not constitute property. Id. Except for an executor or administrator of a permittee's or licensee's estate as allowed in the discretion of the Director for a reasonable period, a permit or license may not be used by anyone other than the permittee or licensee. Id. Accordingly, it is our judgment that a receiver cannot operate a business selling alcoholic beverages or beer with a debtor's permit or license.

It is observed that the reference in unnumbered paragraph 2 of § 123.38 to "any person duly appointed by the court to take charge of and administer the property or assets of the licensee or permittee for the benefit of his creditors," although incorporating receivers, does not authorize receivers to operate a licensed establishment. Instead, that paragraph merely designates which individuals are entitled to surrender a permit or license and receive a refund of the permit or license fee.

In further support of that conclusion, we observe that our opinion is consistent with public policy. Iowa Code § 123.1 (1983) declares that the provisions of the Iowa Beer and Liquor Control Act are to be liberally construed for the protection of the public's health, safety, and welfare. The purpose of

the permit and licensing requirements is to assure that only persons who can be held legally responsible to patrons are insured and meet the qualification for a permit or license to operate a business selling alcoholic beverages or beer. Thus, the issuance of a permit or license subjects the holder to the State's full regulatory power and protects the public's interest consistent with the public policy declaration. Finally, we note that the procedures for obtaining a permit or license are not difficult and that the issuance of a permit or license to a receiver could not be unreasonably denied.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:sh

STATE OFFICERS AND DEPARTMENTS: Merit Employment Department; Pay Plan. Ch. 17A: § 17A.2(7). Ch. 19A: § 19A.9(2). The statutory obligation to promulgate rules regarding a "pay plan" pursuant to § 19A.9(2) does not require that a memorandum establishing procedures for reinstitution of merit pay increases upon expiration of a merit pay freeze to be promulgated in rule form. Procedures for reinstitution of merit pay increases, moreover, are not required to be incorporated as part of the "pay plan" subject to the procedures outlined in § 19A.9(2). A memorandum which is not promulgated in rule form or incorporated as part of the "pay plan," however, is not binding on administrative agencies. (Pottorff to Priebe, Chair, Administrative Rules Review Committee, 6/7/84) #84-6-1(L)

June 7, 1984

Honorable Berl E. Priebe, Chair
Administrative Rule Review Committee
R. R. 2, Box 145A
Algona, Iowa 50511

Dear Senator Priebe:

You have requested an opinion of our office concerning § 19A.9(2) of the Code which requires the Merit Employment Department to prepare and submit proposed rules to the Iowa Merit Employment Commission in accordance with Chapter 17A which provide for a "pay plan" for employees in the merit system. Merit pay increases for employees in the merit system were frozen by the legislature for the pay periods from July 3, 1981, through June 30, 1983. 1981 Iowa Acts, Ch. 9 § 19(5). This freeze was extended by the legislature for the pay periods from July 1, 1983, through June 28, 1984. 1983 Iowa Act, Ch. 205 § 16(5). You point out that the Department has issued an interagency memorandum which outlines a procedure for reinstitution of merit pay increases in state government upon expiration of this freeze. You note that this procedure was not promulgated in rule form.[1]

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[1] In lieu of promulgation of the procedure for reinstitution of merit pay increases, the Commission has adopted

In light of the rulemaking obligation imposed under § 19A.9(2), you pose the following specific question regarding the Department memorandum:

> May department staff promulgate "policies" which are binding on administrative agencies and their employees without going through either the rulemaking process or following the procedures outlined in section 19A.9?

In our opinion, the statutory obligation to promulgate rules regarding a "pay plan" pursuant to § 19A.9(2) does not require that a memorandum establishing procedures for reinstitution of merit pay increases upon expiration of a merit pay freeze be promulgated in rule form. Procedures for reinstitution of merit pay increases, moreover, are not required to be incorporated as part of the "pay plan" subject to the procedures outlined in § 19A.9(2). A memorandum which is not promulgated in rule form or incorporated as part of the "pay plan," however, is not binding on administrative agencies.

Chapter 19A, which establishes the State Merit System of Personnel Administration, imposes rulemaking obligations on the Merit Employment Commission and the Merit Employment Department. Under § 19A.9 the Commission "shall adopt and may amend rules for the administration and implementation" of Chapter 19A in accordance with Chapter 17A. The Department director, moreover, is specifically directed "to prepare and submit to the Commission proposed rules" on specific topics. These topics include rules:

> [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, after consultation with appointing authorities with due regard to the results of a collective bargaining agreement negotiated under the provisions of chapter 20 and after a public hearing held by the commission. Such pay plan shall become effective only after it has been approved by the executive council after submission from the commission. Review of the pay plan for

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n.1 continued

a rule stating simply that the Department "shall provide" for reinstitution of merit pay increase eligibility. 570 I.A.C. § 4.5(2)(e).

> revisions shall be made in the same manner at the discretion of the director, but not less than annually. The annual review by the director shall be made available to the governor a sufficient time in advance of collective bargaining negotiations to permit its recommendations to be considered during such negotiations. Each 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. Unless otherwise established by law, the governor, with the approval of the executive council, shall establish a pay plan for all exempt positions in the executive branch of government except for employees of the governor, board of regents, the state educational radio and television facility board, the superintendent of public instruction and members of the professional staff of the department of public instruction, appointed under the provisions of section 257.24, who possess a current, valid teacher's certificate or who are assigned to vocational activities or programs, the commission for the blind, members of the Iowa highway safety patrol and other peace officers, as defined in section 97A.1, employed by the department of public safety, and officers and enlisted personnel of the armed services under state jurisdiction.

Iowa Code § 19A.9(2) (1983). Under this language two separate processes are created. First, rules shall be adopted to provide "[f]or a pay plan." Second, the "pay plan," itself, which is prepared after consultation with appointing authorities and after a public hearing, must be approved by the Executive Council.

The rulemaking obligation imposed on the Department under § 19A.9(2) is distinct from the rulemaking obligations ordinarily imposed on state agencies. Under the Iowa Administrative Procedure Act, Chapter 17A, all "rules" must be adopted in compliance with statutory rulemaking procedures. Iowa Code § 17A.4(3) (1983). A "rule," in turn, is defined as "each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure or practice requirements of any agency." Iowa Code § 17A.2(7) (1983). This definition of "rule," however, is subject to exceptions. A "rule" does not include "[a]n intergovernmental, interagency, or intra-agency memorandum, directive, manual or other communication which does not substantially affect

the legal rights of, or procedures available to, the public or any segment thereof." Iowa Code § 17A.2(7)(c) (1983). Under this statutory scheme, therefore, memoranda which fall within the exclusion are not subject to rulemaking procedures.

The exclusion of interagency memoranda which do "not substantially affect legal rights of, or procedures available to, the public or any segment thereof" from the definition of "rule" has been interpreted to include memoranda concerning internal personnel practices and directives. See Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process, 60 Iowa L. Rev. 731 (1975). Commentators have explained that employees of state agencies are not members of the "public" within the meaning of this language. Accordingly, memoranda specifying vacation policies, work schedules, promotion policies, or grievance procedures, for example, would be excluded from rulemaking procedures. Id. at 833-35. This view has been adopted in a prior opinion of this office which states that a policy concerning overtime compensation for merit system employees is excluded from the definition of rule under § 17A.2(7)(c). 1976 Op. Att'y Gen. 786, 788. Cf. Op. Att'y Gen. #80-9-7(L) (No affect on legal rights of or procedures available to the public in establishment of work standards for Iowa Highway Patrol).

We consider a memorandum establishing a procedure for reinstitution of merit pay increases to fall with the statutory exclusion to the definition of a "rule" under 17A.2(7)(c). The reinstitution of merit pay increases is a personnel directive which affects only state employees within the merit system rather than the public. See Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process, 60 Ia. L. Rev. at 833-35; 1976 Op. Att'y Gen. at 788. Under § 17A.2(7)(c), therefore, the interagency memorandum is excluded from the definition of a rule under Chapter 17A.

Since rulemaking would not otherwise be imposed under Chapter 17A, we must construe Chapter 19A to determine the scope of the obligation to make rules "[f]or a pay plan." The terms "pay plan" are not otherwise defined in Chapter 19A. The context of § 19A.9(2) as well as the language of relevant case law, however, demonstrate that a "pay plan" encompasses a schedule of pay for positions within the merit system. Section 19A.9(2) expressly 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." Iowa Code § 19A.9(2) (1983). This language clearly addresses the provision for rates of pay within the pay plan. The Iowa Supreme Court, moreover, has further observed in

construing § 19A.9(2) that a goal of Chapter 19A is to insure equal pay for equal work. This goal is accomplished, in part, by providing for a uniform position classification and pay plan which compensate all positions in the same class in the same geographical area under the same schedule of pay. Peters v. Iowa Employment Security Commission, 235 N.W.2d 306, 310 (Iowa 1975). A "pay plan," therefore, minimally, includes a schedule of pay for positions in the classified service.

Construing the obligation to adopt rules "[f]or a pay plan" pursuant to § 19A.9(2), this office has expressed the view that the obligation is procedural rather than substantive. In 1976 an opinion of this office stated that the obligation to adopt rules which provide "[f]or a pay plan" does "not require that the pay plan itself be adopted pursuant to Chapter 17A." 1976 Op. Att'y Gen. 706, 707. We note that existing Department rules define the content of a pay plan. See 570 I.A.C. §§ 4.1, 4.3 (pay plan includes numbered pay grades, steps, and classes). Existing Department rules, moreover, provide for preparation and adoption of the pay plan but do not provide for promulgation of the pay plan in rule form. See 570 I.A.C. §§ 4.1, 4.2 (consultation with appointing authorities and public hearing precede executive council approval).

The adequacy of these procedural rules to meet the statutory obligation to promulgate rules "[f]or a pay plan" is measured against a standard of reasonableness. The scope of rules which an agency is authorized to promulgate are those rules which a rational agency could conclude are within the agency's delegated authority. Histerote Homes, Inc. v. Riedmann, 277 N.W.2d 911, 913 (Iowa 1979). Ordinarily, this standard of reasonableness is applied when an existing rule is challenged as ultra vires. See id. at 913. In our view, under the particular circumstances of this case in which rulemaking is not imposed by Chapter 17A but is imposed by a separate statute that creates a distinct procedure for the pay plan itself, the standard of reasonableness is similarly applied when the failure to promulgate a rule is challenged. See, generally, Citizens Against the Lewis and Clark Landfill v. Pottawattamie County Board of Adjustment, 277 N.W.2d 921, 923-24 (Iowa 1979); Bruce Motor Freight, Inc. v. Lauterbach, 247 Iowa 956, 961-62, 77 N.W.2d 613, 616-17 (1956).

Applying this reasonableness standard, we cannot conclude that the failure to promulgate a procedure for reinstatement of merit pay increases violates the statutory mandate of § 19A.9(2). A rational agency could conclude that reinstitution of merit pay increases is not within the scope of the statutory mandate to promulgate rules "[f]or a pay plan." We do not imply, however, that a rational agency could not conclude, conversely, that reinstitution of merit pay increases is within the scope of the

statutory mandate of § 19A.9(2). The Department and the Commission must have some flexibility in determining the scope of rulemaking pursuant to § 19A.9(2) in order to carry on the dual processes of rulemaking and of preparing, adopting and submitting for approval the pay plan. If these two processes become too interdependent, the Department and the Commission may be faced with the anomaly of promulgating valid rules from which the pay plan ultimately approved by the Executive Council significantly differs. The agency's expertise and knowledge concerning the factors for delineation between the two types of processes in § 19A.9(2), moreover, are relevant to the question whether rulemaking is required for a specific action. We cannot decide this issue in the abstract.

Even if § 19A.9(2) does not require rulemaking on the reinstitution of merit pay increases, the issue remains whether the reinstitution of merit pay increases is part of the schedule of pay constituting the "pay plan" which must be prepared, adopted and approved in accordance with § 19A.9(2). Under § 19A.9(2) and 570 I.A.C. § 4.1, the "pay plan" must be prepared after consultation with appointing authorities, adopted by the Commission, and approved by the Executive Council. The effectiveness of the pay plan is contingent upon these processes. Iowa Code § 19A.9(2) (1983).

The determination of what elements must be included in the "pay plan," itself, is a matter of statutory construction. Although statutory construction is an issue of law, appropriate weight is accorded to the judgment of state agencies charged with the special duty of administering the statute. West Des Moines Education Association v. Public Employment Relations Board, 266 N.W.2d 118, 124-25 (Iowa 1978). In this case, the Department's determination that reinstitution of merit pay increases need not be incorporated into the "pay plan" ultimately submitted to the Executive Council for approval is supported by a 1976 opinion of this office. Addressing the issue of overtime compensation for state employees, this office stated that, in order to revise existing overtime pay provisions promulgated in rule form, the Department could either amend the existing rule or recind the rule and incorporate overtime compensation provisions as part of the "pay plan." 1976 Op. Att'y Gen. 706, 707. From this opinion it is evident that overtime compensation was determined to be an element which may be, but is not required to be, incorporated into the "pay plan." We consider the procedure for reinstitution of merit pay increases to bear no more significantly on the schedule of pay for positions in the classified service than overtime compensation. In light of the appropriate weight accorded to the Department in construing Chapter 19A and the previous opinion addressing the scope of the "pay plan," we cannot conclude as a matter of law that the procedures for the

reinstitution of merit pay increases are required to be incorporated as part of the "pay plan" subject to the procedures outlined in § 19A.9(2).

We do not suggest that the Department may elect to forgo both rulemaking under Chapter 17A and incorporation of matters into the "pay plan" under Chapter 19A and, nevertheless, bind all state agencies which employ merit system employees through an interagency memorandum. Prior opinions have suggested that either rulemaking or revision of the pay plan are necessary to impose changes in compensation for merit employees. See 1976 Op. Att'y Gen. 706; 1976 Op. Att'y Gen. 786. While the memorandum may represent a reasoned approach to reinstitution of the merit pay increases which all state agencies may elect to follow, we cannot conclude that the memorandum binds all state agencies.

In summary, the statutory obligation to promulgate rules regarding a "pay plan" pursuant to § 19A.9(2) does not require that a memorandum establishing procedures for reinstitution of merit pay increases upon expiration of a merit pay freeze to be promulgated in rule form. Procedures for reinstitution of merit pay increases, moreover, are not required to be incorporated as part of the "pay plan" subject to the procedures outlined in § 19A.9(2). A memorandum which is not promulgated in rule form or incorporated as part of the "pay plan," however, is not binding on administrative agencies.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:cjc

SCHOOLS: SECRETARY OF STATE. Redistricting of School Board Director Districts. 1983 Iowa Code Supp. §§ 275.12(2), 275.23A. When the Secretary of State is required to redistrict a school district because the board of directors has failed to do so, the criteria of 1983 Iowa Code Supp. § 275.23A(1) must be applied. The method chosen by the district for electing directors from those authorized by 1983 Iowa Code Supp. § 275.12(2) must be utilized. Expenses incurred by the Secretary of State in the redistricting process shall be assessed to the school district. (Fleming to Whitcome, Director of Elections, 7/26/84) #84-7-9(1)

July 26, 1984

Ms. Louise Whitcome
Director of Elections
Office of the Secretary of State
L O C A L

Dear Ms. Whitcome:

You have asked for our opinion with respect to the exercise of responsibility assigned to the State Commissioner of Elections when a school district decides not to redistrict pursuant to 1983 Iowa Code Supp. § 275.23A. The Board of Directors of the Perry Community School District did not redistrict as required by law and your office is required to do so. The questions you have presented in this circumstance are as follows:

1. Section 275.23A, Code Supplement 1983, requires that the Secretary of State redraw director districts for school districts which do not redraw their director districts according to statutory standards. Perry Community School District currently has a plan with the largest district exceeding the smallest district by 412.57 percent. The scheme includes a multi-member director district for the city of Perry and two single member director districts in that portion of

the school district which lies outside the corporate limits of Perry. The city of Perry should be represented by at least three director districts and perhaps a portion of a fourth director district. If such a plan was redrawn, would the Secretary of State's office be free to designate those director districts which are totally within the city of Perry as being one multi-member district, or is the Secretary's office bound by the prior scheme of one multi-member district and two single-member districts?

2. Chapter 77, 1983 Acts, created section 275.23A, Code Supplement 1983. Chapter 53, 1983 Acts, which was approved 3 days later provided for the election of school board members from multi-member districts. If the Perry redistricting paired two incumbents from a multi-member district whose terms extended beyond the organizational meeting of the board of directors after the regular school election following the adoption of the redrawn districts, would their terms have to be shortened even though only two board members are to be elected from the multi-member district?

3. In cases where the school redistricting plan has been redrawn by the Secretary of State's office, is the assessment of corresponding incurred expenses to the school district optional or mandatory?

We understand that the existing districts were adopted pursuant to the method for selecting directors in the Perry district as determined in 1964. The method selected was that provided in Iowa Code § 275.12(2)(c) (1962). That Code section, as amended, now provides as follows:

> Election of not more than one-half of the total number of school directors at large from the entire district and the remaining directors from and as residents of designated single-member or multi-member director districts into which the entire school district shall be divided on the basis of population for each director. In such case, all directors shall be elected by the electors of the entire school district. Changes in the boundaries of director districts shall not

> be made during a period commencing sixty days prior to the date of the annual school election.

1983 Iowa Code Supp. § 275.12(2)(c) (emphasis supplied).

The Code section under which you are required to redistrict if a school district fails to do so provides, in pertinent part, as follows:

> Upon failure of a district board to make the required changes by the dates established under this section, the state commissioner of elections shall make or cause to be made the necessary changes as soon as possible, and shall assess any expenses incurred to the school district. The state commissioner may request the services of personnel of and materials available to the legislative service bureau to assist the commissioner in making any required boundary changes.

1983 Iowa Code Supp. § 275.23A(3) (last two sentences).

The method for electing school board members is determined by the voters of a school district at the time of a reorganization, see generally, Iowa Code Ch. 275 (1983), as amended, and 1983 Iowa Code Supp. § 275.12, or at a regular or special election of an existing district pursuant to Iowa Code § 278.1(8) or Iowa Code § 275.35 or § 275.36 (1983). As an introductory matter to your first question, it is our opinion that you are required to redistrict pursuant to the method for selecting directors that was adopted by the voters of the district, that is method c found in 1983 Iowa Code Supp. § 275.12(2). This view is reached in light of the principle that statutes relating to the same subject matter or to closely allied subjects are in pari materia and must be construed, considered and examined in light of their common purposes and intent. Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co., 165 N.W.2d 771, 774 (Iowa 1969).

As we observed in an earlier opinion, "[t]he method for selecting members of the board of directors of a school district is one of the most fundamental issues in creation and maintenance of that governmental unit." 1982 Op. Att'y Gen. 463, 465. Thus, it is clear that redistricting is to be done under 1983 Iowa Code Supp. § 275.12(2)(c).

The relevant criteria for redistricting of school districts are set out in 1983 Iowa Code Supp. § 275.23A(1) as follows:

> School districts which have directors who represent director districts as provided in

> section 275.12, subsection 2, paragraphs b through c, shall be divided into director districts on the basis of population as determined from the most recent federal decennial census. The director districts shall be as nearly equal as practicable to the ideal population for the districts as determined by dividing the number of director districts to be established into the population of the school district. The director districts shall be composed of contiguous territory as compact as practicable.

(Emphasis supplied.) We understand that Perry has elected one director from the district at-large, i.e., "not more than one-half of the total number of school directors . . ." 1983 Iowa Code Supp. § 275.12(2)(c). It would be reasonable to leave that arrangement in place. Under the criteria of § 275.23A(1) above, a serious problem is presented in the Perry district in connection with directors who are elected as residents of director districts. There is gross inequality in the population of the director districts.

Inasmuch as the existing arrangement does not meet the equality requirement of Iowa Code § 275.23A which is a codification of the "one person, one vote" principle under the United States Constitution, you are free to re-draw district boundaries to achieve equality; indeed, you are required to do so. Section 275.12(2)(c) permits election of the "remaining directors from and as residents of designated single-member or multi-member districts . . ." The population of existing director districts 2 and 3 combined is less than one-fourth that of the entire district. The Perry board left redistricting "up to the state." (Superintendent's letter of June 1.) In our view, your office is bound by the criteria in § 275.23A(1) set out above and by the method adopted by the district. We believe you are not bound by the past application of method c. That method permits variations but the variations cannot defeat the criterion of equality. In other words, the city of Perry need not be one multi-member director district. The creation of four single-member districts may be the most practicable way to meet the criteria under method c in this particular school district. It seems to us that in this circumstance you are free to make reasonable judgments to redistrict to meet the criteria of the statute.

Your second question pertains to 1983 Iowa Code Supp. § 275.23A(4). We believe that particular subsection comes into play only if redistricting results in more incumbent directors residing in a "redrawn director district" than that district is entitled to elect. We believe that subsection creates a

transition period and would not apply in the circumstance you describe; for example, if a multiple-member district is to be represented by two directors and two incumbent directors reside there, they would serve out their respective terms. Our view is based on the principle that a construction should not be placed on a statute that would lead to absurd consequences. Graham v. Worthington, 259 Iowa 845, 854, 146 N.W.2d 626, 633 (1966).

Finally, it is our opinion that your office is required by 1983 Iowa Code Supp. § 275.23A(3), supra, to assess any expenses incurred in the redistricting process to the school district. See Iowa Code § 4.1(36)(a) ("The word 'shall' imposes a duty."). When a school district does not redistrict correctly or by the dates established by the statute, the burden to do so is shifted to the State Commissioner of Elections. We believe the legislative use of the word "shall" clearly requires the school district to pay "any expenses incurred" by your office.

In summary, when the State Commissioner of Elections is required to redistrict a school district because the board of directors has failed to do so, the criteria of 1983 Iowa Code Supp. § 275.23A(1) must be applied with respect to the method chosen by the district from among those listed in 1983 Iowa Code Supp. § 275.12(2), (b) through (e). Expenses incurred by the Commissioner in the redistricting process shall be assessed to the school district.

Sincerely,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

STATE OFFICERS AND DEPARTMENTS: HUMAN SERVICES: Licensing; Funding; Foster Care; Substance Abuse; Juvenile. Senate File 2176, 70th G.A.; Chapters 125, 135B, 135C, 236; §§ 125.43, 125.44, 125.45, 218.1, 232.142, 234.35, 237.1, 237.1(3), 237.4, Code of Iowa, 1983; 498 Iowa Administrative Code §§ 202.1(5), 202.1(7), 202.2(1), 202.4(4). A juvenile substance abuse facility licensed under Ch. 125 need not be also licensed under Ch. 237 in order to receive foster care funds, assuming that the facility in a particular child's case meets the other criteria for payment for foster care. (Lynn to Rosenberg, State Representative, 7/26/84) #84-7-8(L)

July 26, 1984

The Honorable Ralph Rosenberg
State Representative
Seventy-Third District
111 State Street
Ames, IA 50010

Dear Mr. Rosenberg:

You have requested an opinion from our office regarding Senate File 2176, as passed by the 70th General Assembly, and its effect on the policies of Department of Human Services for foster care licensing. Specifically, you would like to know whether a juvenile substance abuse facility, licensed under Ch. 125, must also be licensed under Ch. 237 in order to receive foster care funds from DHS. An answer to your question requires an examination of the relevant licensing and funding statutes.

Licensing requirements for foster care are contained in § 237.4, Iowa Code. That section states that:

> An individual or an agency, as defined in section 237.1, shall not provide child foster care unless the individual or agency obtains a license issued by the director under this chapter. However, a license is not required of the following:
>
> 1. An individual providing child foster care for a total of not more than twenty days in one calendar year.

> 2. A hospital licensed under chapter 135B.
>
> 3. A health care facility licensed under chapter 135C.
>
> 4. A juvenile detention home or juvenile shelter care home approved under section 232.142.
>
> 5. An institution listed in section 218.1.
>
> . . .

Senate File 2176 amends § 237.4 by adding the following new subsection 6:

> 6. A facility licensed under chapter 125.

Senate File 2176 is described as an act "eliminating the requirement that a facility licensed by the Department of Substance Abuse providing child foster care be licensed by the Department of Human Services." See S.F. 2176, 70th G.A., approved April 10, 1984. It appears that the intent of the amendment is to eliminate duplicate licensing. What is not clear is how this licensing statute impacts on funding.

Chapter 237 by itself says nothing about payment for foster care, nor does it tie in licensing requirements with payment. Chapter 237 is purely a licensing statute, not a funding statute. Section 234.35 identifies when the State is liable to pay foster care costs. That provision states that:

> The department of social services shall be initially responsible for paying the cost of foster care for a child under any of the following circumstances:
>
> 1. When a court has committed the child to the commissioner of social services or his designee.
>
> 2. When a court has transferred legal custody of the child to the department of social services.
>
> 3. When the department has agreed to provide foster care services for the child on the basis of a signed placement agreement between the department and the child's parent or guardian.

> 4. When the child has been placed in emergency care for a period of not more than thirty days upon approval of the commissioner or his designee.

"Child foster care" is defined as "the provision of parental nurturing, including but not limited to the furnishing of food, lodging, training, education, supervision, treatment or other care, to a child on a full-time basis by a person other than a relative or guardian of the child" with certain exceptions delineated in the statute. § 237.1(3), Iowa Code. The applicable regulations state essentially the same thing, except "foster care" is defined as being furnished "in a licensed foster care facility or approved shelter care facility". . . . 498 I.A.C. § 202.1(5). There is no indication in that regulation whether "licensed foster care facility" means licensed under Ch. 237, or whether it means licensed either under that chapter or under any of the express exemptions from 237 licensing requirements.

Only an "eligible child" shall be considered for foster care services supervised by the department. 498 I.A.C. § 202.2(1). "Eligible child" is defined in § 202.1(7), which tends to track the instances in which the State is liable for foster care expenses under § 234.35, Iowa Code., as discussed above. A foster group care facility must be selected on the basis of its ability to meet the needs of the child. 498 I.A.C. § 202.4(4). The regulations go on to state that the department "shall place a child only in a licensed or approved facility which has a current purchase of service agreement with the department". Id. Once again, "licensed" is not defined, but it has seemingly been read by DHS to mean "licensed under chapter 237."

Reading all of these statutes and regulations together, if an eligible child is placed in a facility that provides foster care to that child, as defined by statute and rule, then the State is initially responsible for paying foster care expenses. The inquiry should be whether the child is an "eligible child" under 498 I.A.C. § 202.1(7) and § 234.35, Iowa Code and whether the facility is providing "foster care" under the definition of § 237.1(3). There should be no additional requirement imposed that the facility be licensed under Ch. 237 in order to receive payment when Ch. 237 by its own terms states that certain facilities licensed under certain other provisions of the Code may provide foster care without obtaining a Ch. 237 license.

This opinion should not be construed to mean that in every instance where a child is in a Ch. 125 substance abuse facility or a Ch. 135C health care facility or any of the other facilities excepted from the licensing requirements of Ch. 237, that the

child is eligible for foster care payments. Many, if not all, of the facilities excepted from Ch. 237 licensing requirements pursuant to § 237.4 have their own funding schemes. See, e.g., §§ 125.43 - 125.45, Iowa Code. Whether a child placed in a Ch. 125 substance abuse facility is eligible for foster care funds may depend upon an examination of the exclusivity or priority of Ch. 125 funding sources in relation to foster care funds, and whether the care provided is essentially foster care, or something else, such as medical treatment. This analysis should also be true of other facilities listed in § 237.4 that have their own funding schemes. For example, juvenile detention has never been considered foster care and has its own statutory scheme for cost allocation. See §§ 232.142, 356.15, Iowa Code; Op.Att'yGen. #83-4-3(L), Munns to Reagen. This opinion does not address the question of priorities in the various funding programs.[1] This opinion merely concludes that where a child would otherwise be eligible for foster care funds, DHS should not withhold such payments based on the fact that the facility has not obtained a duplicate license when § 237.4 has instructed that such duplicate license need not be obtained. Notwithstanding the removal of the duplicate license problem by the statutory change, the obligation of the Department to provide funding to any facility is unaffected by this opinion and remains subject to the requirements of Chapter 234 and the administrative rules promulgated by the Department thereunder.

In conclusion, a juvenile substance abuse facility licensed under Ch. 125 need not be also licensed under Ch. 237 in order to receive foster care funding from DHS, assuming that the facility in a particular child's case meets the other criteria for payment of foster care expenses.

Sincerely,

Eleanor E. Lynn

Eleanor E. Lynn
Assistant Attorney General

EEL/kap3

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[1]The Department would be justified, however, in refusing to provide duplicate payments (i.e., preventing "double-dipping") by not paying child foster care expenses when the statutory maximum under another section of the Code, such as Ch. 125 substance abuse funds, has already been paid.

SECRETARY OF STATE: Corporation Division Duties Under Senate File 510, 1984 Session, 70th G.A. Upon receiving, from an agricultural supply dealer, a request for a certificate showing any effective financing statements or verified lien statements naming a certain debtor and the crops to which a newly filed lien attaches, the secretary should supply a listing of all financing statements and verified lien statements which name the specified debtor and relate to crops or real property. Likewise, when a request for a certificate relates to livestock, the secretary should supply a listing of all financing statements and verified lien statements which name the specified debtor and relate to livestock. (Galenbeck to Odell, Secretary of State, 7/26/84) #84-7-7(L)

July 26, 1984

Mary Jane Odell
Secretary of State
L O C A L

Dear Ms. Odell:

You have requested an opinion of the Attorney General regarding the duties of the Secretary of State pursuant to Senate File 510, 1984 Session, 70th G.A. In particular, you have expressed concern over the appropriate interpretation of subsection 5 of section 4 of the legislation which provides:

> "An agricultural supply dealer filing a verified lien statement shall request from the Secretary of State a certificate showing any effective financing statement or verified lien statements naming the debtor and the crops or livestock to which the lien attaches. . . ."

Depending upon the interpretation adopted, the burden placed upon the Secretary of State by Senate File 510 may vary from the present level of duty imposed by § 554.9407, Code of Iowa, as amended by Ch. 70, § 3, 1983 Session, 70th G.A. and Senate File 510 itself (§ 12), to a far more extensive (if not impossible)

standard of duty. This opinion will analyze which alternative statutory constructions are most appropriate.

I. LEGISLATIVE PURPOSE

No statement of legislative purpose precedes the main body of Senate File 510. However, the general purpose of the legislation can be inferred from text provisions which, in certain circumstances, cause bank memoranda to constitute irrevocable letters of credit, and in other circumstances create liens for the retail cost of agricultural chemicals, seed, and petroleum products, including labor furnished. These provisions clearly provide special financial protection to suppliers of such products.

The Secretary of State's duties arising from the statute consist of filing the liens created by Senate File 510, providing information regarding such liens, and providing information regarding financing statements filed with the secretary pursuant to § 554.9401(1)(c). Specifically, upon request from an "agricultural supply dealer" (and, presumably, any other person) the secretary must supply a "certificate showing any effective financing statement or verified lien statements naming the debtor and the crops or livestock to which the lien attaches." Section 4(5) of Senate File 510.

II. FUNCTION OF SECRETARY OF STATE

The Secretary's function appears to be a clerical one; nothing in the statute indicates an intention that the Secretary prioritize various liens and financing statements. However, you question whether the language cited in your letter of May 22, 1984, and quoted above, suggests that the Secretary might be expected to perform a function of comparing the property description on "verified lien statements" with property descriptions on other verified lien statements or financing statements. Likewise, you question whether the Secretary might be expected to compare the livestock description on a verified lien statement with the livestock description on another lien statement or financing statement.

a. Property Description.

Subsection 1 of section 4, Senate File 510, specifies information to be included in the verified lien statement. Two portions of subsection 1 provide information similar to that

included on many financing statements currently filed with the Secretary of State. Subsection 1(e) and 1(f) require:

> "e. The name and address of the farmer for whom the agricultural chemical, seed, feed, or petroleum product was furnished.
> f. The legal description of the real property on which the crops to which the lien attaches are growing or are to be grown or the description of the livestock or animals to which the lien attaches." (emphasis added)

Presently, § 554.9402(1) of the Iowa Code (1983), regarding financing statements, provides:

> "A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. . . . When the financing statement covers crops growing or to be grown, the statement must also contain a description of the real estate concerned." (emphasis added)

Although it is certainly possible that a financing statement would contain a legal description, the statute only requires a description of the real estate -- and "description" is broadly defined in § 554.9110 as follows:

> "For the purposes of this Article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described."

Moreover, the Official Text comment to the Uniform Commercial Code § 9-402 makes clear the drafters' intent to adopt a "notice filing" system where "further inquiry from the parties concerned will be necessary to disclose the complete state of affairs." See, Comment, Sec. 9-402, Uniform Commercial Code, 1962 Official Text. See also, Jasper County Sav. Bank v. Gilbert, 328 N.W.2d 287, 292 (Ia. 1982).

Thus, whereas a legal description of property must be provided to comply with Senate File 510, the property description required by § 554.9402(1) may be something along the order of:

"John Doe's north eighty acres in Scott County." The filings received by the Secretary of State will not, therefore, lend themselves to comparison. In many cases it will be impossible to verify -- from the face of the filings -- whether a financing statement (filed pursuant to § 554.9402(1)) and a verified lien statement[1] (filed pursuant to Senate File 510) relate to the same property.

Because the statutes contain significantly different language, we must presume the legislature did not intend the Secretary to perform a function of comparing "description" to "legal description." Instead, upon receipt of a request for "a certificate showing any effective financing statement or verified lien statement naming the debtor and the crops . . . to which the lien attaches," the Secretary should supply a listing of all financing statements and verified lien statements naming the specified debtor and relating to crops or real property.

b. Livestock Description.

The same analysis must apply to the Secretary's responsibilities where the verified lien being filed names livestock rather than real property. As noted above, subsection 1(f) of section 4, Senate File 510 requires only a "description of the livestock or animals to which the lien attaches." (emphasis added) The mode of description will, of course, vary from person to person.

Similarly, the description of livestock required by § 554.9402(1) is only what is "reasonably" required to identify the livestock. As mentioned above, § 554.9402(1) embodies a "notice filing" concept which does not mandate that livestock be identified with exactitude.

Under these circumstances, the Secretary would expose the State to substantial liability -- and perhaps perform a disservice to lien holders -- if only those financing statements and liens having exactly the same livestock description as the verified lien were revealed to a lienholder upon request for the "certificate" contemplated in section 4(5) of Senate File 510.

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[1] Even if the statutes required use of a "legal description" on both financing statements and verified lien statements, there is no single correct legal description for most properties -- especially those in a rural setting rather than urban, subdivided property.

III. CONCLUSION

Any interested party must be given information regarding "verified liens" and financing statements from the Secretary of State. The Secretary must index and provide that information according to the debtor's name and the type of collateral secured (livestock or crops). However, because both statutes allow substantial variation in the description of the collateral secured, the Secretary should not attempt to determine if the property described on one "verified lien" is identical to that described, for example, on a financing statement relating to the same debtor. Determinations as to which other secured parties are affected by the filing of a lien created by Senate File 510 should be left to the party secured by the lien.

Sincerely,

Scott M. Galenbeck

SCOTT M. GALENBECK
Assistant Attorney General

SMG/cjc

SCHOOLS: Redistricting. 1983 Iowa Code Supp. § 275.23A(4). Where two school district directors reside in the same new director district after redistricting and were elected to terms extending beyond the effective date of redistricting, both directors' terms expire at the next regular election. (Fleming to Heeren, Tama County Attorney, 7/26/84) #84-7-6(L)

July 26, 1984

Brent D. Heeren
Tama County Attorney
P. O. Box 6
Toledo, Iowa 52342

Dear Mr. Heeren:

You have submitted a question pertaining to redistricting of school board director districts as follows:

> If, after reapportionment, two former districts are combined to make one newly organized district, then what is the status of the two directors who represent the one new district and whose terms have not yet expired?

We understand that the district at issue, North Tama Community School District, has a seven member board of directors. In our view, the issue you present is controlled by 1983 Iowa Code Supp. 275.23A(4) which provides as follows:

> If more than one incumbent director, whose term extends beyond the organizational meeting of the board of directors after the regular school election following the adoption of the redrawn districts, reside in a redrawn director district,

> the terms of office of the affected directors expire at the organizational meeting of the board of directors following the next regular school election. (emphasis added)

It appears that the terms of office of the two incumbent directors will expire in 1985, that is "at the organizational meeting . . . following the next regular school election." We note that one director's term expires in 1985 and the other would have expired in 1986. Under the terms of § 275.23A(4) above, the terms of both will expire in 1985. In other words, election of a single director in that director district will be held at the next regular school election, in this circumstance in 1985.

The circumstances described to us present another problem, the existence of an extra director in one district, which if a new director is elected and continues in each of the other six districts, an eight-member board would result. This situation requires us to apply relevant principles of statutory construction. First, we note that statutes relating to the same subject matter or to closely allied subjects are in pari materia and must be construed and examined in the light of their common purposes and intent. Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co., 165 N.W.2d 771, 774 (Iowa 1969). Moreover, legislative intent is to be gleaned from the whole statute or statutes relating to the matter, and not from any particular part, with due consideration for the object to be attained. Georgia v. State Tax Commission, 165 N.W.2d 782, 786 (Iowa 1969).

There is no doubt that 83 Acts, Ch. 77, § 3, 4, codified as 1983 Iowa Code Supp. 275.23A, was adopted to require school districts to be redistricted to comply with the constitutional prescription of "one person, one vote." See 1982 Op. Att'y Gen. 463, 474 (a timetable for altering school director district boundaries is desirable and could clarify any existing doubt that school districts must redistrict to comply with "one person, one vote."). The General Assembly has provided that school boards shall be composed of "either five or seven members." See 1983 Iowa Code Supp. § 275.12(2), first sentence (emphasis added). See also 1983 Iowa Code Supp. § 275.25(2). Other Code sections pertaining to transition periods provide that staggered terms for directors are to be established. See e.g. 1983 Iowa Code Supp. § 275.25(3). School districts hold annual elections; the statutes do not provide for the election of a majority of board members at one election and directors normally serve three year terms.

In the particular factual situation you have presented, a construction of the statutes in pari materia requires that one of the newly created districts will not elect a director until the

1985 school election. Otherwise, the North Tama School District would have eight members.

We reach this conclusion for three reasons. First, a board of eight members is not authorized by statute. Second, we believe that § 275.23A(4) is a compromise transitional provision. Finally, an eight member board would present practical problems including potential tie votes. We note that the director districts in this particular case were quite uneven. Moreover, the district elects its directors pursuant to § 275.12(2)(b), that is all voters vote for all board members.

In summary, where two school district directors reside in the same new director district after redistricting and were elected to terms extending beyond the effective date of redistricting, both directors' terms expire at the next regular election.

Sincerely,

MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

PUBLIC FUNDS: State Fish and Game Protection Fund; Interest Earned. Iowa Code Chapters 18 and 107; Iowa Code §§ 107.17, as amended by 1984 Iowa Acts, H.F. 2401, § 3; 453.7, and 453.7(2) (1983); Iowa Code Supp. § 18.120 (1983); 1982 Iowa Acts, Ch. 1084 and 1979; Iowa Acts, Ch. 12 § 6.3. Interest earned on fish and game protection fund payments to the motor vehicle dispatcher depreciation fund is to be credited to the state's general fund as opposed to being credited back to the fish and game protection fund. (Lyman to Wilson, Director, State Conservation Commission, 7/26/84) #84-7-5(L)

July 26, 1984

Larry J. Wilson, Director
State Conservation Commission
Wallace State Office Building
L O C A L

Dear Mr. Wilson:

You have requested an opinion of this office as to whether interest earned on the portion of the motor vehicle dispatcher depreciation account transferred from the fish and game protection fund should be credited to the fish and game protection fund rather than the general fund.

Pursuant to Iowa Code § 453.7(2) (1983), interest or earnings on investments or time deposits are generally credited to the general fund of the governmental body making the investment or deposit, not to the agency or department whose funds have been deposited or invested. The section does, however, provide an exception for "specific funds for which investments are otherwise provided by law." The fish and game protection fund constitutes such an exception as stated in Iowa Code § 107.17 (1983), as amended by H.F. 2401, § 3, 70th G.A., Second Sess., 1984: "Notwithstanding section 453.7, subsection 2, interest or earnings of investments or time deposits of the funds in the state fish and game protection fund . . . shall be credited" to the fish and game protection fund. This special treatment of the

fish and game protection fund was first mandated by the 68th General Assembly, which as part of an appropriation bill directed that interest earned on the fund be credited back to the fund. 1979 Iowa Acts, Ch. 12, § 6.3. Three years later, the legislature permanently amended the Code to that effect. 1982 Iowa Acts, Ch. 1084. Consequently, the fish and game protection fund has retained the interest earned on the investment or deposit of its monies, rather than those earnings being credited to the state's general fund which would otherwise occur.

Incidental to the fish and game division's use of automobiles in carrying out its responsibilities, your agency makes depreciation payments from the fish and game protection fund to the state vehicle dispatcher's replacement fund (hereinafter "depreciation fund"). The purposes of this replacement fund, which is described at Iowa Code Supplement § 18.120 (1983), are to record the approximate loss in value of each state vehicle as a result of depreciation and to provide for their orderly replacement as the need arises. Although the amounts paid into the depreciation fund remain the property of the department or agency which makes such payments, the nature of the payments is clearly an expense. Iowa Code Supplement § 18.120 (1983).

Because the treatment of earnings and interest on fish and game protection fund monies represents an exception to the proposition that earnings and interest are credited to the general fund, the exception must be narrowly construed, with any doubts resolved in favor of the rule and against the exception. Heilinger v. City of Sheldon, 236 Iowa 146, 18 N.W.2d 182 (1945). As a matter of administrative practice, the fish and game protection fund has not been credited with interest earned on the portion of the depreciation fund transferred from the fish and game protection fund. There is no specific statutory authority to so credit the fish and game protection fund in Iowa Code Chapter 18 (1983), Iowa Code Supplement § 18.120 (1983), or Iowa Code Chapter 107 (1983), as amended by 1984 Iowa Acts, H.F. 2401, § 3. Likewise, when Iowa Code §§ 107.17 and 453.7(2) are construed in pari materia, no exception can be found for crediting the fish and game protection fund with interest earned on its payments to the depreciation fund, since Iowa Code § 107.17 limits the crediting of interest to earnings on "funds in the state fish and game protection fund." (Emphasis added.) Expense payments made to the depreciation fund on behalf of the fish and game protection fund by your agency do not constitute "funds in" the fish and game protection fund; rather, they are "funds in" the depreciation fund. The legislature clearly intended for the funds to be two separate entities.

Thus, it is our opinion that the interest earned on state fish and game protection fund payments to the state vehicle

dispatcher's depreciation fund is to be credited to the general fund as opposed to being credited back to the state fish and game protection fund.

Sincerely,

LYNDEN LYMAN
Assistant Attorney General

LL/cjc

OPEN MEETINGS LAW; GOVERNMENTAL BODY, Area Agency on Aging: 28A.2(1)(c); 249B.8, 45 C.F.R. 1321.61. By designation, the Iowa Commission on Aging formally created the Iowa Lakes Area Agency on Aging to fulfill public policy-making and decision-making functions which requires its meetings to be open to the public. The Iowa Association of Area Agencies has not been created by the State Commission and its meetings may be closed to the public. (Allen to Zenor, 7/11/84) #84-7-4(L)

Mr. Michael L. Zenor
Clay County Attorney
201 East Fifth Street
Spencer, Iowa 51301

July 11, 1984

Dear Mr. Zenor:

You asked the opinion of our office as to whether the Iowa Lakes Area Agency on Aging and the Iowa Association of Area Agencies on Aging are governmental bodies within the meaning of § 28A.2, The Code 1983. More specifically, the answers to your questions determine whether meetings of those organizations must be open to the public as required by § 28A.3, The Code.

As you correctly point out, that section requires only meetings of "governmental bodies" as defined in § 28A.2, The Code 1983, must be open to the public. As you describe the Iowa Lakes Area Agency on Aging, it is a governmental body only if it organizationally meets the definition contained in § 28A.2(1)(c), subsections a, b and d thereof being inapplicable. Applying the requirements of subsection c to the Iowa Lakes Area Agency on Aging, we believe it to be "a governmental body" and subject to the open meetings requirements. It is a "multimember body", "formally", and "directly created" by the Iowa Commission on Aging. The latter is a Commission expressly created by statute. (Section 28A.2(1)(a), The Code 1983.)

We believe this to be the correct result even though the history of the Iowa Lakes Area Agency on Aging as you recite it, indicates the Agency was incorporated under Ch. 504A, Iowa Code, on December 20, 1977, and was in existence for two years prior to designation as the official Area Agency on Aging by the Iowa Commission. As discussed at length in Op.Att'yGen. 79-5-4, the intent of the legislature in passage of Ch. 28A was to make governmental decisions more accessible to the public. "Ambiguity

in the construction or application of the Chapter should be resolved in favor of openness". The focus of the statute is on decision making and policy making. Although the Iowa Lakes Area Agency on Aging preexisted, it is those policy making and decision making functions as the designee of the Iowa Commission on Aging, for which, meetings are now held. For purposes of that decision making, as delegated to the Iowa Lakes Area Agency on Aging by the Iowa Commission (Section 249B.8, The Code 1983), the date of designation was the date of "creation". It was that designation which created the Iowa Lakes Area Agency on Aging as a public body.

Irrespective of the purpose or function for which the corporation had existed prior to designation as the Area Agency, thereafter the purpose of that organization is to fulfill Area Agency functions. (45 C.F.R. § 1321.61.) With respect to those public functions, the Area Agency was "created" by the State Commission, and the pursuit of those functions must occur in a meeting open to the public.

However, for nearly identical reasons, the Iowa Association of Area Agencies on Aging, is not a governmental body as defined in § 28A.2, The Code. The Association is neither designated or "created" by the State Commission on Aging (Section 28A.1(a) and (c). The Association is a membership organization, the purpose of which is provide a forum for the exchange of knowledge and information on legislative and administrative issues, to study and define working relationships between area agencies and local state and federal governments, and to stimulate and foster community support for programs of the area agencies. While these purposes are in support of, and consistent with, the public functions of the State Commission on Aging, they are nevertheless functions not contemplated by either the federal regulations nor the State enabling act (Section 249B, The Code 1983).

The lack of compliance with § 28A.2(1)(c) dictates our belief that the Association is not a governmental body and the meetings of such Association are, therefore, not subject to the requirements of Chapter 28A.

Respectfully submitted,

Gordon E. Allen
Special Assistant
Attorney General

GEA/jaa

INSURANCE: TAXATION: Premium tax on workers' compensation group self-insurance associations. Iowa Code sections 87.1, 87.4, 87.11, 87.21, 432.1 (1983). An association of employers under Iowa Code section 87.4 is subject to the tax under Iowa Code section 432.1 on the premiums or assessments paid by its members for coverage from liability for workers' compensation benefits. (Osenbaugh to Foudree, Commissioner of Insurance, 7/9/84) #84-7-3(L)

The Honorable Bruce W. Foudree July 9, 1984
Commissioner of Insurance
LOCAL

You ask the opinion of our office as to whether payments by the members of a workers' compensation group self-insurance association under Iowa Code section 87.4 (1983), for coverage of the members' statutory liability for workers' compensation benefits are subject to the statutory tax on gross premiums or assessments of an insurance company or association.

A bit of background is necessary in order to understand the context in which your question arises. In order to meet their liability under Iowa Code ch. 85 (1983), for workers' compensation payments to their employees, employers are required to either obtain workers' compensation insurance or be relieved from the requirement of obtaining such insurance. See Iowa Code section 87.1 (1983). The penalty for failing to either maintain insurance or be relieved from the insurance requirement is that a form of strict liability for injuries to or death of an employee is imposed on the employer. See Iowa Code section 87.21 (1983). Individual employers may secure relief from the insurance requirement by obtaining permission from the insurance commissioner. See Iowa Code section 87.11 (1983). Groups of employers may obtain relief by forming mutual insurance associations. Authorization for doing so is found in Iowa Code section 87.4 (1983), which states:

> For the purpose of complying with this chapter, groups or employers by themselves or in an association with any or all of their workers, may form insurance associations as hereafter

> provided, subject to such reasonable conditions and restrictions as may be fixed by the insurance commissioner; and membership in such mutual insurance organization as approved, together with evidence of the payment of premiums due, shall be evidence of compliance with this chapter.

Typically, an association under Iowa Code section 87.4 charges its members premiums or assessments in order to form a pool of funds to be used to provide coverage of the members' liability for workers' compensation benefits. Iowa Code section 432.1 (1983) sets forth the applicability of the tax on gross insurance premiums or assessments. It states in relevant part as follows:

> Every insurance company or association of whatever kind or character, not including fraternal beneficiary associations, and nonprofit hospital and medical service corporations, shall, as required by law, pay to the director of the department of revenue, or to a depository designated by the director, as taxes, an amount equal to the following, . . .:
>
> . . . .
>
> 2. Two percent of gross amount of premiums, assessments, and fees received during the preceding calendar year by every company or association other than life on contracts of insurance other than life for business done in this state, including all insurance upon property situated in this state, after deducting the amounts returned upon canceled policies, certificates and rejected applications but not including the gross premiums, assessments and fees in connection with ocean marine insurance authorized in section 515.48.

As a revenue law, this statute is strictly construed against the taxing body and liberally in favor of the taxpayer. See Iowa Mut. Tornado Ass'n v. Fischer, 245 Iowa

951, 65 N.W.2d 162, 165 (1954) (uncollected assessments not subject to tax); but see Iowa Mut. Tornado Ass'n v. Gilbertson, 129 Iowa 658, 106 N.W. 153 (1906) (state mutual insurance association held to be encompassed by predecessor of §432.1). Nevertheless, while the rule of strict construction of taxation statutes is one factor to be considered, it does not preclude consideration of other principles of statutory construction. See American Home Products v. Iowa State Bd. of Tax Review, 302 N.W.2d 140, 143 (Iowa 1981). One such important principle is that statutory words are used in their ordinary and usual sense with the meaning commonly attributed to them. Id. An association of employers under §87.4 would clearly appear to be an "insurance. . . association of whatever kind or character." It is significant that workers' compensation group employer associations have been accorded the status of mutual insurance companies under the federal income tax laws. See Rev. Ruling 83-172; Letter Rulings 8325042 (3/18/83), 8316033 (1/13/83), 8117035 (1/27/81). Of course, in order to be subject to the §432.1 tax, an association would have to offer an "insurance" contract.

In Huff v. St. Joseph's Mercy Hosp., 261 N.W.2d 695, 700 (Iowa 1978), the Iowa Supreme Court indicated that in determining whether a contract constituted "insurance," the form of the transaction must be looked through to determine whether the relationship of insurer and insured exists. Under State v. Timmer, 260 Iowa 993, 999, 151 N.W.2d 558, 561 (1967), quoted in Huff, an insurance contract is a contract in which one party, for a compensation called a "premium," assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency. An arrangement under which members of an association of employers under §87.4 pay premiums or assessments to the association and in turn receive guarantees of coverage of their liability for workers' compensation benefits obviously entails "insurance."[1] This is true even though

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[1]Of course, the premiums or assessments would have to be legally binding upon a member in the sense that they are not purely voluntary contributions. Cf. Timmer (benevolent association held not to offer "insurance" contract where members were not required to pay assessments and thus there was no guaranteed minimum benefit).

nothing referred to as an insurance "policy" is issued to a member; it is the contractual relationship of "insurance", derived from the charter documents of the association, which is determinative. Huff.

But this does not end the inquiry. Under the language of §432.1, companies or associations thereunder must be doing the "business" of insurance, since the tax is upon the premiums or assessments generated by that "business." Plans offered by employers to their employees providing for payment of benefits in the event of sickness or accident have been held not to be the "business of insurance" in non-tax contexts. See e.g., State ex rel Farmer v. Monsanto Co., 517 S.W.2d 129 (Mo. 1974). The controlling feature of those plans was the absence of commercial orientation or profit motive on the part of the employer in establishing them. Arguably, an association of employers under §87.4 which is likewise motivated only by a concern for the welfare of its members and not by profit is not engaged in the insurance "business." But any construction of §432.1 which would exclude corporations or associations not for profit is thwarted by the language of that section. Thereunder, there is an express exemption for fraternal beneficiary associations and nonprofit hospital and medical service corporations. The existence of a specific exemption for those types of nonprofit corporations and associations implies that had there been no specific exemption, they would have been subject to the tax. It is not presumed that the legislature intended that words in a statute should be given a redundant and useless meaning. See Hanover Ins. Co. v. Alamo Motel, 264 N.W.2d 774, 778 (Iowa 1978). Since there is no specific exemption for other than the types of nonprofit corporations and associations listed, it must be concluded that nonprofit corporations and associations generally are not exempt from the tax imposed by §432.1. "Taxation is the rule; exemption is the exception." Dow City Senior Citizen Housing, Inc. v. Board of Review, 230 N.W.2d 497, 499 (Iowa 1975).

Historically, §432.1 in its present form was enacted in 1900. See 1900 Iowa Acts, ch. 43, §5. (Premium taxation of insurance companies had existed since 1851. See Iowa Code §807 (1851)). At that point, the language "of whatever kind or character" was added after the words "insurance company

or association." Later, nonprofit hospital service corporations were authorized. See 1939 Iowa Acts, ch. 222. A specific exemption from the premium tax statute was then granted to those types of corporations. See 1945 Iowa Acts, ch. 212, §9. Yet no exemption was ever granted to §87.4 associations, which had been authorized in 1913. See 1913 Iowa Acts, ch. 147, §42. Thus, it is clear that the legislature knew that it could create an exemption from §432.1 if it desired.

We thus believe that a careful analysis of the relevant statutes leads to the conclusion that an association of employers under §87.4 is subject to the tax under §432.1. However, due to the importance of the question, arguments pointing to the opposite conclusion should be discussed. Once again, legislative history is again significant. As enacted, Iowa Code section 87.4 originally read as follows:

> For the purpose of complying with the foregoing section, groups of employers by themselves or in an association with any or all of their workmen, may form insurance associations as hereafter provided, subject to such reasonable conditions and restrictions as may be fixed by the state insurance department and membership in such mutual insurance organization as approved, together with evidence of the payment of premiums due, shall be evidence of compliance with the preceding section.

[Emphasis added]. 1913 Iowa Acts, ch. 147, §42. This section was part of the Act creating the original workers' compensation system of benefits and was contained in "Part III" of that Act, which set forth the manner in which employers were to ensure their liability under the new system. "Part III" constituted the core of the provisions presently contained in Iowa Code ch. 87. Nothing therein provided, or now provides, for the associations to pay premium taxes. It could be argued that the import of this section is that an association of employers for workers' compensation purposes is subject only to the remaining provisions of the original Act, which, as indicated, were

later codified in Iowa Code ch. 87. In other words, the apparent legislative intent is that those associations not be subject to the normal requirements for insurance companies, including payment of premium taxes, but only such reasonable conditions and restrictions as are imposed by the commissioner (presumably pursuant to rule under Iowa Code ch. 17A).

The difficulty with this argument, though, is that §432.1 is contained in the title of the Iowa Code, Title XVI, dealing with taxation. It is not part of the Code title, Title XX, covering insurance companies. That is, for purposes of insurance regulation, Title XX may govern an insurance entity exclusively, yet the entity is still subject to the tax under §432.1. Here, ch. 87 is analogous to Title XX: for insurance, but not tax, purposes, it is exclusive as to the entities covered by it. The exclusivity of ch. 87 for taxation purposes would be an easier argument to make if the premium tax was in Title XX, rather than in a separate title pertaining to taxation. By way of example, hospital service corporations are "exempt from all other provisions of the insurance laws of this state. . .." besides ch. 514. Iowa Code section 514.1 (1983) (emphasis added). Yet, other than the fact that there is a specific exemption in §432.1 for those corporations, they would be subject to the tax imposed by that section. Thus, as a matter of statutory construction, the "reasonable conditions and restrictions" under §87.4 which the Commissioner may impose (by ch. 17A rule, of course) relate to requirements of an insurance, and not a taxation, nature.

Indeed, were it otherwise, the Commissioner would presumably be able to impose the tax by rule as part of the "reasonable conditions and restrictions". Yet he would lack the power to do so. It is elementary that taxation may only be by statute. See 84 C.J.S. Taxation §58, at 157 (1954). "[T]he legislature imposes the tax and only the legislature can grant exemptions." Iowa Movers and Warehousemen's Ass'n v. Briggs, 237 N.W.2d 759, 765 (Iowa 1976) (emphasis in original); see also S & M Finance Co. v. Iowa State Tax Comm'n, 162 N.W.2d 505, 510 (Iowa 1969) ("The commission is powerless to adopt rules inconsistent with, or in conflict with, the law to be administered. It may neither impose a

tax nor grant an exemption."); Des Moines and Central Iowa Ry. Co. v. Iowa State Tax Comm'n, 253 Iowa 994, 999, 165 N.W.2d 178, 181 (1962) (same).

Section 87.4 has existed since 1913, and associations have existed thereunder since 1957. It is true that there has never been any attempt to collect the §432.1 tax from §87.4 associations on the part of the insurance commissioner or revenue director. Yet mere acquiescence or failure to collect a tax is not a defense to new efforts to do so. See S & M Finance Co. at 511. As seen, the revenue collecting authority cannot create a tax exemption where none exists by statute. Id. at 510; Des Moines and Central Iowa Ry.; see also Sullivan v. Iowa Departmental Hearing Bd., 325 N.W.2d 923, 927 (Iowa Ct. App. 1982) ("the doctrine of equitable estoppel cannot be invoked against the State").

We recognize that there has been legislative silence in the face of the insurance commissioner's practice of not collecting the §432.1 tax from associations under §87.4. But we believe that the correct analysis of the existing statutes is that those associations have always been subject to that tax. It is, after all, possible to draw too much significance from the legislative failure to respond to the insurance commissioner's acquiescence. The legislature can easily clarify the situation if it disagrees with the conclusion reached here.

Accordingly, it is our opinion that an association of employers under §87.4 is subject to the tax under §432.1 on the premiums or assessments paid by its members for coverage from liability for workers' compensation benefits.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

MUNICIPALITIES: Council members. Disqualification from volunteer fire department. An ordinance which prohibits a city council member from serving on a volunteer fire department, assuming a legitimate intent, is valid. (Walding to Hutchins, State Senator, 7/3/84) #84-7-2(L)

July 3, 1984

The Honorable Bill Hutchins
State Senator
412 E. Division
Audubon, Iowa 50025

Dear Senator Hutchins:

We are in receipt of your letter requesting an opinion of the Attorney General regarding the following question:

> Can a City Council adopt a city ordinance to prohibit volunteer firemen from seeking the office of City Council or serving as a member of the Council?

At issue, we were subsequently informed, is an ordinance recently adopted by the City of Merrill, Iowa which provides, in pertinent part, that: "No elected city official shall be an active member of the Merrill City Fire Department during the term of his elective office." City of Merrill, Iowa, Municipal Ordinances, § 11-1. Because the ordinance does not seek to regulate the conduct or activities of candidates for office, we limit our examination of the validity of such an ordinance as it relates to elected officials.

Initially, it is observed that the ordinance in question does not prohibit any individual from serving on the Merrill City Council. What the ordinance does seek to regulate is the authority of a council member to belong to the local volunteer fire department.

Volunteer fire departments, found in many of Iowa's smaller communities, function as a branch of city government. In addition to receiving municipal financial support, volunteer fire departments may expose a municipality to general liability. See generally, 16 McQuillin, Municipal Corporations, § 45.05 (3rd ed. 1979). Thus, service on a volunteer fire department would constitute quasi-public employment.

The United States Supreme Court has held that an individual does not have a constitutionally-protected fundamental right to public employment. Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548, 558-59 (1972). A similar result was reached by the Iowa Supreme Court. Anderson v. Low Rent Housing Commission, Etc., 304 N.W.2d 239, 243-45 (Iowa 1981). Thus, a municipality need only demonstrate a rational basis for the ordinance in question. One basis for an ordinance disqualifying a city council member from serving on a volunteer fire department would be the avoidance of conflicts of interest and potential incompatabilities of office. See generally, 3 McQuillin, Municipal Corporations, § 12.66 (3rd ed. 1979). Accordingly, a municipality could enact an ordinance prohibiting a city council member from serving on a volunteer fire department. We caution, however, that a similar result may not follow if an illicit motive for the enactment of the ordinance, such as the elimination or reduction of electoral opponents, can be demonstrated.

We conclude by noting that other ordinances prohibiting certain employment have been sustained. For instance, in Jurgens v. Davenport, Rock Island & N. W. Ry. Co., 249 Iowa 711, 88 N.W.2d 797 (1958), the Court held valid an ordinance prohibiting police officers from performing any service for private individuals or receiving compensation from any source other than their salary.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:sh

COSMETOLOGISTS: The Practice of Rendering Cosmetology Services to Residents of Nursing Homes in Iowa By Licensed Cosmetologists. Iowa Code § 157.13(1) and 470 I.A.C. 58.31(3), 59.36(3), 58.32(2), 59.37(2), 61.6(1). Cosmetologists who provide cosmetology services with or without compensation in an intermediate or skilled nursing facility for residents who have a physical or mental disability are exempt from practicing cosmetology in an unlicensed salon under Iowa Code § 157.13(1). (Hart to Pawlewski, Commissioner of Health, 7/3/84) #84-7-1(L)

July 3, 1984

Norman Pawlewski
Commissioner of Health
Lucas Building
L O C A L

Dear Commissioner Pawlewski:

We are in receipt of your recent request for an Attorney General's opinion concerning the legality of the practice of licensed cosmetologists visiting residents of health care facilities to render cosmetology services. You have specifically asked:

> Whether cosmetologists who provide cosmetology services both with or without compensation in an intermediate care facility or skilled nursing facility for residents of the facility, who have a physical or mental disability are exempt under the provisions of Iowa Code Section 157.13(1) from practicing cosmetology in a licensed beauty salon.

Iowa agencies have been delegated the authority by the General Assembly to construe their own statutes as the agency exercises its legislative, prosecutorial, and judicial powers. It is our opinion that the practice referred to in your request is permitted under Iowa Code § 157.13(1).

Iowa Code Section 157.13(1) provides generally that "[i]t is unlawful for a licensed cosmetologist to practice cosmetology with or without compensation in any place other than a licensed beauty salon or licensed school of cosmetology . . .". That section, however, provides an exception to this general requirement. "[A] licensed cosmetologist may practice cosmetology at a location which is not a licensed beauty salon or school of cosmetology under extenuating circumstances arising from physical or mental disability or death of a customer." Id. This exception is a codification of public policy. A physically or mentally disabled person might have limited mobility for various reasons. Because of this, the cosmetologist would be required to visit the home of the disabled person to render services. It is unrealistic to require the Board of Cosmetology to issue salon licenses to every home in which such disabled persons reside. A pragmatic solution to this problem is the exception created in Iowa Code Section 157.13(1).

We believe it is reasonable to conclude that persons who have a physical or mental disability and reside in an intermediate care facility or skilled nursing facility would satisfy the requirements of Iowa Code § 157.13(1) and may receive the services of a cosmetologist at the facility. This conclusion is further supported by the fact that Health Department rules for these facilities recognize the need for cosmetology services on site for these residents.

Health care facilities in Iowa are presently regulated by the Department of Health pursuant to Iowa Code Chapter 135C. The Division of Health Care Facilities requires intermediate and skilled facilities to provide a personal care room in which beauty shop services may be provided to the resident. 470 I.A.C. 61.6(1). The rules further provide sanitation requirements, violation of which could result in citation. See 470 I.A.C. 58.31(3) and 59.36(3), 58.32(2) and 59.37(2). Even in these circumstances, it is conceivable that the resident might be unable to meet with the cosmetologist in any place other than his or her room at the nursing home.

In conclusion, it is our view that a cosmetologist may provide services to disabled residents of an intermediate care facility or a skilled nursing facility without violating Iowa Code § 157.13(1).

Sincerely,

Elizabeth Hart

ELIZABETH HART
Assistant Attorney General
Health Division

EH/cjc

INCOMPATIBILITY OF OFFICES; Iowa Code Chs. 280 and 331 (1983). The positions of member of the board of directors of an area vocational school and member of the county board of supervisors are not incompatible. (Weeg to Tofte, State Representative, 8/21/84) #84-8-7(L)

August 21, 1984

Honorable Semor C. Tofte
State Representative
210 Mound, Apartment 3
Box 276
Decorah, Iowa 52101

Dear Representative Tofte:

You have requested an opinion of the Attorney General as to whether the doctrine of incompatibility of offices is violated when a member of the Northeast Iowa Technical Institute Board of Directors[1] is appointed to fill a vacancy on the county board of supervisors.[2] It is our opinion that these two positions are not incompatible.

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[1] It is our understanding that the Northeast Iowa Technical Institute is a part of the area vocational school and community college system governed by the provisions of Iowa Code Ch. 280A (1983).

[2] We note that the position of members of the board of trustees is an elective position. See § 280A.11. In the event this position were appointive rather than elective, § 331.216 would dictate the answer to your question. That section provides as follows:

> Unless otherwise provided by state statute, a supervisor may serve as a member of any appointive board, commission, or committee of this state, a political subdivision of this state, or a nonprofit corporation or agency receiving county funds.

(emphasis added) Enactment of this provision in 1981 (see 1981 Iowa Acts, ch. 117, § 215) effectively overruled the doctrine of incompatibility as to members of a board of supervisors who

The common-law doctrine of incompatibility holds that "if a person, while occupying one office, accepts another incompatible with the first, he ipso facto vacates the first office, 'and his title thereto is thereby terminated without any other act or proceeding.'" State v. White, 257 Iowa 606, 133 N.W.2d 903, 904 (1965) (incompatibility exists between duties of member of school board and member of county board of education), citing State v. Anderson, 155 Iowa 271, 136 N.W. 128, 129 (1912). See also 1982 Op.Att'yGen. 220.

In 1982 Op.Att'yGen. 220 we concluded that the first step in analyzing whether two positions are incompatible is to determine whether the two positions are both public offices: if one or both are not, the incompatibility doctrine is inapplicable. We referred to the Iowa Supreme Court's five-factor test set forth in State v. Taylor, 260 Iowa 634, 144 N.W.2d 289, 292 (1966), in making this determination. Applying this test in the present case, we conclude that both a county supervisor and a member of an area vocational school's board of directors are public officers:

> 1. Both positions are created by the legislature. See §§ 331.201 and 280A.11-12;
>
> 2. Both positions have been delegated a portion of the sovereign power of government. See, e.g., §§ 331.303-471 (supervisors' responsibilities with regard to county government) and 280A.12-13, 17-19, 22-24, 31-32, 35, 37-38, 42-43) (directors' responsibilities with regard to area vocational schools and community colleges);
>
> 3. The duties and powers of each position are defined by the legislature. See section 2, above;
>
> 4. The duties of each position are performed independently and without control of a superior power other than the law;[3] and

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[2] (cont'd) simultaneously hold appointive positions. Elective positions were not exempted, so the common-law doctrine continued to apply in situations such as the present one.

[3] Ch. 280A does subject certain actions of the board of directors to review and approval by the state board of public instruction. See, e.g., § 280A.17 (authority of state board to

> 5. Both positions have some permanency and continuity, and are not temporary and occasional. See §§ 331.201 and 280A.11.

Following the analysis of 1982 Op.Att'yGen. 220, the next step is to determine whether incompatibility exists by comparing the respective statutory duties of the two offices, using the following guidelines:

> ". . . the test of incompatibility is whether there is an inconsistency in the function of the two [offices], as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' (citations omitted) A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' (citations omitted)"

1982 Op.Att'yGen. 220, citing Anderson, supra, 136 N.W. at 129.

A review of the statutory duties of both offices here in question leads us to conclude that there appear to be no instances in which either office would exercise any supervisory or revisory power over the other, nor do the duties of both offices seem "inherently inconsistent and repugnant." Instead, it appears the two offices have jurisdiction over entirely different subject matters and have little occasion to interact. The only situation we can find in which statutory duties of each office overlap or are otherwise interrelated arises as a result of § 280A.17, which governs preparation of the budget for a Ch. 280A institution. That section directs the board of

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[3] (cont'd) review and approve budgets). However, we do not believe that this fact alone divests a member of the board of directors of his or her status as a public official, particularly in light of the fact that the four other prongs of the "public official" test are clearly satisfied. To conclude that such review divests persons of their public official status would result in a great number of persons now unquestionably viewed as public officials being relegated to the status of employees. See, e.g., § 24.23 (review of budgets of all municipalities by state appeal board).

directors to prepare an annual budget, which is to, inter alia, designate amounts to be raised by local taxation and by other sources. Section 280A.17 goes on to provide that:

> . . . Upon approval of the budget by the state board [of public instruction], the board of directors shall certify the amount to the respective county auditors and the boards of supervisors annually shall levy a tax of twenty and one-fourth cents per thousand dollars of assessed value on taxable property in a merged area for the operation of an area vocational school or area community college. Taxes collected pursuant to such levy shall be paid by the respective county treasurers to the treasurer of the merged area in the same manner that other school taxes are paid to local school districts.
>
> It is the policy of this state that the property tax for the operation of area schools shall not in any event exceed twenty and one-fourth cents per thousand dollars of assessed value, and that the present and future costs of such operation in excess of the funds raised by such levy shall be the responsibility of the state and shall not be paid from property tax.

(emphasis added) Thus, though the supervisors are responsible for levying a tax upon certification of the amount to the auditor by the board of directors, exercise of this duty, as emphasized above, is mandatory. Because the supervisors exercise no discretionary authority over the board of directors in this matter, we do not believe this single overlapping statutory duty is of significance. Further, the supervisors are not involved in any other aspect of financing Ch. 280A institutions. See §§ 280A.18-22.

Thus, we conclude that the position of member of the board of directors of an area vocational school is not incompatible with the position of member of the county board of supervisors. Cf. State v. White, supra (positions of school board member and county board of education member are incompatible because of numerous overlapping statutory duties and county board's supervisory role over local school boards). However, we would caution you that, even though two positions may not be incompatible, there may be situations in which conflict of interest problems could arise. We mention this simply to alert you to this possi-

bility. The discussion of conflict of interest principles in 1982 Op.Att'yGen. 220 may provide you with some guidance in this area.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

ENVIRONMENTAL LAW: Drainage Districts -- Iowa Code §§ 455.128, 455.202(1), 457.28 (1983). The joint boards of supervisors of the counties forming a drainage district organized under chapter 457 of the Iowa Code or the District Trustees have authority to levy taxes to fund the District's portion of a fish tagging study which will not be paid by the federal government where the study is a cost either incident to the district's adoption of a plan for original construction of an improvement or the repair or alteration of an existing structure to be undertaken by a proper agency of the United States government or incident to the construction itself. (Hamilton to Ballou, Executive Director, Department of Water, Air and Waste Management, 8/7/84) #84-8-6(L)

August 7, 1984

Mr. Stephen W. Ballou
Executive Director
Department of Water, Air and
Waste Management
Wallace State Office Building
L O C A L

Dear Mr. Ballou:

Your request for an opinion of the Attorney General has been received. You asked whether a drainage district established pursuant to Iowa Code Chapter 457 (1983) has the authority to levy a tax on district residents to fund a fish tagging study that must be performed in conjunction with the construction of a flood control structure by the U.S. Army Corps of Engineers. The background facts which you provided in your letter reveal that the Corps of Engineers must have a certification from the Iowa Department of Water, Air and Waste Management affirming that the construction of the proposed bedgrade control structure will be conducted in a manner which will not violate the water quality standards for the State of Iowa. This certification is a necessary part of the application process for a construction permit, applied for by the Corps of Engineers in accordance with Section 404 of the Clean Water Act.

The body of water which would be affected by this structure is the Little Sioux River. Its designated water use is for wildlife, aquatic life, and secondary body contact. I.A.C. 900--61.3(5)(e). This existing designated water use must be maintained. I.A.C. 900--61.2(2)(a). Thus, the existing aquatic life must be maintained. Because the theory that fish will move through the low-flow notch of the planned bedgrade control structure remains untested, a fish tagging study is needed to determine whether such movement would in fact take place. As the

movement of fish is crucial to the maintenance of the existing aquatic life level, the fish tagging study is a requirement for the state certification being sought by the Corps of Engineers.

Drainage districts established under Iowa Code Ch. 457 embrace land in two or more counties. However, § 457.28 states that "[e]xcept as otherwise stipulated in this chapter the provisions and procedure set forth in chapter 455 shall govern and apply to the formation, establishment and conduct of every levee or drainage district extending into two or more counties . . . ." This includes all matters relating to ". . . the rights, privileges, and duties of all persons, landowners, officers, appellants, and courts." Iowa Code § 457.28 (1983).

Chapter 455 concerns the powers and duties vested in single county drainage districts. Section 455.202(1) in relevant part provides that:

> Whenever the government of the United States acting through its proper agencies or instrumentalities will undertake the original construction of improvements or the repair or alteration of existing improvements which will accomplish the purposes for which the district was established or aid in the accomplishment thereof and shall cause to be filed in the office of the auditor of the county in which said district is located a plan of such improvement . . . the board shall have the jurisdiction, power and authority, upon the notice, hearing and determination hereinafter provided, to adopt such plan of improvement . . . and to pay such portion of all costs and damages incident to the adoption of such plan, [and] the construction thereunder . . . as will not be discharged by the federal government under legislation existing at the time of adoption . . . . (emphasis added).

It should be noted that it is not the drainage district itself but the county board of supervisors that is given the authority to pay the costs incurred under this provision. However, if the control of the drainage district has been placed in the hands of a board of trustees, elected in the manner provided for under Iowa Code § 462.1, the board of trustees ". . . shall be clothed with all of the powers . . . conferred on the board or boards of supervisors . . . ." Iowa Code § 462.27 (1983). The authority to levy a tax to meet costs is granted under §§ 455.57 and 455.213. The process for the assessment of benefits and the

levying of costs on the basis of the classification for benefits is explained in sections 455.212 and 455.213.

Iowa Code § 455.202(1) does contain language authorizing financial cooperation with the United States government. 1962 Op.Att'yGen. 196. This cooperation is authorized when a proper agency of the United States will undertake original construction of the improvement. In this instance, the U.S. Corps of Engineers is the proper agency which is undertaking original construction. Furthermore, this original construction is to further a purpose for which a drainage district is established, namely flood control.[1] As the fish tagging study is a requirement for certification and thereby a requirement for the permit to construct, the cost of the study may be considered a cost incident to construction, if not incident to adoption of the construction plan. Therefore, if a one-county drainage district were the situs of the proposed structure, the board could properly levy a tax on the district residents to pay for that portion of the fish tagging study not discharged by the federal government once the plan had been filed with the county auditor's office and properly adopted by the board.

Unless there is a provision in chapter 457 which would prevent the application of § 455.202(1) et seq. to intercounty drainage districts, the levying of taxes upon the residents of such an intercounty drainage district for the previously stated benefit would be governed by the same criteria. This is particularly true in light of the fact that Iowa Code § 455.182 requires that:

> [t]he provisions of this chapter and all other laws for the drainage and protection from overflow of agricultural or overflow lands shall be liberally construed to promote

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[1] Section 455.2 of the Iowa Code provides that:

> "[t]he drainage of surface of waters from agricultural lands and all other lands or the protection of such lands from overflow shall be presumed to be a public benefit and conducive to the public health, convenience and welfare (emphasis added).

See also Iowa Employment Sec. Comm'n v. Des Moines County, 260 Iowa 341, 149 N.W.2d 288 (1967). It is this requirement of public benefit that Iowa Code § 455.1 states is the basis for the power to establish a drainage district.

> leveeing, ditching, draining, and reclamation of wet, swampy, and overflow lands.

A careful reading of chapter 457 does not reveal any provisions which would prevent the application of Iowa Code § 455.202(1) et seq. (1983) to intercounty drainage districts.

Proper consideration must be given to § 455.202(1) as well. In relevant part, this provision reads:

> If the cost to the district of the repair or alteration of existing improvements contemplated by this section does not exceed twenty-five percent of the sum of the original cost to the district and the cost of subsequent improvements, the board may proceed under the provisions of section 455.135 without notice and hearing and without appraisement . . . .

Thus, if the cost will be in excess of the allowable twenty-five percent, the provisions for notice and hearing and appraisement must be adhered to. (See Iowa Code §§ 455.207 and 455.211).

It is therefore the opinion of this office that where the proper intercounty drainage district adoption procedures are followed (see Iowa Code §§ 455.202(2), 457.9, 457.12, 457.15), the joint boards of supervisors of the counties which form a drainage district organized under Chapter 457 of the Iowa Code or the Board of Trustees duly elected to manage the drainage district may cooperate in financial matters with the United States government as the board of supervisors in a single county drainage district would under the authority granted by Iowa Code § 455.202. This would include the authority to levy taxes to fund the District's portion of the cost of a fish tagging study where the study is a cost incident to the district's plan for construction, repair or alteration of a structure to be undertaken by the United States government or incident to the construction itself.

Sincerely,

Elena-Maria Hamilton

ELENA-MARIA HAMILTON
Assistant Attorney General

EMH:rcp

GAMBLING; REVENUE, DEPARTMENT OF: Revocation of gambling licenses; Iowa Code §§ 99B.2, 99B.14. Even if a gambling license is revoked for a period of less than two years, a gambling license may not be issued for the location at which the violation occurred for two years. A gambling licensee whose license was revoked permanently under the statute prior to July 1, 1984 may not have the period of revocation shortened to the two year maximum revocation which is effective after July 1, 1984. (Williams to Bair, Director, Department of Revenue, 8/7/84) #84-8-5(L)

August 7, 1984

Gerald D. Bair
Director
Iowa Department of Revenue
Hoover Building
L O C A L

Dear Mr. Bair:

You have requested an opinion of the Attorney General regarding several matters concerning the new legislation effecting Chapter 99B gambling. Specifically you have asked:

> 1. House File 2015 authorizes revocation of licenses for a period not to exceed two years rather than permanently as in the past. The director comtemplates revocations of varying durations, some of which will be only 30 to 60 days in length. Specifically, you wish to know whether the location at which the license has been operating at the time of revocation can be used to conduct gambling activities within two years of the revocation.
>
> 2. Prior to July 1, 1984, all revocations of gambling licenses were permanent. You wish to know whether revocations which occurred prior to July 1, 1984 are permanent as indicated under the old law or whether those licensees may reapply at some time in the future.

Iowa Code §§ 99B.14 relating to revocations and 99B.2 relating to issuing licenses govern the situation referred to in your first question.

The relevant portion of § 99B.14 was amended by H.F. 2015 of the 70th General Assembly as follows:

> If the department finds cause for revocation, the license shall be revoked and ~~thereafter no license may be issued to the person or to the agent of the person found to be in violation of this chapter~~ for a period not to exceed two years.

Iowa Code § 99B.2 governing the issuance of licenses contains the following language:

> However, a license shall not be issued to an applicant who has been convicted of or pled guilty to a violation of this chapter, or who has been convicted of or pled guilty to a violation of chapter 123 that resulted, at anytime, in revocation of a license issued to the applicant under chapter 123 or that resulted, within the twelve months preceding the date of application for a license required by this chapter, in suspension of a license issued under chapter 123. **A license also shall not be issued for a location for which a previous licenses issued under this chapter or chapter 123 has been revoked within the preceding two years.**

(Emphasis added.)

While the legislature shortened the period of revocation, it did not alter the location restrictions already in The Code. It should be noted that, although the two year ban upon issuing a license for a location seems excessive when compared with the comparatively short length of some revocations now proposed by the director, the restriction is not significantly more harsh than that which has always been required for a location where a liquor license is suspended under the provisions of Iowa Code § 123.50 for 14 days for selling liquor to a minor.

Iowa Code § 4.4 governing the presumption of enactment provides that it is presumed that the entire statute is intended to be effective. In that there is no ambiguity between the statutes, they are not irreconcilable as contemplated by § 4.8 and there already were provisions in The Code which might be deemed to be equally harsh, it is the opinion of this office that the department may not issue a license pursuant to chapter 99B for a location at which gambling activities had been conducted resulting in revocation of a license within the past two years.

With respect to your second question, Iowa Code § 4.13 sets out the general savings provision stating:

> The reenactment, revision, amendment, or repeal of a statute does not effect: 1) the prior operation of the statute or any prior action taken thereunder; 2) any validation, cure, right, privilege, obligation or liability previously acquired, accrued, accorded, or incurred thereunder; 3) any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal; or 4) any investigation, proceeding, or remedy in respect of any privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued or enforced, and the penalty, forfeiture, or punishment imposed as if the statute had not been repealed or amended.
>
> If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment if not already imposed shall be imposed according to the statute as amended.

Section 4.5 concerning prospective and retrospective construction states:

> Prospective Statutes. A statute is presumed to be prospective in its operation unless expressly made retrospective.

If a license has been revoked prior to July 1, 1984, the department may not thereafter reduce the punishment from a permanent revocation to a two year revocation as contemplated by S.F. 2015. If, however, the department enters a final revocation order after July 1, 1984 based upon conduct occurring prior to July 1, 1984, the department may only impose a two year revocation.

Respectfully submitted,

Richard A. Williams

RICHARD A. WILLIAMS
Assistant Attorney General
Area Prosecutions Division

bjr

COUNTY: COUNTY OFFICERS: Iowa Code Ch. 252, §§ 252.24, 252.25, 252.27. Iowa Code § 252.24 does not allow each county to limit its liability to counties rendering relief. The county of legal settlement is responsible for all reasonable charges and expenses incurred in the relief and care of a poor person, regardless of whether those expenses would have been incurred within the county of legal settlement. (Williams to Poppen, Wright County Attorney, 8/7/84) #84-8-4(L)

Mr. Lee E. Poppen
Wright County Attorney
P. O. Box 111
Clarion, Iowa 50525

August 7, 1984

Dear Mr. Poppen:

You ask whether a county of legal settlement may limit reimbursement to another county for general relief provided by that other county. The answer is no.

At common law, the public authorities of each county have no duty to support paupers or other needy persons. Such duty, where it exists, rests entirely on statute. Michel v. State Board of Social Welfare, 245 Iowa 961, 65 N.W.2d 98 (1954). Iowa has such a statutory scheme. Iowa Code Ch. 252 dictates that each county provide assistance to persons unable to earn a living by labor due to either a physical or mental disability. 1978 Op.Att'yGen. 766. Specifically, Iowa Code § 252.25 provides that:

> The board of supervisors of each county shall provide for the relief of poor persons in its county who are eligible for, or are in immediate need and are awaiting approval and receipt of, assistance under programs provided for state or federal law, or whose actual needs cannot be fully met by the assistance furnished under such programs.

Iowa Code § 252.24 allocates the ultimate financial responsibility for such relief to the county of legal settlement. 1981 Op.Att'yGen. 8-19(L); 1971 Op.Att'yGen. 766.

> The county where the settlement is shall be liable to the county rendering relief for all reasonable charges and expenses incurred in relief and care of a poor person.
>
> When relief as herein provided is furnished by any governmental agency of the county, township or city, such relief shall be deemed to have been furnished by the county in which such agency is located and the agency furnishing such relief shall certify the correctness of the costs of such relief to the board of supervisors of such county and said county shall collect from the county of such person's settlement. The amounts herein collected by said county shall be paid to the agency furnishing such relief.

Iowa Code § 252.24. (Emphasis supplied.)

Clearly, § 252.24 requires the county of legal settlement to pay all reasonable charges and expenses incurred in the relief and care of a poor person. Thus, your question devolves to whether the county of settlement may legislatively define what classes of relief constitute reasonable charges or expenses. Such a result appears to be inconsistent with the remainder of the statute and the intent of the statute.

Initially, it is important to remember that each individual seeking relief is different. The relief necessary to assist that individual must necessarily vary. Our statutory framework vests within the board of supervisors of the relieving county the discretion to determine the form of relief necessary. Iowa Code § 252.27. Thus, the county supplying assistance is placed in the position of making the initial determination of the reasonableness of the charges and expenses incurred.

Obviously, the county of settlement may challenge the reasonableness of any charge or expense.[1] However, there is no statutory authority for the county to promulgate inflexible "reasonableness" standards and unilaterally impose those reimbursement limits on the county of assistance.

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[1]The procedure for such challenges is delineated in Iowa Code § 252.27.

Secondly, the second paragraph of § 252.24 implies that the costs of relief certified by the providing agency constitute the amount to be collected from the county of settlement. The clear import of that language is to link the costs of providing relief to the amount of reimbursement. This cost provision supports the conclusion that the legislature intended Iowa Code § 252.24 to uniformly allocate or pass through the necessary costs of providing general relief to the county of legal settlement.

To interpret the reasonable charge and expense language cited above to allow imposition of county-by-county interpretations, would cause the county rendering relief to be subject to different reimbursement rates depending upon the individual assisted. Such an interpretation would be inconsistent with the clear legislative intent of § 252.24 to provide a uniform allocation of the costs of general relief to the county of settlement.

Each statute "shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice", Iowa Code § 4.2. A construction of § 252.24 which allows each county of settlement to legislate reimbursement limits would not promote the object of the statute in allocating the costs of general relief to the county of settlement. Nor would such a construction assist the relieving county in obtaining just recompense for the aid furnished to individuals who are settled in other counties. Further, justice would not be served by making one county bear fiscal responsibility for those individuals while another reaps fiscal benefit from them.

Additionally, such construction would have a disruptive effect on the provision of services to nonresidents. There is already substantial confusion among many counties as to the effect of our legal settlement laws. An interpretation of § 252.24 which allows each county to set its reimbursement rates would imply that the county rendering relief need only render relief to the set reimbursement rate. Our legal settlement laws merely operate to allocate financial responsibility, not determine entitlement. Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). See also, Contemporary Studies Project: General Assistance in Iowa, 61 Iowa L.Rev. 1155, 1257 (1976).

In conclusion, Iowa Code § 252.24 does not allow each county to limit its liability to counties rendering relief. The county of legal settlement is responsible for all reasonable charges and expenses incurred in the relief and care of a poor person,

regardless of whether those expenses would have been incurred within the county of legal settlement.

Cordially,

Matthew W. Williams
Assistant Attorney General

MWW/jaa

CIVIL RIGHTS: Public Accommodation. Iowa Code §§ 601A.2(10) and 601A.7 (1983); 1984 Iowa Acts, House File 2466. A private club must be considered a public accommodation, within the meaning of Iowa Code § 601A.2(10) as amended, 1984 Iowa Acts, House File 2466, and is therefore subject to all the requirements of Iowa Code § 601A.7 (1983) for the duration of all time periods when guests are allowed on the premises. In addition, the use of the facilities on a trial basis by prospective members will also subject a private club to all requirements of section 601A.7 for the duration of that prospective member's presence on the premises. The issue of whether a prospective member receives an offer for the services, facilities or goods by the club while touring the premises would require a determination of the facts surrounding such a tour and is thus an issue which should be entrusted in the first instance to the Iowa Civil Rights Commission. (Hamilton to Pavich, State Representative, 8/1/84) #84-8-3(L)

The Honorable Emil S. Pavich
House of Representatives
State Capitol Building
L O C A L

August 1, 1984

Dear Representative Pavich:

Your request for an opinion of the Attorney General has been received. Specifically, you asked the following questions:

> 1. Are members of private organizations permitted to bring their immediate family as guests? If so, is there an age limit?
>
> 2. Are private clubs permitted to bring prospective members into their facilities so that they can see what the private club has to offer to their members? If so, are there any conditions the private clubs must meet?
>
> 3. Are members permitted to bring guests to their facilities even if they are not members?

These questions have been raised with respect to the text of 1984 Iowa Acts, House File 2466, amending the definition of a public accommodation as previously found at Iowa Code section 601A.2(10) (1983). This amendment was signed by the governor on April 17, 1984, and became effective on July 1, 1984.

Prior to this amendment, § 601.2(10) defined a public accommodation and provided the following exception for private clubs:

> Public accommodation shall not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the general public for fee or charge or gratuitously, it shall be deemed a public accommodation during such period.

The amended definition now provides the following exception:

> Public accommodation shall not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the nonmembers for fee or charge or gratuitously, it shall be deemed a public accommodation during such period.

(emphasis added) 1984 Iowa Acts, House File 2466.

There is nothing in the amendment, or in chapter 601A, which would prevent a member of a private club from bringing guests on the premises. Nor is there any prohibition against the presence of prospective members on the premises of a private club for the purpose of examining the facilities made available to members. Therefore, your question is being construed as a request for the opinion of this office as to whether or not the presence of these individuals would cause the club to fall under the category of "public accommodation" and subject it to the provisions of Iowa Code § 601A.7 (1983) (unfair or discriminatory practices at a public accommodation).

Prior to the amendment, a bona fide private club was deemed a public accommodation only during such periods as it catered or offered services, facilities or goods to the general public. House File 2466 changed this section and now provides that a private club is considered a public accommodation during the times a nonmember is catered or offered services, facilities or goods.

Iowa Code § 601A.18 (1983) states that the provisions of the Civil Rights Act of 1965 ". . . shall be construed broadly to effectuate its purposes." The Supreme Court of Iowa has determined that it is the duty of the court in interpreting civil rights legislation to ". . . effectuate the legislative purpose and design as the court finds them expressed by the language and

the spirit of the statute." Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 770 (Iowa 1971). In Iron Workers Local the court considered the purpose of the Act, as stated in its full title, in determining the spirit of the statute. Id. One of the purposes stated in the title of the Civil Rights Act of 1965 is ". . . to eliminate unfair and discriminatory practices in public accommodations . . . ." This purpose must be kept in mind as the amended statute is examined.

As the language of the statute must also be taken into consideration, it should be noted Iowa Code § 4.1(2) (1983) requires that "[w]ords and phrases shall be construed according to the context and the approved usage of the language . . . ." Thus, when the legislature has not defined key words in a statute, the court may look to dictionary definitions to determine the ordinary meaning of those words. State v. Steenhock, 182 N.W.2d 377 (Iowa 1970).

Webster's Third New International Dictionary, p. 1537 (1976) defines the word "nonmember" as "an individual that is not a member" while a "member" is "one of the individuals composing a society, association or other group: a person who has been admitted usually formally into some social or professional society typically requiring payment of dues, adherence to a program or compliance with some other requirements of membership." Id. at 1408.

It is clearly stated that during the times when services, facilities or goods are catered or offered to nonmembers the club is to be considered a public accommodation. This is much more specific than the pre-amendment "general public." Through this substitution in language the legislature has created two distinct categories of individuals in the amended section 601A.2(10). One classification is that of "member" and the other classification is that of "nonmember." A guest is not a member and must therefore be considered a "nonmember," regardless of the relationship between the guest and the host member. If the club "offers services, facilities or goods" to the guest/nonmember, then for the duration of the period that such a guest/nonmember is on the premises the private club must be considered a public accommodation. Returning once more to Webster's dictionary, the meaning of the word "offer" found therein is "to make available or accessible." Webster's Third New International Dictionary, p. 1566 (1976). Thus, when a private club makes its services, facilities or goods available or accessible to a guest/nonmember, it is in fact offering services, etc., and must comply with all Iowa Code § 601A.7 (1983) requirements for public accommodations during the period such a guest/nonmember is given access to the club's facilities.

This conclusion is further supported by a survey of the legislation of all states which have adopted some form of civil rights act. Those states which desired to allow guests on the premises of a private club without calling their civil rights legislation into play have made express provisions for this in the definition of "public accommodation." Both Kentucky and Oklahoma have public accommodation definitions which specifically exempt private clubs when facilities or services are available only to the club members and their bona fide guests. Ky. Rev. Stat. § 344.130 (1983) and Okla. Stat. tit. 25, § 1401 (1971). The fact that the legislature in Iowa did not make such a specific exemption for bona fide guests of members strengthens the interpretation that the public accommodation definition includes private clubs when guests are given access to the facilities.

It should be stated at this point that whether the family of a private club member is considered to have nonmember status under the provisions of section 601A.2(10) is predicated on the determination of whether membership to the private club in question is on an individual basis. If membership to the private club is on a family basis, then the term "member" would be extended to include all those covered in the club's definition of family. Those not included in the club's definition of family would continue to be considered nonmembers for the purposes of this Act, even though the individual might in fact be a relative of the member, by marriage or blood. If membership is on an individual basis, only the individual would be a member for purposes of chapter 601A.

With respect to the prospective club member, it is obvious that of the two legislatively created classifications, this individual must fall into the category of "nonmember." However, it may prove more difficult to determine whether or not this particular nonmember is being offered services, facilities or goods. It could be argued that if the prospective member is only on the premises for the purpose of viewing and not using the available services, facilities or goods (i.e. a tour of the club) then nothing is actually accessible or offered at that time. Conversely, it is possible to argue that since club membership is being offered, the services and facilities which are a part of that membership are also being offered as the prospective member tours the club. The determination of whether or not the club's services, etc., have been offered to a prospective member while on a tour of the facilities may depend on the circumstances surrounding the individual's presence at the club. When a question is a matter of fact rather than law, it is not properly the subject of an opinion by this office. Op.Att'yGen. #72-12-17. Furthermore, the application of the statutory terms to a specific factual situation should be entrusted in the first instance to the Civil Rights Commission by adjudication or

rule-making. Op.Att'yGen. #83-3-4. It would however seem to be a valid interpretation of the amended statute that a private club should be considered a public accommodation, subject to all requirements of § 601A.7, for the duration of any time period in which a prospective member is actually allowed, on a trial basis, to make use of the services, facilities or goods available.

It is therefore the opinion of this office that a private club must be considered a public accommodation, within the meaning of Iowa Code § 601A.2(10) as amended, 1984 Iowa Acts, House File 2466 and is therefore subject to all the requirements of Iowa Code § 601A.7 (1983) for the duration of all time periods when guests are allowed on the premises. In addition, the use of the facilities on a trial basis by prospective members will also subject a private club to all requirements of section 601A.7 for the duration of that prospective member's presence on the premises. The issue of whether a prospective member receives an offer for the services, facilities or goods by the club while touring the premises would require a determination of the facts surrounding such a tour and is thus an issue which should be entrusted in the first instance to the Iowa Civil Rights Commission.

Sincerely,

Elena-Maria Hamilton

ELENA-MARIA HAMILTON
Assistant Attorney General

EMH:ds

SOIL CONSERVATION DISTRICTS; Construction of an office building. Iowa Const. Art. XI, § 3; Iowa Code §§ 346.24, 467A.2, 467A.7(5) (1983). It may be appropriate for a soil conservation district to construct an office building if the particular circumstances further the legislative policies prescribed for districts. A promissory note and a mortgage may be entered to finance the acquisition so long as the debt created does not exceed the appropriate limitation or is secured solely by the real property itself. (Norby to Gulliford, Director, Department of Soil Conservation, 8/1/84) #84-8-2(L)

Mr. James B. Gulliford
Director
Department of Soil Conservation
Wallace State Office Building
L O C A L

August 1, 1984

Dear Mr. Gulliford:

We have received your request for an Attorney General's opinion concerning the ability of a soil conservation district[1] to construct an office building, and the related question of their ability to finance such construction. As you have noted, an opinion found at 1962 Op.Att'yGen. 61 states that the districts do not have these powers. This opinion, after reciting Iowa Code § 467A.7(5), conferring authority to acquire, improve, and lease real property, concludes that construction of an office building to house state and federal governmental agencies does not further the declared legislative policy for districts as stated in § 467A.2. As discussed below, we feel that the 1962 opinion is erroneous in too narrowly construing the policy of § 467A.2 and the powers of § 467A.7(5). Accordingly, we now state that soil conservation districts may construct or acquire office buildings and finance them, if construction and leasing of the building reasonably appear to further the purposes of the district.

Initially we note the following three paragraphs of § 467A.7:

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[1] "Soil conservation district" is defined in Iowa Code § 467A.3(1) and further described in §§ 467A.5 and 467A.6. The majority of the powers of a soil conservation district are provided in § 467A.7, but other authorities appear in the remainder of ch. 467A and elsewhere, as in § 467D.23.

> A soil conservation district organized under the provisions of this chapter shall have the following powers, in addition to others granted in other sections of this chapter:
>
> * * *
>
> 5. To obtain options upon and to acquire, by purchase, exchange, lease, gift, grant, bequest, devise or otherwise, any property, real or personal, or rights or interests therein; to maintain, administer, and improve any properties acquired, to receive income from such properties and to expend such income in carrying out the purposes and provisions of this chapter; and to sell, lease or otherwise dispose of any of its property or interests therein in furtherance of the purposes and provisions of this chapter.
>
> * * *
>
> 9. To sue and be sued in the name of the district; to have a seal, which seal shall be judicially noticed; to have perpetual succession unless terminated as hereinafter provided; to make and execute contracts and other instruments, necessary or convenient to the exercise of its powers; to make, and from time to time amend and repeal, rules not inconsistent with this chapter, to carry into effect its purposes and powers.
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> * * *
>
> 12. No provisions with respect to the acquisition, operation, or disposition of property by other public bodies shall be applicable to a district organized hereunder unless the legislature shall specifically so state.

These provisions indicate a broader range of authority in the district to acquire property than normally vested in a public body. Cf. Iowa Code ch. 23 (1983) (which requires certain procedures prior to construction of public improvements by municipalities); § 298.21 (limitation of use of proceeds of school bonds).

Even in the more limited context of other public agencies' ability to acquire a building, assuming compliance with any specific statutory requirements, the overriding concern is whether the acquisition serves a public purpose. See 1980 Op.Att'yGen. 580 (#80-2-2(L)). A review of ch. 467A and § 467A.7(5) in particular clearly shows that the districts will certainly need a location in which to conduct their affairs. Furthermore, the districts are empowered not only to distribute cost-sharing funds in cooperation with the Department of Soil Conservation, see §§ 467A.7(4) and 467A.48 and 780 I.A.C. ch. 5, but to provide through sale or at no cost materials and equipment to aid landowners in soil conservation. § 467A.7(6). We believe that it is not inconsistent with any provision of law for a district to devote income generated from a building to aid in this purpose.

By way of limitation, we direct this opinion only to buildings which will be used entirely or in part by a district to conduct their affairs. Because of the close connection between the districts and the U.S. Department of Agriculture, Soil Conservation Service (S.C.S.), the S.C.S. and a district often share space. In many instances the Agricultural Stabilization and Conservation Service (A.S.C.S.) office is in the same building, but we do not intend to impose any limitation on the type of tenant permissible if the building is otherwise appropriate. We do note, however, that it would be virtually impossible for the districts to function without cooperation with the S.C.S. The S.C.S. in fact provides the districts with technical personnel free of charge pursuant to cooperative agreements with the Districts. Accordingly, leasing space to the S.C.S. provides a permissible rationale from which to conclude that acquiring a building is in furtherance of the policy of § 467A.2.

The above discussion concerns the purchasing of a building, but not the further question of whether a District may finance the purchase of a building. Presumably this financing would be accomplished by a promissory note and a mortgage if entering such agreements is permissible.

Initially, the broad authority provided in § 467A.7(5) to obtain interests in real property appears broad enough to include the entry of a mortgage agreement by a District.[2] As the

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[2] A curious provision, however, is contained in § 467A.10 which provides that the State Soil Conservation Committee, a state agency, is substituted as a party to any contracts entered by a district if the district dissolves. It would be wise for some form of communication to be established to inform the State

Districts are public corporations[3] and political subdivisions, however, the execution of a promissory note and incurring of debt invoke the application of the limitations of Iowa Const. Art. XI, § 3, and Iowa Code § 346.24 (1983). The constitutional provision limits aggregate debt of a political subdivision to five percent of the taxable property within the county, or corporation, while § 346.24 limits debt to one and one quarter percent of the actual value of the property within the area of the boundaries of the particular public corporation.

The debt limitations of Art. XI, § 3, and § 346.24 will of course depend on the value of property in the particular district. As discussed below, however, we believe that an office building may be financed without incurring debt, for purposes of the limitations, by securing the note solely with the real estate itself. In light of the circumstances of a district, this would appear to be a more realistic method of financing.

The ability of public bodies to finance capital improvements in a manner consistent with debt limitations has been a frequently litigated issue. See Farrell v. State Bd. of Regents, 179 N.W.2d 533 (Iowa 1979); Goreham v. Des Moines Metro Area Solid Waste Agency, 179 N.W.2d 449 (Iowa 1979); Iowa Southern Utilities v. Cassil, 69 F.2d 703 (8th Cir. 1934). A doctrine known as the special fund theory has developed which essentially provides that a particular improvement may be financed without regard to a debt limitation if the improvement is self-financing and does not obligate the general revenues of the governing body. Goreham, 179 N.W.2d at 456. Even under a restrictive application of the special fund theory, an improvement may be financed if it serves a function which is not required of government, but which may be abandoned, so that no question arises as to obligation of general revenues. Goreham, 179 N.W.2d at 464 (Becker, J., dissenting).

In the situation considered herein, while we believe acquisition of an office building may serve the purposes of a district, providing an office building is certainly not a required function. In other words, a District can acquire a building and create it as self-financing without raising any question of whether this financing is a subterfuge to provide a mandatory

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[2] (cont'd) Committee of its potential obligations, and this potential would appear to militate toward use of the second method of financing suggested below.

[3] Op.Att'yGen. #84-1-10(L); 1980 Op.Att'yGen. 244, 245 fn. 1; Iowa Code § 467A.3(1) (1983).

service which otherwise would be financed by general funds. Cf. Farrell, 179 N.W.2d 533, 540, 547 (Becker, J., dissenting) (nonrevenue producing academic facilities); Goreham, 179 N.W.2d 449, 457 (solid waste disposal). Accordingly, we believe that a District may execute a promissory note and mortgage to finance an office building without incurring debt subject to the limitation of Art. XI, § 3, and § 346.24 so long as the obligation created is secured solely by the real property itself or a lease for the real property, and no general obligation of the District is created.

In conclusion, we believe that the above referenced 1962 opinion is incorrect in stating that construction of a building is in all instances inappropriate. We believe that construction of an office building may in fact further the legislative policies of ch. 467A in particular circumstances. In other words, we do not intend to state that in all circumstances construction of an office building is appropriate. We do, however, state that construction of an office building may be supportable based on its particular circumstances and financed as described above.

Sincerely,

STEVEN G. NORBY
Assistant Attorney General

SGN:rcp

ADMINISTRATIVE LAW; OPEN MEETINGS; PUBLIC RECORDS. Independent Subscriber Nominating Committees. Iowa Code chapter 17A; Iowa Code sections 28A.2, 68A.1 (1983); 1984 Iowa Acts, S.F. 2277, §1; Iowa Code Supp. section 514.4 (1983). The independent subscriber nominating committees under Iowa Code Supp. section 514.4(1983), as amended by 1984 Iowa Acts, S.F. 2277, §1, are subject to both the Open Meetings Law and the Public Records Act. (Haskins to Priebe, Chair, Administrative Rules Review Committee, 8/1/84) #84-8-1(L)

August 1, 1984

The Honorable Berl E. Priebe, Chair
Administrative Rules Review Committee
LOCAL

Dear Senator Priebe:

You ask the opinion of our office as to whether an independent subscriber nominating committee under Iowa Code Supp. section 514.4 (1983) is required to promulgate administrative rules under Iowa Code ch. 17A, the Administrative Procedure Act, and whether such a committee is under the Open Meetings Law and Public Records Act.

Under 1983 Iowa Acts, ch. 27, health service corporations under Iowa Code ch. 514 are to have two-thirds of the members of their boards of directors as "subscriber directors." See Iowa Code Supp. section 514.4 (1983). A "subscriber director" is defined by statute as, in essence, a director who is a subscriber of a corporation under Iowa Code ch. 514 and who is not a provider of health care as defined in Iowa Code section 514B.1, employed by or related to a provider, or financially interested therein. Id. Existing health service corporations must have a two-thirds majority of "subscriber directors" by August 1, 1985. See 1983 Iowa Acts, ch. 27, §15. "Subscriber directors" are placed on the board of directors of a health service corporation by being nominated by an "independent subscriber nominating committee." See 1984 Iowa Acts, S.F. 2277, §1, amending Iowa Code Supp. section 514.4(1983). Names of potential subscriber directors may be submitted to the committee by

a petition of at least fifty subscribers. Id. Those names are only for the consideration of the committee.[1] Id. From the subscribers nominated by the committee, the required subscriber directors are then elected by the members of the corporation (who, by virtue of corporate by-laws, are exclusively providers of health care services). See §514.4; Op. Att'y Gen. #84-1-13(L). The insurance commissioner adopts rules to "implement the process of election of subscriber directors" to the boards of directors of health service corporations. Id. As most recently amended, §514.4 sets forth the relationship of the commissioner's rules to the nominating committees as follows:

> The commissioner of insurance shall adopt rules pursuant to chapter 17A to implement the process of the election of subscriber directors of the board of directors of a corporation to ensure the representation of a broad spectrum of subscriber interest on each board and establish criteria for the selection of nominees. The rules shall provide for an independent subscriber nominating committee to serve until the composition of the board of directors meets the percentage requirements of this section. Once the composition requirements of this section are met, the nominations for subscriber directors shall be made by the subscriber directors of the board under procedures the board establishes which will also permit nomination by a petition of at least fifty subscribers. The board shall also establish procedures to permit nomination of provider directors by

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1. This interpretation of S.F. 2277, §1, has been adopted in the insurance commissioner's rules under ch. 17A. See 510 I.A.C. §34.7(2)(a). Accordingly, it is entitled to a presumption of correctness. See Hiserote Homes, Inc. v. Riedemann, 277 N.W.2d 911, 913 (Iowa 1979).

> petition of at least fifty participating providers. A member of the board of directors of a corporation subject to this chapter shall not serve on the independent subscriber nominating committee. The nominating committee shall consist of subscribers as defined in this section. The rules of the commissioner of insurance shall also permit nomination of subscriber directors by a petition of at least fifty subscribers and nomination of provider directors by a petition of at least fifty participating providers. These petitions shall be considered only by the independent nominating committee during the duration of the committee. Following the discontinuance of the committee, the petition process shall be continued and the board of directors of the corporation shall consider the petitions. The independent subscriber nominating committee shall not be subject to chapter 17A. The nominating committee shall not receive per diem or expenses for the performance of their duties.

1984 Iowa Acts, S.F. 2277, §1. As can be seen, once the percentage requirements for the boards of directors are met, the nominating committee no longer serves. Rules of the commissioner under ch. 17A provide for a separate nominating committee for each health service corporation, of which there are five. See 510 I.A.C §34.7(3)(a). Members of the nominating committees are appointed by the commissioner. Id.

You first ask whether the nominating committees must promulgate administrative rules under ch. 17A. At the time you requested our opinion, §515.4 did not specifically speak to the status of the nominating committees under ch. 17A. See Iowa Code Supp. section 514.4 (1983). Since then, that section has been amended to specifically exempt those committees from ch. 17A and therefore we need not address that question. Your other

questions regarding the applicability of Iowa Code ch. 28A, the Open Meetings Law, and Iowa Code ch. 68A, the Public Records Act, have not, however, been explicitly dealt with in the revised §514.4 and hence will be considered.

In order to determine the applicability of the Open Meetings Law to the nominating committees, it is necessary to examine the definitional provisions of ch. 28A. The Open Meetings Law is only applicable to "governmental bodies." Iowa Code §28A.3 (1983). A "governmental body," in turn, is defined to include four different types of entities. Iowa Code §28A.2(1)(a) - (d) (1983). Particularly relevant is the provision which defines as a governmental body "[a] board, council, commission, or other governing body expressly created by the statutes of this state or by executive order." Iowa Code §28A.1(1)(a) (1983). Construing this provision, we have opined that "expressly created" means that the body's constitution is directed, rather than authorized or permitted, to form. 1980 Op. Att'y Gen. 148, 150.

There is little doubt that the nominating committees are "expressly created" under this criterion. The legislature has provided that the insurance commissioner "shall adopt rules pursuant to chapter 17A to implement the process of the election of subscriber directors." These rules, moreover, "shall provide for an independent subscriber nominating committee." 1984 Iowa Acts, S.F. 2277, §1, amending Iowa Code Supp. section 514.4 (1983). These statutory provisions clearly direct, rather than authorize or permit, the formation of the nominating committees.

The conclusion that the nominating committees are "expressly created" by statute does not completely resolve the issue of the applicability of the Open Meetings Law. We have previously determined that all governmental bodies subject to the Open Meetings Law, including bodies expressly created under §28A.2(1)(a), must be "governing" bodies. See 1980 Op. Att'y Gen. 148, 151-152. A "governing" body possesses decision-making or policy-making authority. A body whose authority does not extend beyond studying or investigating a problem and/or giving advice or making recommendations, therefore, is not a governmental body subject to the Open Meetings Law. Id. at 152-153.

Nevertheless, where, as here, the nominating committees are the sole source of actual nomination of the required subscriber directors, it is difficult to say that their role is merely advisory or recommendatory within the meaning of our previous opinions. This conclusion is not altered by the fact that it is the corporate membership which actually elects the subscriber directors. Because the members are limited in their selection to those subscribers nominated by the nominating committees, the role of the nominating committee is significant. And while the nominating committees are subject to the direction of the insurance commissioner through his rules, the criteria which he has chosen to impose on the nominating committees for selection of nominees are general and do not significantly circumscribe the decision-making authority of the committees. See 510 I.A.C. §34.7(3)(e) (a nominee must be a subscriber of the health service corporation, cannot have a material financial interest, etc., in a provider, and must have "reasonable knowledge of the issues facing the corporation.") Thus, we conclude that the nominating committees are subject to the Open Meetings Law.

We must separately decide the applicability of the Public Records Law to the nominating committees. Public records include "all records and documents of or belonging to this state of . . . any branch, department, board, bureau, commission, council, or committee" of the state. Iowa Code §68A.2 (1983). We have observed that this language may reach records or documents not only owned by but also simply possessed by one of the delineated entities. 1982 Op. Att'y Gen. 215, 219. The determinative issue, therefore, is whether records or documents owned or possessed by the nominating committees are possessed by committees of the state.

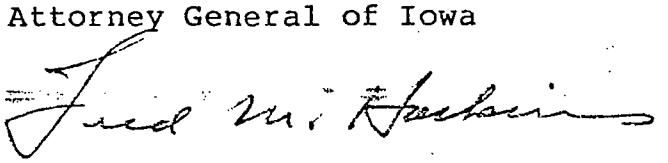
The resolution of the issue of whether the nominating committees are committees "of the state" is particularly troublesome since the committees have both private and public attributes. The determinative legislative intent is found in the language from revised §514.4 quoted above. Under that section, the members of the nominating committees are expressly exempted from the receipt of per diem or expenses. By exempting the nominating committees from those payments the implication is created that the legislature viewed them as state bodies, because that is

the only way their members could receive the payments. Moreover, in revising §514.4, the legislature availed itself of the opportunity to exempt the nominating committees from ch. 17A but failed to do likewise for ch. 68A (or ch. 28A). (A study bill revising §514.4 along the lines of S.F. 2277 and exempting the nominating committees from chs. 17A, 28A, and 68A was considered but never actually introduced. See 1984 Iowa G.A., H.S.B. 783.) Hence, we conclude that the nominating committees are "committees of the state" for purposes of ch. 68A, in light of the broad construction given that chapter. See Iowa Code section 68A.8 (1983).

In sum, the nominating committees are subject to both ch. 28A and ch. 68A.

Yours very truly,

THOMAS J. MILLER
Attorney General of Iowa



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LICENSING: Cosmetologists. Iowa Code §§ 157.1, 157.5. A person who is licensed to practice electrolysis must possess a license to practice cosmetology as well. (Hart to Jay, State Representative, 9/25/84) #84-9-5(L)

September 25, 1984

Daniel Jay
State Representative
604 Wildwood Lane
Centerville, Iowa 52544

Dear Mr. Jay:

We are in receipt of your recent request for an Attorney General's opinion concerning an interpretation of Iowa Code § 157.5 (1983). You have specifically asked:

> Whether Iowa Code § 157.5 prohibits the practice of electrolysis by one trained for said practice unless said person is also a licensed cosmetologist.

Iowa agencies have been delegated the authority to construe their own statutes as the agency exercises its legislative, prosecutorial, and judicial powers. It is our opinion that Iowa Code § 157.5 does require the practice of electrolysis to be performed only by a licensed cosmetologist.

Iowa Code § 157.5 permits "an applicant for a license to practice cosmetology" to "obtain a license from the department for authority" to practice electrolysis providing the applicant fulfills those requirements enunciated in this statute. (See also 470 I.A.C. 149.8.)

Iowa Code § 157.1(1)(b) has included this practice in the definition of cosmetology; specifically, ". . . beautifying . . . the upper part of the body of any person -- with . . . electrical apparatus . . .". Our office has previously concluded that the similar listing of "manicuring" in the definition of cosmetology in § 157.1(b) meant that a cosmetology license was required to perform manicuring professionally. 1972 Op. Att'y Gen. 462; 1940 Op. Att'y Gen. 439. Those opinions compel the conclusion here that a cosmetology license is required to professionally perform electrolysis services.

In conclusion, it is our view that a person who practices electrolysis must possess a dual license from the Department of Health in cosmetology and electrolysis.

Sincerely,

Elizabeth Hart

ELIZABETH HART
Assistant Attorney General
Health Division

EH/cjc

NEWSPAPERS: Official Publications. Review. Iowa Code §§ 349.1, 349.2, 349.3, 349.4, 349.11 and 618.3 (1983). A board of supervisors has no authority to reconsider the factual basis for its prior non-contested, non-appealed selection of an official county newspaper during the year the selection is in effect. (Walding to Miller, Guthrie County Attorney, 9/21/84) #84-9-4(L)

September 21, 1984

The Honorable Thomas H. Miller
Guthrie County Attorney
Guthrie Center, Iowa 50115

Dear Mr. Miller:

We have received your request for an opinion concerning whether Guthrie County has improperly designated the "Guthrie Center Times" and the "Guthrie Center Guthrian" as two official newspapers and, if so, whether the Board may set aside its selection.

You have cited our previous opinion #84-4-5(L). That opinion notes that the ultimate issue whether newspapers are to be treated as separate newspapers is a question of fact to be determined by the Board of Supervisors and not by this office in a legal opinion. We do not therefore believe it appropriate for us to review the Board's designation to determine whether it was correct. See 1982 Op. Att'y Gen. 353, 354.

Your letter states that Opinion #84-4-5(L) endorsed the District Court decision in Creative House Enterprises, Inc. v. O'Brien County. We would note that the opinion simply cites that case and notes the factors that the Court there considered. We would further note that the issue before the Court in Creative House Enterprises involved a contest concerning which newspapers

should be designated. The Court's emphasis on reaching the maximum number of subscribers might support a different result if there were not a competing newspaper with a different subscription list involved. Our 1974 opinion, 1974 Op. Att'y Gen. 513, concluded that newspapers having the same offices and the same subscribers could nonetheless have distinctive identities. Creative House Enterprises did not expressly reject that view. Instead that decision examined a number of factors tending to show common identity versus distinctive identities. Our opinion #84-4-5(L) simply notes that in that District Court decision the Court did give substantial weight to the fact of nearly identical subscription lists. The weight to be given to that District Court decision, the appeal of which we are advised was dismissed, is a matter for you as the Board's legal advisor to assess.

We are told that the Board of Supervisors of Guthrie County fears that it may have improperly applied the criteria and facts in the selection of official county newspapers. You write:

> In January 1984, the Guthrie County Board of Supervisors designated the "Guthrie Center Times" and the "Guthrie Center Guthrian" as the official newspapers for Guthrie County. The "Times" and the "Guthrian" were the only applicants and accordingly there was no contest. Both the "Times" and the "Guthrian" are owned and operated by Times-Guthrian Publishing Company, Inc. The "Guthrian" is published weekly on Monday and the "Times" is published weekly on Wednesday. The subscription lists for the "Times" and the "Guthrian" are nearly identical. The employees for both newspapers are substantially the same. The mastheads for both publications list only the rates for subscribing to both papers and do not list a price for subscription to just one publication alone. Both publications are prepared and distributed from the same business office and have the same address and telephone number.

Guthrie County, pursuant to Iowa Code § 349.3(1) (1983), is required to select two newspapers, or one newspaper if there is but one published in the county.

Basically, our office has been asked whether a board of supervisors can change its selection of official newspapers during the year the selection is in effect simply because it now believes that it may have made an erroneous factual determination. And, assuming a board possesses such authority, you ask what steps may be taken to remedy an erroneous selection. At the outset, we feel compelled to observe that the facts presented do

not present a clear violation of law. Instead, the question whether jointly published newspapers have separate identities is ultimately a question of fact to be determined by the totality of circumstances. Op. Att'y Gen. #84-4-5(L). In addition, we note that the Guthrie County Board of Supervisors' selection was not ultra vires. Clearly, the Board acted under statutory authority, Iowa Code § 349.1 (1983), regardless of whether it may have inappropriately exercised that authority. Nor is this a case where the Board allegedly used improper procedures, acted for improper purposes, or violated a statute designed to prevent improper influence (such as conflict of interest or bidding statutes). The Board's original selection was neither contested nor appealed as provided for in Iowa Code §§ 349.4 and 349.11, respectively. As such, the time for statutory review has passed. Additionally, no applicant has been adversely affected by a possible erroneous selection.

It is our opinion that a board of supervisors lacks authority to change a non-contested, non-appealed selection of an official county newspaper simply because it now believes it may have reached an erroneous factual determination. A board's statutory authority to select official newspapers, as previously stated, is § 349.1. That section provides: "The board of supervisors shall, at the January session each year, select the newspaper in which the official proceedings shall be published for the ensuing year." [Emphasis added].[1] The underscored language was examined by our office in 1981 and served as the basis of our conclusion that: "Whether or not a paper qualifies to be an official paper is a question which is resolved once each year and such determination remains in effect for the ensuing year." 1982 Op. Att'y Gen. 302. In addition, the 1981 opinion cited 1944 Op. Att'y Gen. 7, which held that whether a particular newspaper may qualify as an official newspaper within § 618.3 must be determined as of the time of the selection of official newspapers. While the 1981 opinion concerned a change in the status of a newspaper after the selection, we believe the principle for which we cite that opinion -- that a board's selection of an official newspaper is made at one point in time and is binding for the ensuing year -- is equally applicable to the present situation concerning a possible improper application of the statutory criteria to the facts.

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[1] The definition of a "newspaper," as used in § 349.1, is contained in Iowa Code § 618.3 (1983), and was the focus of the 1984 opinion which gave rise to the present examination.

Permitting supervisors to set aside their own selection of official newspapers on the ground that they would now reach a different result would seriously undermine the statutory scheme for finality of selection. This is especially true because it would be difficult to objectively delineate among cases where factual reconsideration would be appropriate and those where reconsideration is simply a means to revoke a contract. Absent any statutory authority to reconsider its prior decision, we are unable to find authority for the Board to set aside its prior factual determination.

It is therefore our conclusion that the Board of Supervisors has no authority to reconsider the factual basis for its selection of official newspapers during the year in which that selection is in effect.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/cjc

GAMBLING: Candidate Committees; Qualified Organizations; Political Fund Raising - Iowa Code ch. 99B (1983 Supplement) as amended by 1984 Session, 70th G.A., H.F. 2015. A committee for an individual political candidate is eligible to hold an annual raffle with a $10,000 prize provided it meets the general requirements. A candidate's committee which does not hold a gambling license may not contract with another qualified organization which does have a license to conduct games with the proceeds being turned over to the candidate. In order to obtain a two-year gambling license a candidate's committee must meet the requirement that it must have been in existence for five years. A candidate committee conducting games as a qualified organization may divide the proceeds between its candidate and a candidate whose committee does not meet the five year requirement. (Hansen to McIntee, State Representative, 9/13/84) #84-9-3(L)

John E. McIntee
State Representative, District 26
327 East Fourth Street
Waterloo, Iowa 50701

Dear Representative McIntee:

You have requested an opinion of the Attorney General concerning the effect of Iowa's gambling law on fundraising by political action committees. You pose the following questions for our consideration:

1. Under Section 99B.7, The Code, can the committee for an individual political candidate hold an "annual" raffle with a $10,000 prize?

2. Does the new law allow a political candidate's committee which is defined as a qualified organization but does not hold a gambling license, to contract with another qualified organization which does have a gambling license to conduct one or more bingo occasions with the proceeds being turned over to the political candidate? If that is possible, would those bingo occasions be assessed against the total number of bingo occasions the licensed organization can hold?

3. In order for a political candidate's committee to obtain a gambling license to hold its own bingo occasions or raffles, must that committee meet the new requirement that in order to qualify for a license the organization must have been in existence for five years? If this is necessary, could one political candidate's organization (one that has been in existence for five years) sponsor a bingo occasion or occasions and divide the proceeds between its candidate and another candidate whose committee does not meet the five year requirement?

It is our opinion that: 1) under Iowa Code § 99B.7 the committee for an individual political candidate may hold an annual raffle with a $10,000 prize; 2) a political candidate's committee which does not hold a gambling license may not contract with another qualified organization which does have a gambling license to conduct one or more bingo occasions with the proceeds being turned over to the political candidate; 3) in order for a political candidate's committee to obtain a gambling license the committee must meet the new requirement that in order to qualify for a license the organization must have been in existence for five years; and a candidate committee conducting games as a qualified organization may divide the proceeds between its candidate and a candidate whose committee does not meet the five year requirement. Our reasons are as follows.

I. Can the committee for an individual political candidate hold an annual raffle with a $10,000 prize?

Iowa Code § 99B.7 (1983 Supplement) regulates games conducted by qualified organizations. Under § 99B.7(1)(m) the person or organization conducting the game must show that it is exempt from federal taxation. Section 99B.7(1)(m) formerly exempted political parties and nonparty political organizations, and as amended this section now exempts candidate committees from the requirement. H.F. 176 (70th G.A., 2d Sess.). Therefore if a candidate committee meets the other general requirements and obtains a license, it may conduct raffles and other games. Section 99B.7(1)(d), which restricts the value of prizes, authorizes one raffle per twelve-month period at which a merchandise prize having a value not greater than ten thousand dollars.

Prior to the 1983 amendment individual candidates or candidate committees were not eligible for qualified organization gambling permits and could not legally conduct any games. See Op.AttyGen. page 481 (1982). Under the amended statute candidate committees, but not individual candidates, are now eligible for qualified organization gambling permits.

II. May a political candidate's committee which does not hold a gambling license contract with a qualified organization which does have a gambling license to conduct games with the proceeds being turned over to the candidate?

Iowa Code § 99B.7(5) (1983 Supplement) allows certain qualified organizations to contract with other qualified organizations to conduct games. The only qualified organizations that may contract under § 99B.7(5) are a political party or a political party organization. Candidate committees are not included in this authorization and therefore may not contract with another qualified organization to conduct games for the committee.

Section 99B.7(5) also limits political parties or party organizations to contracting games which may lawfully be conducted by the political party or party organization. Because all qualified organizations must obtain licenses in order to lawfully conduct games a political party or party organization must be licensed before it may contract with other qualified organizations to conduct games.

III. In order for a candidate committee to obtain a gambling license must it meet the new requirement that the organization must have been in existence at least five years? If so, could a qualifying candidate committee sponsor a bingo occasion or other occasion and divide the proceeds between its candidate and another candidate whose committee does not meet the five year requirement?

Effective July 1, 1984, § 99B.2 as amended places a new licensing restriction on qualified organizations. Iowa Code § 99B.2, as amended by H.F. 2015 (70th G.A., 2d Sess.). Section 99B.2(1) provides that: "To be eligible for a two year license under section 99B.7, an organization shall have been in existence at least five years prior to the date of issuance of the license." This is a general requirement for all qualified organizations conducting games under § 99B.7 and no organizations are exempted. In order to obtain a two year license a candidate committee thus has to have been in existence for five years.

The five year requirement applies only to organizations seeking two year licenses. Qualified organizations may also conduct games with limited licenses. Section 99B.7(3)(a) provides for limited licenses which authorize an organization to conduct games at a specified location and during a specified period of fourteen consecutive days. These limited licenses shall not be issued more than once during any twelve-month period to the same person or for the same location. Because the five year requirement of § 99B.2(1) applies only to two year licenses, an organization applying for a limited license need not have been in existence for five years.

The following question is then posed: may a candidate committee that has not been in existence for five years receive proceeds from games conducted by a licensed candidate committee that has been in existence for five years? Section 99B.7(3)(b) regulates game proceeds and provides that receipts must be distributed as prizes or dedicated and distributed to "educational, civic, public, charitable, patriotic or religious uses." Section 99B.7(3)(b) further provides that the term "public use" specifically includes dedication or receipts to

political parties. This section does not specifically provide that a candidate committee is a "public use" but it would appear that such committees are "public uses."

Under § 99B.7(1)(m) candidate committees are now eligible, along with political parties and nonparty political organizations, to conduct games as qualified organizations. The inclusion of candidate committees as qualified organizations represents a determination that candidate committees are a public use. Moreover, if a candidate committee is not a public use, a candidate committee conducting games as a qualified organization would not be able to retain the proceeds, since § 99B.7(3)(b) requires that proceeds be dedicated to public uses. The inclusion of candidate committees in § 99B.7(1)(m) was made so that the candidate committees could conduct games to raise funds for the candidates. In order for a candidate committee to keep funds raised by conducting games the committee must be a public use under § 99B.7(3)(b).

If a candidate committee may retain the funds it raised by conducting games as a qualified organization, it is a public use. If the committee is a public use, then regardless of whether it meets the licensing requirement it may receive proceeds from another candidate committee that does meet licensing requirements. A candidate committee may also receive proceeds from games conducted by any qualified organization, not just political parties and candidate committees.

Since a candidate committee may keep proceeds it has raised, and a candidate committee may receive proceeds from other qualified organizations, one candidate committee which meets the five year requirement may conduct games as a qualified organization and divide the proceeds between its own candidate and a candidate whose committee does not meet the five year requirement.

Sincerely,

Steve Hansen

STEVEN K. HANSEN
Assistant Attorney General

SKH/cla

STATE OFFICERS AND DEPARTMENTS; COMPTROLLER: Iowa Code §§ 8.6(16), 8.13(1) and 79.1; 1983 Iowa Acts, ch. 205, §§ 16.4 and 17.1; I.A.C. ch. 570 and § 570-1.1(36). The Comptroller has the authority to permit professional and managerial employees to defer salary increases until the last six months of Fiscal Year 1985, pursuant to 1983 Iowa Acts, ch. 205, § 16.4. (Lyman to Harbor and Swearingen, State Representatives, 9/10/84) #84-9-2(L)

September 10, 1984

The Honorable William H. Harbor
State Representative

The Honorable George R. Swearingen
State Representative
State Capitol
L O C A L

Dear Representatives Harbor and Swearingen:

You have requested an opinion of the Attorney General concerning the authority of the State Comptroller to permit professional and managerial employees to defer salary increases until the last six months of Fiscal Year 1985. This question is raised in view of 1983 Iowa Acts, ch. 205, § 16.4, which states in part that:

> Each appointing authority shall determine the percentage increase for each professional and managerial employee's salary provided for under this section and may increase the base salaries of the professional and managerial employees by different percentages in accordance with rules of the merit employment department and policies of the state comptroller but the total percentage increase of all salaries of the professional and managerial employees under each appointing authority's jurisdiction made using the appropriation authorized by this Act for the fiscal year beginning July 1, 1984 shall not exceed six and six-tenths percent of those salaries as they exist on June 28, 1984.

In adopting this language, the Legislature envisioned that appointing authorities, in conjunction with the Comptroller, would exercise their discretion in instituting salary increases for professional and managerial employees. The limitations placed upon the exercise of this discretion included compliance with merit employment department regulations, and a prohibition against increasing professional and managerial employee salaries more than six and six-tenths percent.

The prohibition against increasing professional and managerial employee salaries by more than six and six-tenths percent does not directly address base salaries. A "base salary" is the rate of pay per period of time for a position, exclusive of shift differential, overtime or other incentive premium pay. I.A.C. § 570-1.1(36). This is in contrast to 1983 Iowa Acts, ch. 205, § 17.1, which provides for "an average base salary increase of six and six-tenths percent of base salaries" of faculty and staff members at state universities. Section 17.1 relates to individual salaries; the provision limits the increase in a faculty or staff member's salary to six and six-tenths percent. On the other hand, § 16.4 relates to an appropriation for salary increases; the section's language authorizes the expenditure of up to six and six-tenths percent over that amount which was allocated to professional and managerial salaries during Fiscal Year 1984. The Legislature, through the enactment of § 16.4, merely established a sum certain to be utilized in extending salary increases to professional and managerial employees; the determination as to how this sum was to be distributed among employees was left to the discretion of appointing authorities and the Comptroller. The scope of this discretion would include the authority to defer the salary increases of professional and managerial employees, again provided that the over-all effect would not result in a cost to the state exceeding six and six-tenths percent over the amount which was expended for professional and managerial salaries during the preceding fiscal year.

The authority of appointing authorities and the Comptroller to defer salary increases of professional and managerial employees under § 16.4 is additionally limited by the regulations of the Merit Employment Department. However, a review of I.A.C. ch. 570 does not disclose any impediment to the deferral of salary increases. It should also be noted that the Merit Employment Department reviewed and concurred in the Comptroller's provision for the deferral of salary increases for professional and managerial employees.

Several arguments have been raised questioning the Comptroller's authority to defer professional and managerial employee salary increases in view of other sections of the Iowa Code. As a preliminary matter, Iowa Code § 8.6(16) (1983) extends to the Comptroller rulemaking authority, and 1983 Iowa Acts, ch. 205, § 16.4 expressly defers to "the policies" of his office in regard to professional and managerial employee salary increases. Thus, if the Comptroller's provision for the deferral of these salary increases is not contrary to law, his actions must be upheld. Iowa Code § 79.1 (1983) requires in part that a "specific annual salary rate or annual salary adjustment commencing with the fiscal year shall commence July 1." This section is inapplicable to the deferral of salary increases under § 16.4, as § 16.4 does not specify a particular salary adjustment or increase, only an upper limitation on the amount which may be expended for professional and managerial employee salary increases. We also find unpersuasive the contention that Iowa Code § 8.13(1) -- which states that "no claim shall be allowed by the state comptroller's office when such claim is presented after the lapse of three months from its accrual" -- prevents salary increases for professional and managerial employees from being deferred for more than three months into the fiscal year. Generally, the term "accrued" means "due." Prudential Ins. Co. of America v. Buss, 240 Iowa 701, 37 N.W.2d 300 (1949). A right or entitlement, such as a salary increase, would thus not accrue until actually due; the salary increase would have to come into existence as an enforceable claim to vest as a right. A salary increase which has been deferred has not "accrued" for purposes of Iowa Code § 8.13(1) (1983).

The practical effect of deferring professional and managerial employee salary increases is to raise the base of these salaries. However, this in and of itself does not violate § 16.4, assuming that the six and six-tenths percent spending limitation is not exceeded. Any impact from deferring the salary increases will be limited to Fiscal Year 1985, as the Legislature will have the opportunity to review the base salaries of professional and managerial employees during the first session of the Seventy-first General Assembly.

Thus, it is the opinion of this office that the Comptroller has the authority to permit professional and managerial employees to defer salary increases until the last six months of Fiscal Year 1985, pursuant to 1983 Iowa Acts, ch. 205, § 16.4.

Sincerely,

Lynden Lyman

LYNDEN LYMAN
Assistant Attorney General

LL:sh

HEALTH: Certificate of Need. Iowa Code Sections 135.61(19), 135.61(19)(d), 135.61(19)(e), 135.63 (1983); 42 U.S.C. § 1395tt; 470 I.A.C. 202.2(3), 470 I.A.C. 202.2(8). The Department of Health need not require CON review for participation in the swing-bed program. (McGuire to Waldstein, State Senator, 9/10/84) #84-9-1(L)

September 10, 1984

Honorable Arne Waldstein
State Senator
319 East 9th Street
Storm Lake, Iowa 50588

Dear Senator Waldstein:

You have requested an opinion of the Attorney General interpreting the Certificate of Need Law as it relates to the hospital swing-bed program. Specifically, you question the Iowa State Department of Health's determination that a hospital's participation in the swing-bed program is not reviewable under the Certificate of Need (CON) Law, Iowa Code § 135.61(d) or (e) (1983).

The CON law requires that no new institutional health service or changed institutional health service be offered without having applied for and received a CON. § 135.63. The definitions of a new and a changed institutional health service are found in § 135.61(19) and provide in pertinent part:

> (d) A permanent change in the bed capacity, as determined by the department, of an institutional health facility or a health maintenance organization. For purposes of this paragraph, a change is permanent if it is intended to be effective for one year or more.
>
> (e) Any expenditure in excess of two hundred fifty thousand dollars for health services which are or will be offered in or through an institutional health facility or a health maintenance organization at a specific time but which were not offered on a regular basis in or through that institutional health facility or health maintenance organization within the twelve-month period prior to that time.

The State Department of Health has the responsibility for making the initial determination whether a proposed project is within these definitions and thus subject to review under CON. 470 I.A.C. § 202.4(1).

The swing-bed program arises from a federal statute, 42 U.S.C. § 1395tt, which allows certain small rural hospitals to use their inpatient facilities to furnish extended care to medicare and medicaid beneficiaries. Hospitals that are eligible to participate in this program are those that are located in a rural area with less than fifty beds and have been granted a CON for providing long term services from the state health planning agency. 42 U.S.C. § 1395tt(b)(1) and (2).

The federal CON requirements in § 1395tt(b)(2) has been interpreted to require a CON only if a CON is required under the applicable state law. The Health Care Financing Administration (HCFA), the agency which promulgates the rules for the swing-bed program, has stated that:

> By requiring hospitals . . . to obtain a certificate of need, HCFA would be placed in a position of imposing additional administrative burdens on both providers and the States. We believe this requirement would be expensive, unnecessary, and counterproductive, and could penalize those states that would benefit most from the swing-bed program. Therefore, if a state allows expansion of long-term care units without requiring a certificate of need for these services in hospitals, this criteria will not apply.

47 Fed. Reg. 31518, 31519 (1982).

This interpretation is further supported by the U.S. Department of Health and Human Services, Program Information Letter, 82-24, (September 20, 1982). This letter states that "a certificate of need will not be necessary to enter into a swing bed agreement with HCFA for reimbursement, unless one is required by virtue of the scope of coverage of the State CON program." The letter further states that the HCFA regulations do not supersede federal or state CON requirements. "It simply does not impose an additional CON requirement solely for a swing bed agreement."

Therefore, Iowa's CON law needs to be examined to determine if a CON is required for participation in the swing-bed program. As stated earlier, participation in the swing-bed program must be reviewed if it comes within the definition of a new or changed institutional health service.

CON review for participation in the swing-bed program would be necessary if the hospital spends in excess of $250,000.00 for health services which were not offered by the hospital within the last twelve months. § 135.61(19)(e). Generally, participating in the swing-bed program does not involve an expenditure by the hospital. However, if the hospital would expend in excess of $250,000.00 in participating in the swing-bed program, then the hospital would be subject to CON review.

If participation in the swing-bed program constitutes a permanent change in the bed capacity, a CON review is necessary. § 135.61(19)(d). A change is considered permanent if intended to be in effect for one year or more. § 135.61(19)(d).

Bed capacity is defined in 470 I.A.C. 202.2(3) to mean:

> a. Designed bed capacity -- the number of beds the facility was originally designed for in architectural plans.
>
> b. Usable bed capacity -- the number of beds available for patient care excluding that portion of the "designed capacity" which cannot be used as an inpatient bed area by adding staff or movable equipment. For purposes of section 135.61(19)"d", The Code, usable beds will be the bed capacity against which a permanent change is measured. Determination of the usable beds shall be made by the department as a result of the facility submitting a number to the department in its annual report for hospitals and related facilities. Usable beds will be categorized in the following ways:
>
> | Acute | Long-term |
> |---|---|
> | Medical/surgical | Skilled nursing (SNF) |
> | ICU | Intermediate care (ICF) |
> | CCU | Intermediate care/mental retardation (ICF/MR) |
> | Pediatric | Residential care (RCF) |
> | Obstetric | Residential care/mental retardation (RCF/MR) |
> | Psychiatric | |
> | Rehabilitation | |
> | Neonatal intensive care | |
> | Substance abuse | |

(emphasis added)

A permanent change in bed capacity is defined in 470 I.A.C. 202.2(8) to be a change, intended to be effective for one year or more which: "a) redistributes the beds among the categories

listed in 202.2(3); or b) relocates beds from one physical facility or site to another."

Participation in the swing-bed program does not increase or decrease the number of beds in the hospital.[1] Rather, the swing-bed program "allows small hospitals to use their beds interchangeably as either hospital, SNF or ICF beds, with reimbursement based on the specific type of care provided." 47 Fed. Reg. 31518 (1982). (emphasis added). The same beds are used to provide both acute and long term care; they are not designated as being exclusively acute or long term.

It is the opinion of this office that the Department of Health could reasonably conclude that participation in the swing-bed program does not constitute a permanent change in bed capacity which would require CON review. Unless a hospital would expend more than $250,000.00, the Department need not require CON review for participation in the swing-bed program under Iowa law.

Sincerely,

Maureen McGuire

MAUREEN McGUIRE
Assistant Attorney General

MM:rcp

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[1] If a hospital chooses to decrease the number of beds in order to fall within the maximum number of beds permitted for eligibility in the swing-bed program, that decrease would be subject to CON review under § 135.61(19)(d).

COUNTIES; Civil Service; Probationary period for deputy sheriffs: Iowa Code Ch. 341A (1983); Sections 341A.11-.12. 1) The county sheriff is to determine the length of a deputy sheriff's probation, subject to the express limitations of § 341A.11. 2) The term of probation commences the date a deputy is hired. If the deputy attends the law enforcement academy or other certified training facility within the first six months of employment, the probationary period cannot exceed six months. If the deputy attends the academy or other certified facility after the first six months of employment, the probationary period cannot extend beyond the date the deputy completes the training program or twelve months, whichever is shorter. 3) The protections afforded permanent rank deputies under §§ 341A.11 and 341A.12 are not applicable to probationary deputies. Instead, a deputy on probation may be terminated by the sheriff at any time during the probationary period if the sheriff has a proper reason for the termination and notifies the deputy of the termination in a reasonable manner. (Weeg to Handorf, State Representative, 10/9/84) # 84-10/2(L)

October 9, 1984

Honorable Ward Handorf
State Representative
State Capitol
L O C A L

Dear Representative Handorf:

You have requested an official opinion of the Attorney General on several questions related to the probationary period for deputy sheriffs hired pursuant to Iowa Code ch. 341A (1983) (civil service for deputy county sheriffs). Your request is as follows:

> Specifically, I would like to know who decides how long a deputy officer's probation period will be and how such a probationary period is calculated. For example, if a deputy is hired and subsequently attends the law enforcement academy, when does the probationary period begin and end? Further, I would also like your opinion on how and for what reasons a deputy officer on probation may be discharged.

We shall address each of your questions in turn.

Introduction

We first review the provisions of § 341A.11 which set forth guidelines for the probationary period for deputy sheriffs:

> The tenure of every deputy sheriff holding an office or position of employment under the provisions of this chapter shall be conditional upon a probationary period of not more than twelve months, and where such deputy sheriff attends the law enforcement academy of a regional training facility certified by the director of the Iowa law enforcement academy, a probationary period of not more than six months, during which time the appointee may be removed or discharged by the sheriff. Thereafter, he may be removed or discharged, suspended without pay, demoted, or reduced in rank, or deprived of vacation privileges or other privileges for any of the following reasons: * * *

(emphasis added)

I.

Your first question is who decides how long a deputy sheriff's probation period will be. It is our opinion that the sheriff is responsible for this decision.

There is nothing in Ch. 341A which specifies who is to determine how long a probationary period should be. However, we believe other provisions in that chapter provide assistance in answering this question. Under §§ 341A.8 and 341A.13, the sheriff is responsible for filling civil service vacancies from lists certified by the civil service commission. Once hired, the sheriff is authorized by statute, subject to express guidelines, to terminate either probationary or permanent-rank deputies. Sections 341A.11-.12. In sum, while the sheriff is required to comply with the provisions of Ch. 341A, the sheriff remains the actual employer of deputy sheriffs and oversees these deputies in the performance of the duties to be performed by the sheriff's office. See §§ 331.651-331.660. We therefore believe the sheriff's general authority over the hiring, supervision, and hiring of deputy sheriffs encompasses the authority to determine the length of the probationary period for deputy sheriffs under § 341A.11, subject of course to the express limitations of that section emphasized above. That is, under § 341A.11 the sheriff may place a deputy on probation for any period of time up to twelve months, unless the deputy attends a certified law enforce-

ment training program, in which case the sheriff may place a deputy on probation for any period of time not to exceed six months.[1]

II.

Your next question is how a deputy officer's probationary period under § 341A.11 is to be calculated. In particular, you ask when the probationary period is to begin and end in the event a deputy is hired and subsequently attends the law enforcement academy. It is our opinion that the probationary period may be calculated by reference to § 341A.11.

As an initial matter, Ch. 341A only provides for two classifications of deputy sheriffs: those on probationary status and those who assume permanent status upon completion of the probationary period. See §§ 341A.11, 341A.12. Accordingly, the probationary period under § 341A.11 must necessarily commence the date a deputy is hired. If the probationary period would commence at some other date subsequent to the hiring date, the deputy would hold an unrecognized status for the intervening time period. Such a status is not permitted under Ch. 341A.

Once the probationary period has commenced, § 341A.11 provides specific guidelines for calculating the duration of this period. As set forth above, that section expressly provides for a probationary period of not more than twelve months, unless the probationary deputy attends the law enforcement academy or other certified training facility, in which case the probationary period is not to extend beyond six months. It appears the legislature intended that a shorter probationary term was appropriate when a deputy undergoes the rigorous training of a formal, state-certified program as a part of his or her probationary term. Accordingly, if a deputy is hired and subsequently attends the law enforcement academy, it is our opinion that the probationary period begins on the date the deputy is hired. If the deputy attends the law enforcement academy or other certified training facility within the first six months of his or her employment, then the probationary period cannot extend beyond the end of that six-month period. If, however, the deputy attends the academy or other certified facility after the first six months of employment, then the probationary period cannot extend beyond either the date the deputy completes the training program or twelve months, whichever is shorter. We believe this conclusion is consistent with the legislature's intent that the proba-

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[1] We would caution county sheriffs that failure to act reasonably and consistently in setting probationary periods for deputy sheriffs could result in allegations of discriminatory treatment.

tionary period of a deputy who participates in a designated training program after assuming a position as deputy sheriff be of shorter duration than the probationary period for other deputies. Of course, in either case a shorter period of probation could be authorized by the sheriff.

III.

Your third question asks how and for what reasons a deputy on probation may be discharged. It is our opinion that a deputy on probation may be terminated at the sheriff's discretion, if reasonable, at any time during the probationary period.

Chapter 341A provides procedural protections for deputy sheriffs when disciplinary action is taken against them. However, these protections clearly do not apply to deputies during their probationary period. First, § 341A.11 provides that the sheriff is limited to taking disciplinary action against a deputy for the reasons enumerated in § 341A.11(1) through (7). However, that same section makes clear that these limitations apply only after a deputy has successfully completed the probationary period:

> The tenure of every deputy sheriff holding [a civil service position] shall be conditional upon a probationary period . . ., during which time the appointee may be removed or discharged by the sheriff. Thereafter, he may be removed or discharged, [or have other disciplinary action taken against him], for any of the following reasons. . . .
>
> * * *

(emphasis added)

Second, § 341A.12 expressly provides for certain procedures to be followed in the event the sheriff pursues disciplinary action against a deputy. However, this section also specifically states that its provisions apply only to persons in the classified civil service who have "been permanently appointed or inducted into civil service under provisions of this chapter." (emphasis added)

Accordingly, there are no statutory limitations on the sheriff's authority to terminate a probationary deputy nor are there any procedural protections provided to probationary deputies who are terminated. These facts are consistent with the general concept of probation, for probation is commonly understood as a period of time in which a new employee's performance

is evaluated with the mutual understanding that if that performance is unsatisfactory, the employee may be terminated. However, one commentator has provided the following guidance in determining what procedural protections are due probationary employees who are terminated:

> Until a probationer under civil service law receives a permanent appointment, the appointing power or the department head need not afford him a hearing upon charges before dispensing with his services at the end of the probationary period. (footnote omitted) However, if the charges placed against the probationer impute illegal, dishonest or immoral conduct calling the employee's good name, honor or integrity into question so as to seriously jeopardize his chances of securing another job a hearing must be provided. (footnote omitted)

E. McQuillin, Municipal Corporations § 12.248a, (3d ed. 1979). Cf. 1982 Op.Att'yGen. 319 (and cases cited therein) ("Constitutional due process does not require notice and an opportunity for a hearing in conjunction with the termination of a chief deputy sheriff [not covered by civil service] unless the termination is based on allegations of dishonesty, immoral, or illegal conduct that call into question the terminated employee's honesty, reputation, or good name.") Thus, the determination of what procedural protections are required by due process in the termination of probationary deputy sheriffs depends on the facts of each particular case.

The status of a probationary deputy may be analogized to the status of an at-will employee. Under the doctrine of at-will employment, an employee serves at the will of the employer, and may be terminated for any reason at any time. See Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978). Though the Iowa Supreme Court has yet to make any exceptions to this doctrine, the Court has noted that exceptions have been recognized in other jurisdictions where termination of an at-will employee was found to violate public policy. Id. at 455-456 (and cases cited therein). Based on this analogy, and the guidelines set forth by McQuillin, above, we would thus caution sheriffs seeking to terminate probationary deputies to ensure that there is a proper, reasonable, and articulable basis for the decision to terminate a particular deputy.

Finally, because a probationary deputy is not entitled to the procedural protections of Ch. 341A for the reasons discussed above, the requirement of § 341A.12 that a deputy may be termi-

nated "only upon written accusation of the county sheriff" is inapplicable. Accordingly, a sheriff may terminate a deputy sheriff in any manner which the sheriff reasonably believes is sufficient to inform the deputy of the termination.

Conclusion

In conclusion, it is our opinion that: 1) The county sheriff is to determine the length of a deputy sheriff's probation, subject to the express limitations of § 341A.11. 2) The term of probation commences the date a deputy is hired. If the deputy attends the law enforcement academy or other certified training facility within the first six months of employment, the probationary period cannot exceed six months. If the deputy attends the academy or other certified facility after the first six months of employment, the probationary period cannot extend beyond the date the deputy completes the training program or twelve months, whichever is shorter. 3) The protections afforded permanent rank deputies under §§ 341A.11 and 341A.12 are not applicable to probationary deputies. Instead, a deputy on probation may be terminated by the sheriff at any time during the probationary period if the sheriff has a proper reason for the termination and notifies the deputy of the termination in a reasonable manner.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

HUMAN SERVICES: MEDICAID: CONFIDENTIALITY. Iowa Code §§ 68A.7, 217.30, 249A.3, 249A.4; 498 I.A.C. § 75.1(1), 498 I.A.C. Ch. 79, 498 I.A.C. § 79.2(2)-(4), 498 I.A.C. § 79.3; 42 U.S.C. § 1396a(A)(30). The Department of Human Services may compel Medicaid providers to make Medicaid patient records available for program review either through program sanctions or through enforcement of an administrative subpoena. Such review does not breach the patient's confidentiality. (Williams to Reagen, Commissioner, Human Services, 10/11/84) #84-10-4(L)

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

October 11, 1984

Dear Commissioner Reagen:

Essentially, you ask three questions concerning the ability of the Iowa Department of Human Services (IDHS) to audit the records of medical service providers participating in the Medicaid Program.

1. May IDHS compel providers to make available to IDHS representatives provider records concerning Medicaid patients?

2. Does review of provider Medicaid records by IDHS representatives breach confidentiality between the Medicaid provider and Medicaid patients?

3. May IDHS require the provider to submit patient records or copies to IDHS representatives for review?

I. May Medicaid providers be required to supply Medicaid patient records to DHS on request?

Iowa Code § 249A.4 and 42 U.S.C. § 1396a(A)(30) place upon the Commissioner of IDHS the responsibility for the promulgation and enforcement of regulations "to safeguard against unnecessary utilization ... and to assure that payments are consistent with efficiency, economy and quality of care." Id. The portions of those regulations pertinent to this inquiry are found in 498

I.A.C. Chapter 79. Specifically, 498 I.A.C. § 79.3 delineates the duties of Medicaid providers to keep records and make them available to IDHS auditors.

> Providers of service shall maintain clinical and fiscal records in support of services for which a charge is made to the program and shall make such records available to duly authorized representatives of the department on request. The fiscal records shall support each item of service for which a charge is made to the program and the clinical records shall specify the procedure or procedures performed, the dates of service, the medications or other supplies or services prescribed or provided to the recipient together with information concerning progress of treatment. Such clinical and fiscal records shall be retained for a minimum of five years. After five years the records may be destroyed.

Id.

By requiring providers to document in detail the services which they provide, IDHS encourages specific focused treatment and encourages treatment continuity and consistency. Further, by requiring detailed clinical records, § 79.3 assists IDHS in determining whether the services were properly provided, or provided at all. In this manner, § 79.3 assists in the efficient and economical operation of the Medicaid program.

A rule is held to be within an agency's power to adopt when a rational agency could conclude that the rule is within its delegated authority. Hiserote Homes, Inc. v. Riedmann, 277 N.W.2d 911 (Iowa 1979); Community School District v. Civil Rights Commission, 277 N.W.2d 907 (Iowa 1979). Because the record keeping rules serve the purpose stated in the statute, IDHS can reasonably conclude that adoption of such record keeping standards is within its delegated authority. Accordingly, those rules are within the agency's power to adopt pursuant to Iowa Code §§ 17A.4 et. seq. Once duly promulgated, the record keeping standards acquired the force and effect of a legislated statute. Community School District v. Civil Rights Commission, 277 N.W.2d 907, 909 (Iowa 1979); Young Plumbing & Heating Co. v. Natural Resources Council, 276 N.W.2d 377, 382 (Iowa 1979).

Accordingly, § 79.3 creates a legal duty that providers not only maintain adequate records, but also that they "make such records available to duly authorized representatives of the department on request." § 79.3. The Department has two methods of enforcing § 79.3.

The first method is the invocation of program sanctions. IDHS has the legal authority to impose sanctions against a provider, 498 I.A.C. § 79.2(4)(a), for "[f]ailure to disclose or to make available to the department or its authorized agent, records of services provided to medical assistance recipients and records of payments made for those services." 498 I.A.C. § 79.2(2)(d). The sanction imposed may range from a term of probation to provider termination, 498 I.A.C. § 79.2(3), depending upon the factors listed in 498 I.A.C. § 79.2(4)(b).

The second method of securing records is through the issuance and enforcement of administrative subpoenas.

> Administrative agencies are normally invested with broad investigative powers to enable them to effectively carry out their legislative mandates. Agencies with authority to conduct investigations for the purpose of ascertaining probable cause for the institution of a contested case have powers comparable to those of a grand jury. United States v. Powell, 379 U.S. 48, 57, 85 S.Ct. 248, 254-55, 13 L.Ed.2d 112, 119 (1964); United States v. Morton Salt Co., 338 U.S. 632, 642-43, 70 S.Ct. 357, 364, 94 L.Ed. 401, 411 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 216, 66 S.Ct. 494, 509, 90 L.Ed. 614, 634 (1946); Falsone v. United States, 205 F.2d 734, 737 (5th Cir.), cert. denied, 346 U.S. 864, 74 S.Ct. 103, 98 L.Ed. 375 (1953).
>
> . . .
>
> Courts have been cautious to interfere with agency subpoena powers except to preserve due process rights.

Civil Rights Commission v. City of Des Moines, 313 N.W.2d 491, 495 (Iowa 1981).

IDHS is empowered to issue and judicially enforce investigative subpoenas so that the agency may "determine whether it should institute a contested case proceeding." Iowa Code § 17A.13(1). Thus, provider patient records may be subpoenaed where IDHS seeks to determine if a program violation is present warranting the imposition of program sanctions and the initiation of a contested case proceeding.

Accordingly, the answer to your first question is yes: Medicaid providers are required to make Medicaid patient records available for IDHS inspection and those providers may be compelled to do so.

II. Does IDHS review breach the confidentiality between provider and patient?

The answer to your second question is no. Further confidentiality is maintained. Medicaid patients expressly authorize IDHS review when they apply for Medicaid benefits.

Each Medicaid applicant expressly authorizes IDHS to examine the applicant's health care records by signing a "Certification Statement", which provides as follows:

> I understand that Federal and State law and rules permit access by authorized Federal and State officials to Medicaid provider records. I also fully understand that my acceptance of Title XIX - Medical Assistance, is my consent for these authorized persons to have access to my medical or other health care records during the time I am eligible for Medical Assistance as necessary to verify appropriate Medicaid payment.

(Emphasis supplied.) Clearly, when IDHS pays for medical services "Medical Assistance" has been accepted. The above certification statement operates as a consent for IDHS access to the Medicaid patient's records. In this light, it is clear that the Medicaid patient has waived any privacy interest between the patient and the provider, as to IDHS. Such a waiver may also be viewed as a release of the provider from any ethical or legal obligation to refuse IDHS access.

The conclusion that this waiver authorizes IDHS review of provider records is supported by the fact that confidentiality is maintained within IDHS.

Medicaid patients are the "individuals receiving services, or assistance from the department". Iowa Code § 217.30(1); see also Iowa Code § 249A.3; 498 I.A.C. § 75.1(1); Pennsylvania Pharmaceutical Ass'n v. Department of Public Welfare, 542 F.Supp. 1349, 1355-56 (W.D. Penn. 1982). IDHS is statutorily compelled, upon criminal penalty, to hold as confidential, information relating to those individuals. Iowa Code § 217.30; 498 I.A.C. Chapter 9. As confidentiality is maintained, and the patient has agreed to access by IDHS, the patient's interest in privacy is not infringed upon. Accordingly, the ethical and legal confidentiality restraints perceived by the various providers do not conflict with the Department's right of access.

III. May IDHS require providers to submit patient records or copies for review?

IDHS interprets the language of 498 I.A.C. § 79.3, requiring providers to "make such records available ...", to allow IDHS to require providers to submit records to IDHS for internal review rather than on-site review at the provider's facility. In analyzing this interpretation, a balance must be struck between the dictates of effective program administration and the patient's right of privacy.

The interest of IDHS in the efficient and economical administration of the Medicaid program is well recognized as a valid and important concern. 42 U.S.C. § 1396a(A)(30); Pennsylvania Pharmaceutical Ass'n v. Dept. of Public Welfare, 542 F.Supp. 1349, 1355-56 (W.D. Penn. 1982). Iowa Code § 249A.4. Such efficiency and economy enables IDHS to assist a maximum number of poor or disabled individuals.

Submission of records by providers allows IDHS to conduct internal reviews without the need to transport and house IDHS staff for each audit. These internal reviews require fewer program resources than on-site reviews. Further, internal reviews enable IDHS to conduct cost-beneficial spot checks. These internal reviews maximize the resources of the program integrity staff so that program resources are not wasted on a large auditing staff, nor excessive program overpayments made to dishonest or careless providers.

The opposing privacy interest is not so definable. As noted above, confidentiality is maintained, so that no substantive infringement of the privacy right takes place. Further, each Medicaid applicant expressly waives any remaining objection to IDHS examination. Thus, the patient's right of privacy does not conflict with the agency's interpretation of § 79.3 requiring

providers to physically submit patient records or copies thereof. The interest of the patient in privacy, sought to be protected by the provider, is being protected by IDHS.

Traditionally, the courts afford "great deference ... to the determination of regulations and rulings issued by the administrative body charged with their enforcement." L.71B Graphic Arts Int'l Union v. Employing Printers Assoc., 416 F.Supp. 769 (S.D. Iowa 1976); see also, Staege v. United States Parole Comm., 671 F.2d 266 (8th Cir. 1982); Anderson v. Heckler, 726 F.2d 455 (8th Cir. 1984). Phrased alternatively, the courts give administrative agencies "a reasonable range of informed discretion in the interpretation and application of their own administrative rules." Dameron v. Neuman Bros., Inc., 339 N.W.2d 160, 162 (Iowa 1983). See also, Community School District v. Civil Rights Comm., 277 N.W.2d 907, 909-10 (Iowa 1979); City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 312-313 (Iowa 1978). As the agency's interpretation "is a logical and sensible interpretation", Dameron v. Neuman Bros., Inc., at 162, and reasonable in light of the lack of countervailing interests, we conclude that IDHS may require Medicaid providers to physically submit copies of Medicaid patient files for program review.

In summary, the Department of Human Services may compel Medicaid providers to make Medicaid patient records available for program review either through program sanctions or through enforcement of an administrative subpoena. Such review does not breach the patient's confidentiality because such review is expressly consented to by each Medicaid applicant. Finally, the agency's requirement that providers physically submit copies of Medicaid patient records is a reasonable interpretation of 498 I.A.C. § 79.3.

Respectfully,

Matthew W. Williams
Assistant Attorney General

MWW/jaa

COUNTIES: Assessor and Auditor. Iowa Code §§ 441.17, 441.26, 558.8, 558.57, 558.61, 558.62, 558.63, 558.67 (1983). In maintaining records of real property ownership for tax purposes, county assessors and auditors have little discretion to question the validity of instruments of conveyance filed with the county recorder. (Smith to Criswell, Warren County Attorney, 10/23/84) #84-10-6(L)

Mr. John W. Criswell
Warren County Attorney
Indianola, Iowa 50125

Dear Mr. Criswell:

You have requested the opinion of the Attorney General as follows: 1) Is a deed which is valid to vest title also valid to cause tax rolls to be changed from grantor to grantee? 2) Would the Iowa Title Standards be proper guidelines for the assessor and auditor in the maintenance of tax assessment rolls? 3) Under some circumstances may an assessor or auditor possibly be guilty of malfeasance of office for failing to change tax rolls after a deed, valid pursuant to Iowa Title Standards, has been filed or a change of title has been issued by the Clerk?

To rephrase the questions you ask, it appears that you are inquiring as to what discretion, if any, a county auditor or assessor has to refuse to change the records maintained by his or her office because of alleged discrepancies in the names of parties or errors in a legal description in an instrument of conveyance.

Questions concerning the degree of discretion inherent in the office of county auditor have been the subject of other attorney general's opinions. This office has previously held that the auditor has no discretion to reject a deed with an erroneous description but must enter the same upon the transfer records, 1932 Op.Att'yGen. 181 and 1976 Op.Att'yGen. 883; that the auditor must change the name of the owner on the plat books when a quit claim deed is received, 1938 Op.Att'yGen. 177; and that the auditor may not refuse to enter in the transfer books a deed signed by a surviving joint owner of property held in joint ownership and may not even require an affidavit of the prior death of the other tenant, 1962 Op.Att'yGen. 104.

A 1980 opinion of this office, following a review of the earlier opinions on the subject, reached the conclusion that ". . . these opinions indicate that the function of the auditor in entering conveyances upon the transfer books and in changing the designation of the plat books is purely ministerial." 1980 Op.Att'yGen. 798. That same opinion, in holding that the auditor must record the name of a quit claim grantee in the County's Plat Book, stated that ". . . we do not believe the legislature intended the Auditor to have the authority to question the validity of conveyances in order to determine ownership for taxation purposes." Id.

Prior opinions have not addressed the role of the county assessor in maintaining the assessment rolls. However a careful search of relevant statutes has failed to disclose authority which would vest the assessor with discretion to refuse changing records of ownership of real property because of perceived irregularities in instruments of conveyance filed with the county recorder.

Iowa Code § 558.67 requires the auditor to correct errors appearing in the transfer books, to notify the grantee of any error in description discovered in an instrument filed for transfer, and to permit the parties to correct the error before completing the transfer. The 1932 and 1976 opinions, supra, held that if the parties fail to correct an error in an instrument after notice from the auditor, the auditor may not refuse to enter the transaction in the transfer books.

In answer, then, to the question implied in your opinion request, a county auditor or assessor has little, if any, discretion to refuse to change the records maintained by his or her office because of discrepancies or errors discovered in instruments of conveyance.

This office is reluctant to speculate concerning circumstances in which future conduct might violate criminal or penal statutes and cannot therefore answer your third question.

Sincerely,

Michael H Smith
MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

AUDITORS/REAL ESTATE TRANSFERS. Iowa Code Chapters 355, 409, 589, 592; §§ 306.21, 331.507(2)(a), 441.65, 714.16 (1983); 1984 Iowa Acts, H.F. 4. Under amendment to Section 331.507(2)(a) the auditor is to charge a fee for each separate platted lot, as well as each separate parcel, which is conveyed in a single instrument of transfer, with a fifty dollar maximum. "Platted lot" refers to lots contained in a subdivision plat and referred to by lot number in an instrument of transfer. The definition of "parcel" under the prior statute is relevant under the statute as amended. (Ovrom to Huffman, Pocahontas County Attorney, 10/23/84) #84-10-7(L)

Mr. H. Dale Huffman
Pocahontas County Attorney
15 N.W. 3rd Ave.
P.O. Box 35
Pocahontas, Iowa 50574

Dear Mr. Huffman:

You asked our opinion concerning an amendment to Section 331.507 of the Iowa Code which authorizes the county auditor to collect a fee for transfers of real estate.

Prior to amendment the section allowed the auditor to collect a five dollar fee "for each separate parcel of real estate described in a deed." Iowa Code Section 331.507 (1983).[1]

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[1] Iowa Code Section 331.507 (1983) stated:

* * *

2. The auditor is entitled to collect the following fees:

a. For a transfer of property made in the transfer records, five dollars for each separate parcel of real estate described in a deed or transfer of title certified by the clerk. However, if more than ten parcels of real estate are described in one instrument and the parcels are contiguous or separated only by a public street or highway, the fee shall not exceed fifty dollars. A parcel of real estate located outside of the corporate limits of a city includes all unplatted land described in a deed or transfer of title lying within one numbered section of land.

* * *

The last sentence of the prior statute also stated: "A parcel of real estate located outside of the corporate limits of a city includes all unplatted land described in a deed or transfer of title lying within one numbered section of land." Id. The amended section allows the auditor to collect a five dollar fee for "each separate platted lot" and "for each separate parcel of contiguous land lying within one unplatted section and described in one instrument of transfer." 1984 Iowa Acts, H.F. 4.[2] You ask the meaning of the amendment to Section 331.507.

Initially we note that both the prior statute and the amended statute provide a fifty dollar maximum fee for property described in a single instrument of transfer and which is contiguous or separated only by a public street or highway. See Section 331.507(2)(a) (1983) and Section 331.507(2)(a) as amended, set forth in footnotes 1 and 2. An attorney general's opinion holds that alleys are treated the same as public streets and highways. 1946 Op.Att'yGen. 47. However, when fewer than ten parcels or lots are being conveyed they are not considered contiguous if separated by a street, highway, or alley; the waiver of separation by street, highway, or alley applies only when determining the maximum fee to be charged. Id. For the purposes of this opinion we will assume that fewer than ten lots are being conveyed so that the fees are under the fifty dollar maximum, and that lots or parcels are not contiguous if separated by public street, highway, or alley.

The amendment deals with two categories of land transfers -- "platted lots" and "parcels." Under the prior statute a fee was charged only for "parcels." "Parcel" was interpreted as contiguous land described, assessed and used as a unit at the time of conveyance. 1946 Op.Att'yGen. 47. Hence two platted lots, or portions of lots, which were contiguous, described and assessed as a unit, and occupied by a single building, were one "parcel" under the prior statute. Id. See also Weaver v. Grant, 39 Iowa

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[2] 1984 Iowa Acts, H.F. 4 amends Section 331.507(2)(a) as follows:

> a. For a transfer of property made in the transfer records, five dollars for each separate platted lot and five dollars for each separate parcel of contiguous land lying within one unplatted section and described in one instrument of transfer. However, the fee shall not exceed fifty dollars for a transfer of platted or unplatted property which is described in one instrument of transfer and which is contiguous or separated only by a public street or highway.

294, 296-297 (1874). Under the new statute, which specifically assesses a fee for "each separate platted lot," a fee would be assessed for each platted lot, or portion of a platted lot, even if two or more lots or portions of lots were used as a unit.

We think the term "platted lot" refers to lots contained in a subdivision plat and referred to by lot number in an instrument of transfer. This includes subdivision plats prepared pursuant to Iowa Code Chapter 409, and could also include plats prepared pursuant to other statutes such as Code Chapter 355 (subdivisions into two or more parts by county surveyor), Section 714.16 (subdivisions into five or more parts under consumer fraud act), Section 306.21 (plats of rural subdivisions filed with county auditor), and Section 441.65 (auditor's plat). "Platted lot" also includes lots contained in plats filed prior to enactment of Chapter 409 or in violation of that chapter's requirements (see legalizing acts at Iowa Code Chapters 592 and 589), so long as the instrument of transfer refers to a lot number in a subdivision plat.

With regard to parcels, the legislature deleted the last sentence of the prior statute, which treated all unplatted land within one numbered section described in a deed as a single "parcel." It added the language requiring a fee for "each separate parcel of contiguous land lying within one unplatted section." Thus it is obvious that under the new statute there can be separate parcels within an unplatted section. However, there is nothing to indicate the legislature intended to otherwise change the definition of "parcel" as it relates to unplatted land. In our opinion that definition is still relevant.

Therefore each piece of contiguous land described, assessed and used as a unit at the time of conveyance, which is lying within one unplatted section and described in one instrument of transfer would be assessed a separate fee. For example, conveyance of the NW¼ and the SW¼ of Section 1 would be one parcel if the land were described, assessed and used as a unit at the time of conveyance. However the same transfer could contain two parcels if, for instance, the grantor had acquired them at different times and they continued to be assessed and used distinctly from each other at the time of conveyance. While it might be difficult for the auditor to know whether contiguous quarter sections were used as a unit or separately, he or she could determine from courthouse records whether the quarter sections were assessed separately or as a unit.

You also ask if a five dollar fee should be charged for noncontiguous parcels. Although the amended statute is not clear on this, we think a five dollar fee should be charged for each noncontiguous parcel described in one instrument of transfer.

The purpose of the statute is to allow collection of five dollars for each separate lot or parcel described in a deed or other instrument of conveyance. See 1946 Op.Att'yGen. 47. Surely the legislature intended to impose a fee on noncontiguous as well as contiguous parcels.

Sincerely,

Eliza Ovrom

ELIZA OVROM
Assistant Attorney General

EO:rcp

COUNTY CONSERVATION BOARDS: Regulation of motor vehicles on park roads. Iowa Code §§ 111A.5, 306.4, 321.235, 321.236, 321.275 (1983). County conservation board regulation denying licensed motorcycles access to park roads generally open to four-wheeled motor vehicles is inconsistent with Iowa Code chapter 321 and therefore is prohibited by §§ 111A.5, 321.235 and 321.236. (Smith to Angrick, Citizens' Aide/Ombudsman, 11/9/84) #84-11-1(L)

Mr. William P. Angrick II
Citizens' Aide/Ombudsman
Capitol Complex
L O C A L

November 9, 1984

Dear Mr. Angrick:

Your letter of August 13, 1984, requested the opinion of the Attorney General concerning whether a county conservation board may prohibit motorcycles licensed for street use from entering and using roadways in a county park in which the roadways or parkways are extensions of a county secondary road that enters and exits the park at one point.

Your letter correctly states that Iowa Code § 306.4(5) (1983) vests in the county conservation board jurisdiction and control over parkways in a county park whose parkways do not serve as extensions of primary or secondary roads entering and exiting the park at separate points. Additionally, § 111A.5, as amended by 1984 Iowa Acts, H.F. 425, § 2, includes the following limited delegation of authority:

> The county conservation board may make, alter, amend or repeal regulations for the protection, regulation and control of all . . . parkways . . . and other property under its control. The regulations shall not be contrary to, or inconsistent with, the laws of this state.

Section 321.275(1) (1983) states that the motor vehicle laws apply to the operators of motorcycles and motorized bicycles to the extent practically applicable. Subsections (2) through (8) of § 321.275 comprise additional laws applicable to motorcycle operation. These additional laws clearly are intended to promote safe operation of two-wheeled motor vehicles on public roads. None of these additional laws prohibits motorcycles from using any type of road open to other motor vehicles.

Your letter also notes § 321.236, which prohibits local authorities from enacting or enforcing regulations inconsistent with Chapter 321 (governing the operation of motor vehicles and the law of the road). Section 321.236 denies local authorities the power to enact, enforce, or maintain any ordinance, rule or regulation in any way in conflict with, contrary to or inconsistent with the provisions of chapter 321. Section 321.236 then lists twelve specific areas wherein authority is delegated for enactment and enforcement of additional local regulations concerning various aspects of motor vehicle operation and road use. Subsection 321.236(5) expressly authorizes local authorities to regulate the speed of vehicles in public parks. The list of twelve areas of local regulation in § 321.236 does not contain any other reference to parks or parkways. The only provisions in § 321.236 allowing local regulations based on discrimination among classes of motor vehicles are § 321.236(7) (licensing of intra-city common carriers) and § 321.236(8) (regulation of trucks or other commercial vehicles, e.g., designating truck routes and weight limitations).

Considering the statement in § 321.275 that the motor vehicle laws apply to the operators of motorcycles to the extent practically applicable, the nature of the additional regulations of two-wheeled motor vehicles in § 321.275, and the prohibition of conflicting or inconsistent local regulations in § 321.236, it is our conclusion that none of the subsections in § 321.236 can reasonably be construed as an express delegation of authority for a local regulation prohibiting motorcycles from using a parkway generally open to four-wheeled motor vehicles.

Although prohibition of motorcycles from parkways open to four-wheeled motor vehicles is not expressly authorized by § 321.236, another Code section mentioned in your letter arguably provides a somewhat broader delegation of regulatory authority to local officials. Section 321.235 states:

> The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this chapter unless expressly authorized herein. Local authorities may, however, adopt additional traffic regulations which are not in conflict with the provisions of this chapter.

However, in City of Vinton v. Engledow, 258 Iowa 861, 140 N.W.2d 857 (1966), the Iowa Supreme Court decided that § 321.235 did not

delegate authority for enactment of a local traffic regulation that was outside the scope of the express delegations in § 321.236.

In conclusion, the legislature has not attempted to discriminate between four-wheeled and two-wheeled motor vehicles by denying the latter access to certain classes of roadways and has not expressly delegated authority to local units of government for adoption of such a regulation. Rather, the legislature in § 321.275 has mandated uniform application of traffic laws to two-wheeled motor vehicles and other noncommercial vehicles except for distinctions related to the hazards associated with the differences in vehicle design. Accordingly, a county conservation board regulation denying licensed motorcycles access to park roads generally open to four-wheeled motor vehicles is inconsistent with Iowa Code chapter 321 and therefore is prohibited by §§ 111A.5, 321.235 and 321.236.

Sincerely,

Michael H. Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

SECRETARY OF STATE: Crop and Livestock Liens. Senate File 510, 1984 Session, 70th G.A., new Iowa Code chapter 570A; Iowa Code § 68A(3); § 554.9407(3). Combined verified lien form and request for information complies with statute and provides administrative efficiency. Uniform fee for certificate of information complies with § 554.9407(3) of the Iowa Code (1983). (Galenbeck to Small, State Senator, 11/9/84) #84-11-A(L)

November 9, 1984

Arthur A. Small, Jr.
State Senator
426 Bayard Street
Iowa City, Iowa 52240

Dear Senator Small:

You have requested an opinion of the Attorney General interpreting Senate File 510, 1984 Session, 70th G.A., adopting new Code chapter 570A relating to crop and livestock liens of agricultural supply dealers. In particular, you have raised two questions:

I. May the Secretary of State combine, in a single form, the "verified lien statement" described in Section 3(1) of Senate File 510 with the request for a "certificate showing any effective financing statement or verified lien statements naming the debtor and the crops or livestock to which the lien attaches" as described in Section 3(5) of Senate File 510?

II. May the Secretary of State charge a uniform fee of $1 per lien search regardless of the statutory provision permitting a $1 charge per "certified copy" (Section 12, Senate File 510)?

You question the Secretary of State's proposed single form which requires an advance payment of $9.00, which includes the $4.00 statutory fee for the verified lien statement and the $4.00 statutory fee for a certificate showing any presently effective financing statements (S.F. 510, § 12, amending Iowa Code Supp. § 554.9407(3) (1983)), as well as the $1.00 charge for uncertified copies of all relevant financing statements and liens. You indicate that an agricultural supply dealer may wish only the certificate and question whether the dealer can be required to pay for the additional documents. You also question the authority of the Secretary of State to charge $1.00 for copies of all relevant filings given the statutory fee of $1.00 per page for certified copies of their prior filings.

I. USE OF COMBINED FORM.

Use of a single form combining a verified lien statement and a request for a certificate from the Secretary of State is not expressly prohibited by Senate File 510. Absent such a statutory prohibition, the secretary is accorded discretion in the administration of the statute, so long as that administration is consistent with the legislative intent embodied in the statute. See, John R. Grubb, Inc. v. Iowa Housing Finance, 255 N.W.2d 89, 97 (1977); Elk Run Telephone Co. v. General Telephone Co., 160 N.W.2d 311, 315-317 (1968); Quaker Oats Co. v. Cedar Rapids Hum. R. Com'n, 268 N.W.2d 862, 868 (1978). We therefore need to determine only whether the Secretary's use of a combined form and resulting charge is a reasonable implementation of the statute.

It is our view that the combined form utilized by the secretary is a reasonable means of implementing the legislation for the following reasons:

Requiring the agricultural supply dealer to obtain both a verified lien statement and a certificate showing effective financing or lien statements is consistent with the statute.

Section 4(5) of the Act, new Code § 570A.4(5), provides:

> "An agricultural supply dealer filing a verified lien statement shall request from the secretary of state a certificate showing any effective financing statement or verified lien statements naming the debtor and the crops or livestock to which the lien attaches. The agricultural supply dealer shall notify by registered mail any other creditor who holds a lien or security interest which is subordinate or equal to the agricultural supply dealer's lien." (emphasis added)

The above-emphasized language of section 4(5) is of a mandatory nature rather than optional. The legislature directed that a three-step process be followed: (1) filing of a verified lien statement; (2) a request for a certificate, and (3) notification by registered mail to all lien holders who are equal or subordinate in priority. Since the first two steps are performed by the secretary, mere simplicity of forms, filing procedures, and certificate preparation procedures would seem to necessitate the combined lien statement, request for information and certificate now utilized.

The combined form may serve an additional purpose by aiding an agricultural supply dealer (who may be unfamiliar with the statute) to negotiate the three-step process. If the verified lien statement were separated from the request for a certificate, it is likely that some dealers would neglect to complete the second step of the process (requesting a certificate). This could result in a failure to perfect the lien and a failure to establish the priorities described in section 5 of Senate File 510. In sum, the form serves to lead a person through the process described by the statute -- and encourage successful completion.

II. UNIFORM COPY FEE

Section 12, the final provision of Senate File 510, amends Iowa Code section 554.9407(3) to provide, inter alia:

> "Upon request and the payment of the appropriate fee the filing officer shall furnish a certified copy of any filed financing statement or financing statement changes or verified lien statement or lien statement changes for a uniform fee of one dollar per page" (emphasis added).

As emphasized, the statutory fee of one dollar per page applies to certified copies supplied by the Secretary of State.

A close reading of section 4(5) of Senate File 510 reveals that, in response to a request for information under the statute, the secretary is to provide "a certificate showing any effective financing statement or verified lien statements naming the debtor and the crops or livestock to which the lien attaches." (emphasis added) This "certificate," as described by the statute, constitutes a listing of security interests. An earlier Attorney General's opinion, #84-7-7(L), dated July 26, 1984, and regarding the same legislation, states:

> "The Secretary's function appears to be a clerical one; nothing in the statute indicates an intention

> that the Secretary prioritize various liens and financing statements. . . .
>
> . . . [U]pon receipt of a request for 'a certificate showing any effective financing statement or verified lien statement naming the debtor and the crops . . . to which the lien attaches,' the Secretary should supply a listing of all financing statements and verified lien statements naming the specified debtor and relating to crops or real property." (Pages 2-4.)

The statute does not require the secretary to provide, in response to an initial request for information, a certified copy of each relevant financing statement and lien. Moreover, because information contained in the financing statements but not in the secretary's certificate would be needed to determine issues of priority and notice, the secretary could reasonably conclude that appending copies of the financing statements is appropriate.

In practice, the secretary charges a uniform fee of one dollar for uncertified copies of all relevant financing statements and verified liens. The fee does not vary, regardless of the number of copies made. The one dollar charge is authorized by Iowa Code § 68A.3 allowing ". . . a fee for the copying service as determined by the lawful custodian [which] shall not exceed the cost of providing the service."

The secretary's decision to charge the uniform one dollar fee and provide uncertified copies was based upon:

1. the expensive nature of the entire process required for the dealer to perfect the lien established by Senate File 510,

2. a failure to designate a uniform fee would delay service to persons requesting information,[1]

3. the fact that any usefulness of a "certificate" issued by the secretary pursuant to a request for information would

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[1] Since the secretary requires pre-payment of fees, the total fee calculated by number of pages would have to be calculated and paid before a request for copies could be processed.

be of limited value unless copies of all relevant financing statements were attached. A mere listing of the names and addresses of persons claiming a security interest in a debtor's crops or livestock would not provide an agricultural supply dealer with enough information to determine which security interest claimants should be sent notice, pursuant to § 570A.5(5), of the dealer's new verified lien filing, and

4. a desire by the secretary to handle all administrative functions relating to the filing of a verified lien and preparation of a certificate at one time; thereby saving the state and the lien claimant money.

The secretary's procedures are appropriate in light of her duties under the statute and the over-all statutory scheme. In fact, they appear to provide maximum service to a lien claimant for a minimal fee.

III. CONCLUSION

An examination of Senate File 510, and the forms and procedures utilized by the U.C.C. Division of the Office of Secretary of State reveal neither a disregard of the language nor a disregard of the intent of the statute. Both the combined form utilized and the uniform fee charged for a certificate effectively promote the public use and state administration of the legislation.

Sincerely,

Scott M. Galenbeck

SCOTT M. GALENBECK
Assistant Attorney General

SMG/cjc

MUNICIPALITIES: Public Contracts. Bid Preference. Iowa Code Ch. 23 (1983); Iowa Code § 23.1; 1983 Iowa Acts, Chapter 96, § 157; Senate File 2160, 1984 Session. Cities are subject to the bid preference requirement contained in Senate File 2130, 1984 Session. (Walding to O'Kane, State Representative, 11/20/84) #84-11-3(L)

November 20, 1984

The Honorable James D. O'Kane
State Representative
1815 Rebecca Street
Sioux City, Iowa 51103

Dear Representative O'Kane:

We are in receipt of your request for an opinion of the Attorney General regarding the applicability of S. F. 2160, 1984 Session to cities. Section 1 of S. F. 2160 adds a new section to Iowa Code Ch. 23 requiring a bid preference for Iowa residents in the awarding of certain contracts for public improvements.

Iowa Code Ch. 23 (1983) provides the method for awarding contracts for certain public improvements. A "public improvement" is defined in Iowa Code § 23.1 (1983), as amended by 1983 Iowa Acts, Chapter 96, § 157, as a building or other construction work to be paid for in whole or in part by the use of funds of any municipality." In turn, a "municipality" is defined to include a "township, school corporation, state fair board, state board of regents and state department of human services." Id. Thus, the provisions for awarding public improvement contracts in Chapter 23 are not applicable to a city.

Nevertheless, the bid preference requirement provided for in S. F. 2160, § 1 is applicable to cities. That section states, in part, that: "This section applies to the state, its agencies, and any political subdivisions of the state." The section further provides that the definition of a "public improvement" in § 23.1 is applicable. Recall, however, that that definition refers to a building or other construction work funded by a township, school corporation,

State Fair Board, State Board of Regents, or State Department of Human Services. Thus, the issue becomes how to harmonize these two apparently conflicting provisions.

In construing the section, familiar principles of statutory construction are applicable. The polestar of statutory construction is legislative intent. Iowa Department of Rev. v. Iowa Merit Employ. Comm., 243 N.W.2d 610, 614 (Iowa 1976). Strained, impractical, or absurd consequences, if possible, should be avoided. Doe v. Ray, 251 N.W.2d 496, 501 (Iowa 1977). In construing a statute, it should be harmonized, if possible, with other statutes relating to the same subject. Id. Effect must be given, if possible, to every word, clause, and sentence of a statute. Bork v. Richardson, 289 N.W.2d 622 (Iowa 1980), citing 2A A. Sutherland, Statutes and Statutory Construction, § 46.06 (4th ed. 1973). The construction of any statute must be reasonable and must be sensibly and fairly made with a view of carrying out the obvious intentions of the legislature. Janson v. Fulton, 162 N.W.2d 438, 442 (Iowa 1968). Other pertinent statutes must be considered. Id.

The statutory definition of a "public improvement" can be divided into applicable projects (i.e., "a building or other construction work") and applicable governmental bodies (i.e., a "municipality" as defined in § 23.1). Reference in S. F. 2160, § 1 to the "public improvement" definition was intended to incorporate the application projects division of that definition. That interpretation is buttressed by the provision in S. F. 2160, § 1 that "public improvement," as defined in § 23.1, "includes road construction, reconstruction, amd maintenance projects." The applicable governmental bodies division is then separately expanded to encompass "the state, its agencies, and any political subdivision of the state." That classification would incorporate all of the entities identified in the statutory definition of a "municipality." That interpretation harmonizes the two provisions and gives effect to the entire statute. It is also consistent with the reference in the first sentence of the bill to Chapter 384; that chapter, entitled "City Finance" concerns only cities.

Accordingly, it is our opinion that cities are subject to the bid preference requirement contained in Senate File 2160.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:sg

AREA HOSPITALS: Iowa Code Ch. 145A (1983); §§ 145A.1, 145A.3, 145A.5 - 145A.7. 1) A school district and city may merge to establish an area hospital; 2) a board of supervisors may exclude townships from a proposed merged area created by a city and a school district; 3) portions of a township may not be excluded from a proposed merged area without excluding the entire township; 4) the question of whether it is advisable for a county board of supervisors to participate in a plan by a city and school district to create a merged area is left to the discretion of the entities involved; 5) the only procedure for submitting a question to the voters concerning a proposed merged area is filing a petition of protest pursuant to § 145A.6. (Weeg to Hines, Jones County Attorney, 11/28/84) #84-11-4(L)

November 28, 1984

Mr. John J. Hines
Jones County Attorney
123 N. Maple
Monticello, Iowa 52310

Dear Mr. Hines:

You have requested an opinion of the Attorney General on several questions concerning establishment of an area hospital pursuant to Iowa Code Ch. 145A (1983). We shall address each question in turn.

I.

Your first question is as follows:

> May the school district and the city, being political subdivisions, merge [to establish an area hospital] , notwithstanding that the school district includes, in area, the city?

Chapter 145A governs area hospitals. In particular, § 145A.1 provides:

> Any of the political subdivisions of this state may consolidate to acquire and operate an area hospital for the purpose of providing hospital service for all residents of such area.

Section 145A.2(1) defines "political subdivision" as "any county, township, school district or city." (emphasis added) Section 145A.3 authorizes the governing bodies of any political subdivision "to plan for the merger of an area to establish and operate an area hospital." An "area hospital" is a hospital established and operated by a "merged area." § 145A.2(4). A "merged area" is defined as "two or more political subdivisions which have merged resources to establish and operate an area hospital." § 145A.2(3).

Given the general authority to establish area hospitals in § 145A.1 and the use of the disjunctive term "or" in the definition of political subdivision in § 145A.2(1), we believe the legislature contemplated mergers between any combination of entities enumerated therein. We do not believe that in enacting these statutory provisions the legislature ignored the likelihood that some entities of a proposed merged area, such as counties and school districts, would necessarily include, in area, other entities, such as townships and cities.[1] Accordingly, a school district and a city may merge to create an area hospital under § 145A.1.

II.

Your second question is:

> May the Boards of Supervisors of Delaware and Dubuque counties, by appropriate action, eliminate the areas of the Monticello School District lying within their respective counties from the merged area so that these counties would not be participating in the plan?

Section 145A.3 provides in relevant part as follows:

> The officials of any political subdivision are hereby authorized to plan for the merger of an area to establish and operate an area hospital; and in planning for such hospitals, a county board of supervisors may exclude any

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[1] This opinion does not address issues concerning the authority of voters in political subdivisions within the school district to protest the inclusion of the smaller subdivision within the merged area under §§ 145A.5 - 145A.9.

> township of the county which the board of supervisors determines would not sufficiently benefit by the merger. . . .

(emphasis added) The issue presented is whether Delaware and Dubuque Counties can, in agreement with the school district and city which are the proposed entities to be merged, eliminate townships in those counties from the merged area. It is our view that non-merging counties can in this situation participate in the planning of the merged area and exclude townships which are not sufficiently benefited as provided in § 145A.3.

III.

Your third question is:

> In the event of a proposed merger of the City of Monticello and a number of townships in Jones county, could parts of some of the townships which would be involved be eliminated without eliminating an entire township under Section 145A.3?

As set forth above, § 145A.3 provides only that the board of supervisors "may exclude any township of the county . . ." from a proposed merged area. This language specifically authorizes the board to exclude an entire township, but does not provide for exclusion of portions of a township. The statute throughout refers to political subdivisions, which include townships and cities. There is no apparent authority to redraw existing boundary lines to include only a portion of a political subdivision. Accordingly, we believe the answer to your question is that parts of some townships may not be eliminated from a proposed area without eliminating the entire township.

IV.

Your fourth question asks:

> Would the Jones County Board of Supervisors have any necessary or advisable participation in the plan to merge the school district and the city?

The county board of supervisors clearly has authority to participate in a plan to create an area hospital and, as noted above, has authority to exclude a township from the merged area. The statute does not, however, make this involvement mandatory if other appropriate political subdivisions create a merged area. The entities involved are in the best position to determine

whether the county board of supervisor's participation is advisable.

Accordingly, the Jones County Board of Supervisors is not required to participate in a plan to merge a school district and a city.

V.

Your final question is:

> Can the plan for the area hospital be submitted to the voters of the area which will be included in the plan before the plan is formally approved pursuant to Section 145A.5 and before a Section 145A.6 Petition of Protest is filed? Some of the area officials who have been looking into the feasibility of an area hospital have asked me if there is any way they could submit the plan for approval by the voters before the plan is formally published.

Section 145A.5 provides that an order of approval containing the details of the creation of a merged area is to be issued and published as designated, with the publication to specify that the order will be deemed approved at the expiration of sixty days from the last published notice unless a petition of protest is filed pursuant to § 145A.6. If such a petition is filed, § 145A.7 requires a special election to be held in the political subdivision where the protest was filed to approve or reject the proposed merger plan. This is the only circumstance under which any question relating to the creation of a merged area must be submitted to the voters of the proposed area. There is no provision for submitting a proposed plan to the voters for approval before the plan is formally published pursuant to § 145A.5, and in the absence of such authority we would strongly advise against such a procedure. Alternatively, we suggest that voter input be sought through such means as public participation in meetings held to consider questions relating to creation of the merged area and area hospital.

In conclusion, it is our opinion that: 1) a school district and a city may form a merged area to operate an area hospital pursuant to § 145A.1; 2) § 145A.3 authorizes the supervisors to exclude an entire township of the county from a merged area, but this provision does not authorize the exlusion of portions of a township from a merged area; 3) a board of supervisors is not required to participate in a plan to merge a school district and a city pursuant to § 145A.1; and 4) the only procedure authorized

in Ch. 145A for submitting a question to the voters concerning a proposed merged area is pursuant to § 145A.7 when a petition of protest is filed pursuant to § 145A.6.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

CRIMINAL LAW; PUBLIC RECORDS; PUBLIC SAFETY, DEPARTMENT OF: Criminal history in control of youth service agencies. Iowa Code §§ 692.6 and 692.7 (1983); Acts of the 70th General Assembly, 1984 Session, House File 2380. Nothing in Iowa Code Ch. 692 (1983) permits youth service agencies receiving criminal history data pursuant to Acts of the 70th General Assembly, 1984 Session, House File 2380, to redisseminate such data. Any redissemination of criminal history data by a youth service agency would violate Iowa Code § 692.7 (1983) and could subject the persons to civil liability under Iowa Code § 692.6 (1983). Youth service agencies receiving criminal history data are subject to applicable rules promulgated by the Iowa Department of Public Safety. The agency should seek advice of counsel to determine whether grounds exist to resist legal process or subpoena of criminal history data. (Hayward to Taylor, State Senator, and Varn, State Representative 12/20/84) #84-12-8(L)

December 20, 1984

The Honorable Ray Taylor
Iowa State Senator
Rural Route
Steamboat Rock, Iowa 50672

The Honorable Richard J. Varn
Iowa State Representative
Rural Route 4, Box 285
Solon, Iowa 52333

Dear Senator Taylor and Representative Varn:

You have asked this office for its opinion regarding the construction of Iowa Code §§ 692.6 - 692.8 (1983) in light of the access to criminal history data granted certain youth service agencies by Acts of the 70th General Assembly, 1984 Session, House File 2380. (Hereinafter referred to as H.F. 2380.) In particular, you ask:

1. May youth service agencies communicate or disseminate criminal history data under the provisions of H.F. 2380 to persons outside their agency?

2. If not, what criminal penalties, if any, would apply?

3. If such communication or dissemination is otherwise legal, can the Confidential Records Council or Department of Public Safety prohibit or regulate it?

4. If so, would the regulations of the Confidential Records Council or Department of Public Safety be enforceable under the provisions of Iowa Code Ch. 692 (1983)?

5. Is criminal history data in the hands of a youth service agency subject to discovery by subpoena or other legal process?

Iowa Code Supp. § 692.2 (1983) was amended in H.F. 2380 by adding a new subsection, number five (5), which states in pertinent part:

> Notwithstanding other provisions of this section, the department [of public safety] and bureau [of criminal identification] may provide copies or communicate information from criminal history data to any youth service agency approved by the confidential records council. The department shall adopt rules to provide for the qualification and approval of youth service agencies to receive criminal history data.
>
> * * *
>
> The criminal history data to be provided by the department and bureau to authorized youth service agencies shall be limited to information on applicants for paid or voluntary positions, where those positions would place the applicants in direct contact with children.

1. Dissemination of Criminal History Data by a Youth Service Agency.

Willful or knowing dissemination of criminal history data, as defined in Iowa Code § 692.1(3) (1983), received by a youth service agency pursuant to H.F. 2380, would be a violation of Iowa Code §§ 692.6 - 692.7(1) (1983). Iowa Code § 692.7(1) (1983) states in pertinent part:

> 1. Any person who willfully requests, obtains, or seeks to obtain criminal history data under false pretenses, or who willfully communicates or seeks to communicate criminal history data to any

> agency or person except in accordance with this chapter . . . shall, upon conviction, for each such offense be guilty of an aggravated misdemeanor. Any person who knowingly, but without criminal purposes, communicates or seeks to communicate criminal history data except in accordance with this chapter, shall be guilty of a simple misdemeanor. (Emphasis added.)

Iowa Code § 692.6 (1983) provides for an action for civil damages for the dissemination of, request for, or receipt of criminal history data "in violation of this chapter." The phrase "except in accordance with this chapter" is not an element of the offense defined in § 692.7. It is an exception to it. See, State v. Boland, 309 N.W.2d 438, 440 (Iowa 1981). Redissemination of criminal history data would have to be in accordance with Iowa Code § 692.3 (1983) which has no provision allowing such action by youth service agencies. It only permits redissemination of criminal history data by a "peace officer, criminal justice agency, or state or federal regulatory agency."

The primary goal of any construction of a statute is to determine and effectuate the intent of the legislature. Beier Glass Co. v. Brundige, 329 N.W.2d 280 (Iowa 1983). This is done by looking at what the legislature said, not by conjecturing upon what it might have said. Le Mars Mut. Ins. Co. v. Bonnecroy, 304 N.W.2d 422 (Iowa 1981). We believe that had the legislature intended to provide youth service agencies authority to share criminal history data with others, it would have expressly provided for it. In this regard, it should be noted that the legislature did expressly provide the Iowa Department of Human Services such authority when it expanded that department's access to criminal history data. Iowa Code Supp. § 692.3(2) (1983). Furthermore, we cannot construe Chapter 692 to provide no limits on youth service agencies so as to give them unlimited discretion in regard to criminal history data. Such license would be wholly inconsistent with the manifest intent of the legislature behind the enactment of Chapter 692.

In response to your third question about whether the Confidential Records Council or Department of Public Safety could prohibit or regulate communications or dissemination by youth service agencies, it is necessary to focus on H.F. 2380. That provision states that:

> The department shall adopt rules to provide for the qualification and approval of youth service agencies to receive criminal history data.

This language requires the Department of Public Safety to promulgate rules to control the flow of criminal history information going to youth service agencies. Although a violation of these rules may not necessarily subject the youth service agencies to the criminal and civil sanctions of Ch. 692, the rules themselves could provide administrative sanctions for any unauthorized communications, such as prohibiting future access to the data. Moreover, since these rules have the force and effect of law, the Department of Public Safety will be able to obtain an injunction to prevent further illegal dissemination. FCC v. Schreiber, 381 U.S. 279 (1965). Accord. Public Utilities Commission v. United States, 355 U.S. 524 (1958); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). We urge the Department of Public Safety to promulgate a carefully considered set of rules to protect the confidentiality of this data.

2. Discovery of Criminal History Data.

You have asked whether criminal history data in the hands of a youth service agency would be subject to subpoena or other legal process. We have concluded that the youth service agency must also keep this data confidential under Chapter 692. It would therefore appear that whether the documents are subject to legal process would not in principle differ depending on what authorized entity is in possession of the document.

The fact that a record is not open to the public by statute does not, per se, render the record absolutely immune from subpoena or other legal process. See, In re Subpoena of Gillespie, 348 N.W.2d 233, 236-237 (Iowa 1984) (civil discovery); State v. Schomaker, 338 N.W.2d 874 (Iowa 1984) (prosecutor's subpoena); Iowa Civil Rights Commission v. City of Des Moines, 313 N.W.2d 491, 495 (Iowa 1981) (administrative agency subpoena). Where a confidential record is sought by subpoena or civil process, the custodian or affected persons could seek an injunction to restrain examination under § 68A.8, see, Brown v. Johnston, 328 N.W.2d 510, 513 (Iowa 1983); seek a protective order under I.R.C.P. 123, In re Subpoena of Gillespie, 348 N.W.2d at 237; or raise a claim of privilege, State ex rel. Shanahan v. Iowa District Court, ____ N.W.2d ____, ____, No. 83-726 (Iowa, filed October 17, 1984). Whether grounds would exist to restrain examination or to limit discovery pursuant to any of these procedures would depend on the record in question. Because the question whether a document must be released in response to legal process would inherently arise in judicial proceedings, an opportunity for judicial determination of the agency's duty to release the document or of appropriate limitations on discovery would always be available. We would therefore refrain from attempting to decide by an Attorney General's opinion whether a

class of documents would be discoverable in every case or to speculate as to what grounds may exist to limit examination of documents within the class. A youth service agency, the Department of Public Safety, or any other agency concerned with the potential subpoena of confidential documents should instead seek advice of counsel.

We would note that the Department of Public Safety's rule-making authority would permit it to impose requirements on youth service agencies requiring that timely notice be given to the Department of Public Safety of any subpoena or other legal process directed to criminal history data. This would ensure that the department would have the opportunity, if desired, to contest any discovery request.

3. Summary.

Iowa Code Ch. 692 (1983) does not authorize any redissemination of criminal history data received pursuant to H.F. 2380. Therefore, any such unauthorized release by a youth service agency could subject those involved to criminal and civil sanctions under Iowa Code §§ 692.6 and 692.7 (1983). Moreover, since the Department of Public Safety is required to promulgate rules regarding the "qualification and approval of youth service agencies to receive criminal history data," any violation of these rules could result in sanctions prescribed by those rules. Lastly, the agency should seek advice of counsel to determine whether grounds exist to resist legal process or subpoena of criminal history data.

Respectfully yours,

Gary L. Hayward by EMO

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH/cjc

ADMINISTRATIVE LAW: Schools: Appeals. Iowa Code § 290.1 (1983). Iowa Code § 290.1 is a statute of limitation for filing appeals with the State Board of Public Instruction. The word "filed" in § 290.1 means actually received by the agency in the absence of a rule that an affidavit of appeal is deemed to be filed when mailed. The State Board could provide by rule that an affidavit of appeal is deemed to be filed when mailed. (Fleming to Benton, State Superintendent of Public Instruction, 12/14/84) #84-12-7(L)

December 14, 1984

Dr. Robert D. Benton
State Superintendent
Department of Public Instruction
Grimes State Office Building
L O C A L

Dear Dr. Benton:

You have asked for our opinion concerning the requirements of Iowa Code § 290.1 (1983) which provide as follows:

> Appeal to state board. Any person aggrieved by any decision or order of the board of directors of any school corporation in a matter of law or fact may, within thirty days after the rendition of such decision or the making of such order, appeal therefrom to the state board of public instruction; the basis of the proceedings shall be an affidavit filed with the state board by the party aggrieved within the time for taking the appeal, which affidavit shall set forth any error complained of in a plain and concise manner.

(Emphasis added.) The specific questions you present are:

1. Does the State Board of Public Instruction have jurisdiction to hear an appeal mailed,

> but not received within the thirty day time limit of Section 290.1? Stated another way, the question might be posed as, does mailing constitute filing within the terms of Section 290.1?
>
> 2. If the response to the first question is in the negative, could the State Board, by rule, define filing to include mailing?

It is our opinion that Iowa Code § 290.1 is a statute of limitation, that is the legislature has created a deadline for invoking the jurisdiction of the Iowa State Board of Public Instruction to hear appeals from decisions or orders of school district boards of directors. This means that the appeal must be actually received by the agency within thirty days. However, the State Board could provide by rule that the affidavit is deemed to be filed when it is mailed.

There are two kinds of statutes or rules that establish time periods for particular actions to be taken. One variety creates a rigid and precise deadline and it may not be extended "by waiver, estoppel or consent." Qualley v. Chrysler Credit Corp., 261 N.W.2d 466, 468 (Iowa 1978). The other type of deadline is directory and may be extended by agreement between parties or by order of a court or an agency. The Iowa Supreme Court has explained the two types of statutes in Taylor v. Iowa D.O.T., 260 N.W.2d 521, 522-23 (Iowa 1977). The mandatory-directory analysis was applied in Iowa Civil Rights Commission v. Massey-Ferguson, Inc., 207 N.W.2d 5 (Iowa 1973) and discussed in detail in Franklin v. Iowa Dept. of Job Service, 277 N.W.2d 877, 879-881 (Iowa 1979). We believe that here

> [w]e are confronted . . ., with a clear and unambiguous statute specifically limiting the number of days within which the complaint shall be filed.

Massey-Ferguson, 207 N.W.2d at 7 (emphasis by court). The relevant language in § 290.1 is parallel: "the basis of the proceedings shall be an affidavit filed . . . within the time for taking the appeal, . . ." (emphasis added).

We are particularly mindful of the principle that administrative agencies do not possess common law or inherent powers, but only the powers which are conferred by statute. Franklin v. Iowa Dept. of Job Services, 277 N.W.2d at 881. The Iowa Supreme Court observed in Franklin, quoting the Massey-Ferguson case, that

> The time in which an administrative proceeding may be brought is often regulated by the

> statute providing for such proceeding, and a failure to comply with such statute may bar the administrative proceeding and any judicial proceeding which depends thereon. An administrative agency may not enlarge its powers by waiving a time requirement which is jurisdictional or a prerequisite to the action taken.

Franklin, 277 N.W.2d at 880. The State Board of Public Instruction is not a roving commission vested with power to interfere with the activities of school districts. Instead, it must await an appeal from a district's final decision. See Southeast Warren v. Iowa Dept. of Pub. Inst., 285 N.W.2d 173, 180 (Iowa 1979).

Important policy reasons for concluding that § 290.1 is a statute of limitation relate to school districts and not to the State Board. A good example of a school district decision for which time for appeal needs to be clear is a decision to close an attendance center. See e.g., Keeler v. Iowa State Bd. of Pub. Instruction, 331 N.W.2d 110 (Iowa 1983). In such a circumstance, a school district needs to proceed with planning of bus routes, hiring or discharging teachers, and other practical activities that flow from the decision. The cut-off time for a § 290.1 appeal of such a decision to the State Board should be clear and precise. Delay of an appeal of the State Board may often affect the school district adversely. Cf. Taylor v. Dept. of Transp., 260 N.W.2d at 523 (where time requirement is directory). We conclude that § 290.1 is a statute of limitation for invoking the jurisdiction of the State Board of Public Instruction.

We reach the same result when we consider your questions in the light of the meaning of the word "filed." The Iowa Supreme Court has said that "[a] paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file." Mills v. Board of Supervisors, 227 Iowa 1141, 1143, 290 N.W. 50, 52 (1940). See also, State v. Parker, 153 N.W.2d 264, 266 (Minn. 1967) ("The meaning of the term 'filed' is plain and means the notice actually be received by the clerk within [the time required by the statute]." There are scores of cases in which the word filed has been construed to mean that a document must have been received by the particular officer or agency to be considered as filed. See cases annotated in 36A C.J.S., File, pp. 395-402 and 1984 pocket part, p. 38; 16A Words and Phrases, 1984 pocket part, p. 15. The most recent statement by the Iowa Supreme Court which relates to the point at which filing occurs is as follows:

> Here a notice was mailed to the clerk on April 8, 1977, but did not reach him. A second notice was thereafter mailed to him, which reached

> him on May 4, 1977. This latter date was the time that filing was accomplished.

Cook v. City of Council Bluffs, 264 N.W.2d 784, 787 (Iowa 1978). See also, Brembry v. Armour and Co., 250 Iowa 630, 631, 95 N.W.2d 449, 450 (1959).

In our opinion, § 290.1 is a statute that is intended to be a statute of limitation; it establishes a precise deadline for invoking the jurisdiction of the State Board of Public Instruction. We believe the effect of § 290.1 is similar to that of Iowa Rule of Civil Procedure 48 (a civil action is commenced by filing a petition with the court), and 55 which provides as follows:

> For the purpose of determining whether an action has been commenced within the time allowed by statutes for limitation of actions, whether the limitation inheres in the statutes creating the remedy or not, the filing of a petition shall be deemed a commencement of the action.

(emphasis supplied). See also, Iowa R. App. Pro. 5(a) (time for appealing to Supreme Court); Iowa Code § 17A.19(3) (1983) (time for appealing a "contested case" decision); and Iowa Code § 17A.16(2) (time to apply for rehearing in a contested case).

The Iowa Supreme Court has ruled that it is the duty of a tribunal "to refuse, on our own motion, to entertain an appeal not authorized by [Iowa R. App. Pro. 5(a)], Robco Transportation, Inc. v. Ritter, _____ N.W.2d _____ (Iowa 1984), Slip. Op. No. 83-915, filed October 17, 1984, page 4. See also, Qualley v. Chrysler Credit Corp., 261 N.W.2d 466, 468 (Iowa 1978). If an appeal is not timely filed, it must be dismissed. Robco Transportation, at page 11; State v. Iowa Dept. of Social Services, 328 N.W.2d 912, 913 (Iowa 1983).

In summary, it is our opinion that the word "filed" in § 290.1 means that the document must actually be received by the agency, in the absence of a rule to the contrary.

We turn now to the question of whether the State Board could provide by rule that an affidavit could be deemed to be "filed when mailed." We believe that the Board could adopt such a rule. The State Board has been granted power to "[a]dopt necessary rules and regulations for the proper enforcement and execution of the provisions of the school laws." Iowa Code § 257.9(2) (1983). The Board has already adopted rules to govern hearings that occur under the provisions of Ch. 290. See I.A.C. 670-51.1 et seq. We know of no reason that would prevent the State Board from

promulgating rules to provide that the affidavit required to be filed to commence an appeal is deemed to be filed when mailed. For agency rules that provide that a document is deemed to be filed when mailed, see e.g., I.A.C. 370-4.35(1) (in re documents submitted to Iowa Job Service). The Iowa Supreme Court has held that a rule that permits a jurisdictional filing date to be met by mailing is within the authority of an agency. See Messina v. Iowa Dept. of Job Service, 341 N.W.2d 52, 56 (Iowa 1983); Cosper v. Iowa Dept. of Job Service, 321 N.W.2d 6, 8 (Iowa 1982).

We are aware that problems may arise in rare cases of lost mail. See Cook v. City of Council Bluffs, 264 N.W.2d 784 (Iowa 1978) (complex fact situation in which opposing counsel and Supreme Court received timely notice of appeal but district court clerk did not). But rules may provide for such circumstances. See Job Service rules cited above and Iowa Rule of Appellate Procedure 30(a) (papers required or permitted to be filed with the clerk of the Iowa Supreme Court "shall be deemed filed on the day of mailing"). Moreover, the General Assembly has provided a process for proving when a document was mailed. See Iowa Code § 622.105 (1983). And see Iowa Code § 622.106 (effect of certified or registered mail).

In summary, it is our opinion that Iowa Code § 290.1 is a statute of limitations. The word "filed" means actually received in the absence of a rule providing that the affidavit of appeal required by § 290.1 is deemed to be filed when mailed. The Board of Public Instruction could promulgate a rule to provide that an affidavit of appeal is deemed to be filed when mailed.

Sincerely,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

LICENSING: Duplicate Licenses for Health Professionals. Iowa Code §§ 147.7 and 147.80(19) (1983). The Code does not prohibit the issuance of a duplicate license to be displayed in a branch office. (Hart to Pawlewski, Commissioner of Health, 12/14/84) #84-12-6(L)

December 14, 1984

Norman Pawlewski
Commissioner of Health
Lucas Building
Des Moines, Iowa 50319

Dear Commissioner Pawlewski:

We are in receipt of your recent request for an Attorney General's opinion concerning an interpretation of Iowa Code § 147.7. You have specifically asked "whether a duplicate professional license can be issued to be displayed in a branch office under Iowa Code § 147.7."

Iowa Code section 147.7 states that:

> Every person licensed under this title to practice a profession shall keep his license publically displayed in the place in which he practices.

Statutes are generally given a reasonable and practical construction which best effects its purpose. Hansen v. State, 298 N.W.2d 263, 265 (Iowa 1980). Iowa Code section 147.7 has been construed to require a professional to display a license in every regular place of practice. See 1935 Op. Att'y Gen. 330. It therefore seems reasonable and practical to issue duplicate licenses to those professionals who practice in two places of

business. However, The Code further specifies that fees may be assessed for the cost of issuing a "[d]uplicate license, which shall be so designated on its face, upon satisfactory proof [that the original] . . . has been destroyed or lost." Iowa Code § 147.80(19). It is well recognized in Iowa that "[w]hen statutes relate to the same subject matter or to closely allied subjects they are said to be pari materia and must be construed, considered and examined in light of their common purpose and intent so as to produce a harmonious system or body of legislation." Rush v. Sioux City, 240 N.W.2d 431, 445 (Iowa 1976).

Iowa Code Section 147.80 gives the examining board for each profession the authority to collect fees for the issuance of duplicate licenses in cases where the original has been lost or stolen. It does not address the issuance of duplicate licenses to be displayed simultaneously where a health professional practices in several locations. Nor does it expressly limit the criteria upon which a duplicate license may be issued. The Board of Health might reasonably conclude it is necessary to issue duplicate licenses for branch offices in order to accommodate the changing marketplace and to prevent the necessity of requiring all health professionals to transport their licenses from one place of practice to another. Duplicate licensing rules should include proper verification requirements and safeguards against fraud such as requiring that a duplicate license be marked as "duplicate" or a designation pertaining to the branch office's address.

In conclusion, it is our view that the Code does not prohibit the issuance of duplicate licenses for branch offices where a reasonable basis exists to justify the issuance of duplicate licenses.

Sincerely,

ELIZABETH HART
Assistant Attorney General
Health Division

EH/cjc

TORT LIABILITY: Liability of Governmental Units for Injuries to Offender Performing Unpaid Community Service. Iowa Code sections 25A, 85.59, 907.13 (1983). Governmental units or other entities using offenders performing unpaid community service work may be liable for workers' compensation or under general tort law for injuries to such workers. Offenders performing unpaid community service work are not relieved of all liability for torts they commit while performing the work. (Peters to Herrig, Dubuque County Attorney, 12/14/84) #84-12-5(L)

Mr. James Herrig
Dubuque County Attorney
Dubuque County Courthouse
Dubuque, Iowa 52001

Dear Mr. Herrig:

You have requested an opinion on the effect of a 1984 law, Senate File 2098, on governmental liability for injuries to criminals performing unpaid community service work and liability of those persons for torts they commit while performing the work. We conclude that the 1984 law does not make any particular governmental entity exclusively liable for workers' compensation benefits to a person performing unpaid community service. Therefore, depending on the facts of each case, persons performing unpaid community service could argue that they are employees entitled to workers' compensation from the governmental unit or other employer. If the person performing unpaid community service is not entitled to workers' compensation benefits, for whatever reason, the person could pursue whatever tort remedies that are available, including a suit against governmental entities under Chapters 25A or 613A. The answer to your second question is that the offenders performing unpaid community service work could be liable for torts they commit while performing the work.

Under Iowa sentencing statutes, a court may order a defendant to perform community service work. The work may be required as a condition of probation, Iowa Code § 907.13 (1983); as part of a plan of restitution to repay court costs or appointed attorney fees, id. § 910.2; or as a condition of work release or parole, id. § 910.5.

Prior to 1984, the portions of the workers' compensation law dealing with criminal defendants were Iowa Code §§ 85.59, .60 and .62. Section 85.60 regarding workers' compensation for inmates on work release has been repealed. Acts of the 70th General Assembly, 1984 Session, S.F. 2084. Section 85.62 allows counties to elect to include inmates confined in county jails as employees entitled to workers' compensation. Section 85.59 provides certain limited benefits to inmates, which the statute defines as persons "confined" to state penal or correctional facilities. See Heumphreus v. State, 334 N.W.2d 757 (Iowa 1983). The benefits for inmates are not coextensive with other benefits for employees covered by the workers' compensation law.

The 1984 session of the legislature attempted to clarify the liability of governmental entities for injuries to criminal offenders performing unpaid community service work. The title of Senate File 2098 states it was intended to be an act "specifying that the state assumes liability for injuries to offenders performing unpaid community service." If that was the intent of the legislature, the statute as passed fails to carry out that purpose.

Section 1 of Senate File 2098 provides that section 85.59, providing workers' compensation benefits to inmates, was amended by adding the following:

> For purposes of this section, the term "inmate" excludes a person who is performing unpaid community service under section 907.13 or a work assignment of value or to the public under chapter 232.

What the legislature intended by this amendment to section 85.59 is unclear. There is little need for a law excluding persons placed on probation under section 907.13 from the definition of inmate in section 85.59. An inmate, as defined in section 85.59, only means persons confined to state correctional facilities, which a probationer obviously is not. Whatever the legislature intended to do in section 1, it would not apply to all offenders performing community service but only to those performing pursuant to a probation sentence under section 907.13 or a work assignment under Chapter 232.

It is possible that the legislature intended to include offenders as "inmates" under workers' compensation and mistakenly used the word "excludes" for "includes." However, a better explanation for the legislature's decision to expressly exclude persons performing community service pursuant to section 907.13 or Chapter 232 from the definition of inmate in section 85.59 was to make clear that such persons were entitled to workers' compensation benefits and were not subject to the limited benefits of inmates.

Assuming that the legislature intended to make the state liable for injuries to offenders performing unpaid community service, but to allow workers' compensation benefits that are broader than benefits received by inmates, Senate File 2098 does nothing to indicate that these persons are employees of the state entitled to workers' compensation. Without specific statutory inclusion as employees, it is doubtful that a person performing forced, unpaid community service is an employee. See Frederick v. The Men's Reformatory, 203 N.W.2d 797 (Iowa 1973) (prisoner working in prison industry not an employee entitled to workers' compensation because state does not employ at will, pay wages or intend to create employer-employee relationship).

Since no law clearly makes defendants performing unpaid community service employees of the state under Chapter 85, such persons may claim benefits and try to establish their entitlement from whatever entity is found to be the employer. This would involve a review of the many factors to determine who is an employee entitled to workers' compensation and, therefore, this opinion cannot give a definitive answer in all cases.

If such persons are not covered by workers' compensation, any governmental unit may be liable under Chapters 25A or 613A for breach of a duty proximately causing injury to the offender performing the service. We express no opinion on whether such a suit would be successful because of the myriad of factual and legal issues that would be involved.

Senate File 2098 was not limited to an attempt to clarify workers' compensation issues, but also attempted to have the state assume liability for "torts committed by offenders performing unpaid community service." Acts of 70th General Assembly, 1984 Session, S.F. 2098, Preamble. The new law amended section 907.13, regarding community service by persons sentenced to probation, by adding the following new subsection:

> 5. The state of Iowa is exclusively liable, according to and under chapter 25A, for a tortious act committed by a defendant while performing unpaid community service.

You have asked whether this amendment relieves an offender from personal liability for torts committed while performing unpaid community service. The amendment does say that the state is "exclusively" liable. However, the amendment also says the state is liable "according to and under chapter 25A." Assuming that the offender is an employee of the state, and was acting within the scope of his employment, the offender could still be personally liable if the act was willful and wanton or malfeasance in office. Acts of 70th General Assembly, 1984 Session, S.F. 2271, section 2. Therefore, section 5 of Senate File 2098 does not eliminate all tort liability for offenders. Finally, although employees are not personally liable for torts that are excluded by section 25A.14, if the claim falls outside of 25A for any other reason, the offender may be personally liable.

Very truly yours,

James M. Peters

JAMES M. PETERS
Assistant Attorney General

JMP/cjc

GOVERNMENT CONTRACTS: Retained funds. 1983 Iowa Code Supp. Ch. 593. The law limits the retainage for payment of claims of subcontractors on public contracts to five percent. A governmental body could provide expressly by contract for a greater amount but such a requirement is unnecessary. (Fleming to Richey, Executive Secretary, 12/14/84) #84-12-4(L)

R. Wayne Richey
Executive Secretary
State Board of Regents
L O C A L

Dear Mr. Richey:

You have asked for our opinion concerning the requirements of 1983 Iowa Code Supp. Chapter 573. The particular questions are:

1. Does any provision of Chapter 573 authorize a governmental body to retain more than five percent of the contract price?

2. Could a governmental body provide by contract for retainage in excess of five percent of the contract price?

The questions are submitted because as you stated, "[i]n some cases, the amount of all claims on file, when doubled, will exceed the amount of 5 percent of the contract price."

It is our opinion that Chapter 573 limits the retainage to five percent of the contract price. However, a governmental body could retain more than five percent if, and only if, the contract

provided in express terms for a retainage in excess of the statutory five percent. We believe that such a contract term is unnecessary because the general contractor's bond is available when the five percent retainage is insufficient to pay claims of subcontractors on file with the governmental body.[1]

When we are asked to ascertain the meaning of statutes, a variety of principles must be employed. The polestar of statutory construction is legislative intent. Doe v. Ray, 251 N.W.2d 496, 500 (Iowa 1977). In searching for legislative intent, we must first consider the purpose of the legislation. Id. The purpose of Ch. 573 has already been determined; it was adopted to protect subcontractors because normally "it is impossible to obtain a lien on public property." Economy Forms Corp. v. City of Cedar Rapids, 340 N.W.2d 259, 263 (Iowa 1983); Lennox Industries, Inc. v. City of Davenport, 320 N.W.2d 575 (Iowa 1982).

The meaning of a statute is always a matter of law, and the final arbiter is the Iowa Supreme Court. Welp v. Iowa Dept. of Revenue, 333 N.W.2d 481, 483 (Iowa 1983). We believe the answer to your first question has been decided. See Hercules Mfg. Co. v. Burch, 235 Iowa 568, 16 N.W.2d 350 (1945); Community Sch. Dist. of Eldora v. Employers Mutual Cons. Co., 194 F.Supp. 733, 744 (N.D. Iowa 1961). However, the language of Iowa Code § 573.14 (1983), if considered in isolation from the other requirements of Ch. 573, may cause confusion.[2] Section 573.14 provides as follows:

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[1] The General Assembly, in 83 Iowa Acts, Ch. 55, § 1, p. 76, excluded from eligible claimants "a person furnishing only materials to a subcontractor who is furnishing only materials . . ." Id. Thus, the legislature, by amending Iowa Code § 573.7 (1983), removed the protection for certain subcontractors who had been held to be covered. See Lennox Industries, Inc. v. City of Davenport, 320 N.W.2d 575 (Iowa 1982).

[2] The issues you have presented here were not before the court in Economy Forms Corp. v. City of Cedar Rapids, 340 N.W.2d 259 (Iowa 1983). We have examined that decision and the Appendix and Briefs of the parties filed with the Supreme Court as well. In that case, double the amount of the claim on file did not exceed the retainage. The Supreme Court upheld the constitutionality of Ch. 573 in response to equal protection and due process attacks. See id. at 262-264.

> Retention of unpaid funds. Said fund shall be retained by the public corporation for a period of thirty days after the completion and final acceptance of the improvement. If at the end of said thirty-day period claims are on file as herein provided the public corporation shall continue to retain from said unpaid funds a sum not less than double the total amount of all claims on file.

(first unnumbered para.) (emphasis added). We may not read that paragraph in isolation. In interpreting statutes, we must consider all parts together without giving undue importance to one single or isolated portion. Peffers v. City of Des Moines, 299 N.W.2d 675, 678 (Iowa 1980); State v. Broten, 295 N.W.2d 453, 454 (Iowa 1980). Two other sections of Chapter 573 are particularly relevant to your first question. Section 573.25 provides: "The filing of any claim shall not work the withholding of any funds from the contractor except the retained percentage, as provided in this chapter." (emphasis supplied). In addition, Section 573.22 provides that:

> "If, after the said retained percentage has been applied to the payment of duly filed and established claims, there remain any such claims unpaid in whole or in part, judgment shall be entered for the amount thereof against the principal and sureties on the bond.

(emphasis added). Thus, Ch. 573 provides two sources of relief for eligible claimants who have not been paid by general contractors on public projects, the retainage and the bond.

We have found nothing in recent cases that indicate that the holdings in Hercules Mfg. Co., supra and Community School Dist. of Eldora, supra, are incorrect now. Indeed, one of the questions before the courts in Hercules and Eldora is identical to yours.[3] The court in Hercules held that claimants for labor and materials had no right to any part of the contract price except the statutory retainage. 235 Iowa at 570, 16 N.W.2d at

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[3] The relevant provisions of Ch. 573 are unchanged from the statutes construed in Hercules except the retainage has been reduced from ten percent to five percent. Cf. 1939 Iowa Code §§ 10310 et seq.

352. Com. Sch. Dist. of Eldora, 194 F.Supp. at 744. Like the court in Hercules, we have considered the entire chapter and conclude that it provides for the retention of five percent of the contract price. Our opinion, in response to your first question, is that § 573.14 must not be read to authorize retention of more than five percent of the contract price even though "double the total amount of the claims on file" exceeds the retainage in a particular situation.

The answer to your second question is not so clear as the first. It, too, was considered by the court in Hercules Mfg. Co., supra:

> It is not to be understood from the foregoing that the highway commission could not contract to retain more than [5] per cent of the contract price. The statutes expressly contemplate such right. [Five] per cent is the minimum and not the maximum that must be retained. What we do hold is that there was no intention here to retain for the benefit of laborers or materialmen more than the [5] per cent.

235 Iowa at 579, 16 N.W.2d at 356 (emphasis added). Iowa Code § 533.13, now as before, provides that the retained percentage "in no case shall be less than five percent . . .," i.e., a minimum, not a maximum. Therefore, we agree with the court's dicta in Hercules that a governmental body could require, by an express term in its bid documents and the contract, for a retainage that is more than five percent. For a discussion of the effect of dicta, see State v. Foster, ____ N.W.2d ____, S.Ct. No. 84-33, slip op. filed October 17, 1984. Because the statute provides for a particular percentage, a decision by a governmental body to require retainage in excess of five percent should be incorporated in bid documents so that bidders would have ample notice of a requirement beyond that required by Ch. 573. Inasmuch as § 573.22 provides that after the retainage has been applied, claimants are entitled to judgment on the bond, retainage above the five percent amount is unnecessary.

In summary, Iowa Code Ch. 573 limits the amount of retainage on a public improvement contract to five percent. A governmental body could provide expressly by contract for a greater amount, but we believe such a requirement is unnecessary.

Sincerely,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

INSURANCE; PUBLIC EMPLOYEES: Group Health Insurance Plans. Iowa Code §§ 97B.41(3), 97B.42, 97B.45-.47 (1983); House File 2528 § 25 (1984 Session). The meaning of "retired," as used in House File 2528 § 25 (1984 Session), is defined by the applicable retirement systems for which a particular public employee is eligible. (Walding to Bauch, Black Hawk County Attorney, 12/11/84 #84-12-3(L)

December 11, 1984

Mr. James C. Bauch
Black Hawk County Attorney
309 Courthouse Building
Waterloo, Iowa 50703

Dear Mr. Bauch:

We are in receipt of a request from your office regarding an interpretation of House File 2528 (1984 Session). Section 25 of that bill provides that a governing body, county board of supervisors, or city council shall allow its employees who "retired" prior to reaching the age of 65 to continue participation, at the employee's own expense, in group health insurance plans until attaining 65 years of age. Specifically, we have been asked to define the term "retired" in that section as applied to county employees.

It is our opinion that the meaning of "retired," as used in H.F. 2528 § 25, is defined by the applicable retirement plan for which a particular public employee is eligible. For instance, county employees are required to be members of the Iowa Public Employees Retirement System (IPERS). Iowa Code §§ 97B.41(3) and 97B.42 (1983). Sections 3 through 19 of H.F. 2528 amend the IPERS statute, Chapter 97B. It is logical then to assume that the legislature, in adopting section 25, would have intended that the term "retired" in section 25, as applied to employees under

the IPERS system, would be determined by reference to the criteria for retirement in Chapter 97B. An employee under IPERS is "retired" when that person leaves employment under the criteria set forth in that chapter. See Iowa Code §§ 97B.45-97B.47 (1983).

Statutes relating to the same subject matter, or to closely-allied subjects, are to be construed, considered, and examined in pari materia. Wonder Life Co. v. Liddy, 207 N.W.2d 27, 32 (Iowa 1973). House File 2528 relates to the benefits of certain public retirement and benefit systems. Frequent usage of the term "retired" is made in the legislation. See e.g., §§ 2 (amending Iowa Code § 97A.6(14)(a)(2)), 9 (amending Iowa Code § 97B.49(8)(a), and 21 (amending Iowa Code § 294.15). Thus, the legislative intent in using the term "retired" in § 25, as in the other sections of the Act, apparently refers to retirement criteria contained in the various applicable retirement systems for public employees.

We believe this interpretation is also the most reasonable construction in the context of employee benefits. If the meaning of "retired" were interpreted, in the alternative, to include unilateral decisions of employees to terminate employment, eligibility for continued participation in a group health insurance plan would be overly expansive, encompassing all former employees regardless of age and tenure. That approach was rejected in Watson v. Brower, 24 N.J. 210, 215, 131 A.2d 512, 515 (1957) (held that the word "retire," as used in a provision of a will establishing a corporate employee's pension, did not include termination of employment upon the unilateral decision of employees). The word "retired," when used to describe employment benefits, commonly refers to termination under established criteria for age, years of service, or disability and not simply a decision to leave employment at any time. Black's Law Dictionary (5th ed. 1979) p. 1183, for example, defines "retire" to mean "to terminate employment or service upon reaching retirement age." [Emphasis added] The construction of any statute must be reasonable and must be sensibly and fairly made with a view of carrying out the obvious intention of the legislature. Jansen v. Fulton, 162 N.W.2d 438, 442 (Iowa 1968). Unreasonable and absurd consequences are to be avoided. Id.

In conclusion, the word "retired" in H.F. 2528, § 25, should be construed to encompass employees who fit the definition of "retired" under the applicable retirement system.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/cjc

RACING COMMISSION: Horse Track Pari-Mutuel Tax. Iowa Code Supp. §99D.15 (1983), as amended by the Acts of the 70th General Assembly, 1984 Session, Senate File 2328, Section 17. The tax credit created by Acts of the 70th General Assembly, 1984 Session, Senate File 2328, Section 17, would be applicable to the tax on all wagers made under the auspices of a license granted a single licensee for dog and horse races at the same facility. Any distinction between dog and horse racing in tax provisions arguably based upon policy or practical distinctions between such racing would be constitutional.
(Hayward to Davis, Scott County Attorney, 12/11/84) #84-12-2(L)

Mr. William E. Davis
Scott County Attorney
Scott County Courthouse
416 West Fourth Street
Davenport, Iowa 52801

December 11, 1984

Dear Mr. Davis:

You have asked for the opinion of this office regarding the tax exemption given certain pari-mutuel racing facilities by Acts of the 70th General Assembly, 1984 Session, Senate File 2328, Section 17 (Hereinafter referred to as S.F. 2328, §17.). That Section amends Iowa Code Supp. §99D.15 (1983), imposing a tax upon the gross sum of monies wagered upon pari-mutuel races, in part by adding a new subsection which reads:

> A tax credit of up to five percent of the gross sum wagered per year shall be granted to licensees licensed for horse races and paid into a special fund for the purpose of retiring the annual debt on the cost of construction of the licensed facility. Any portion of the credit not used in a particular year shall be retained by the treasurer of state. A tax credit shall first be assessed against any share going to a city, then to the share going to a county, and then to the share going to the state.

In regard to this tax credit, you have asked the following three questions:

1. In the case of a facility jointly licensed for horse and dog racing, would the credit apply to the gross sum wagered on both horse and dog racing events?

2. If applicable only to horse racing events, is the statute a violation of constitutional guarantees of due process and equal protection of the law?

3. If unconstitutional when applied only to horse race wagers, would the provision be void or applicable to both horse and dog race wagers?

This office does not have the expertise to determine whether a single facility for both horse and dog racing is feasible or whether the Iowa State Racing Commission would license such a venture. However, for purposes of this opinion, we will assume both that a joint dog and horse facility is possible and that the Racing Commission would license such a facility.

The question whether the tax credit in S.F. §17 is applicable to wagers on dog racing at a facility also licensed for horse racing is one of statutory construction. The goal of any exercise in statutory construction is to ascertain the intent of the legislature and, to the extent possible, to effect that intent. This is done by construing the language employed by the legislature and not by conjecturing as to possible alternative language it could have employed. City of Dubuque v. Telegraph Herald, 297 N.W.2d 523, 527 (Iowa 1980); Neumeister v. City Development Bd., 291 N.W.2d 11, 14 (Iowa 1980).

The language used by the legislature follows in pertinent part:

> A tax credit of up to five percent of the gross sum wagered per year shall be granted to licensees licensed for horse races and paid into a special fund for the purpose of retiring the annual debt on the cost of construction of the licensed facility . . . . 70th General Assembly, 1984 Session, S.F. 2328 §17(2).

With respect to the statute's tax credit language, S.F. 2328 is ambiguous as to whether the credit applies to the gross sum wagered on both horse and dog racing events of a jointly licensed facility. Since the statute is ambiguous, a logical consideration in its interpretation would be the racing commissioner's annual report to the legislature concerning proposed legislation. That report was prepared pursuant to the statutory mandate to include in the State Racing Commission's annual report "any recommendations for legislation which the commission deems advisable." Iowa Code Supp. §99D.21 (1983). Thus, the Executive Secretary of the Commission sent a memorandum to the members of the legislature outlining the rationale for the commission's legislative package. With regard to this tax credit, that memorandum stated:

This change would benefit the horse racing licensee who cannot exist with a 6% pari-mutuel tax in a start-up situation. This fact has been documented in feasibility studies nationwide, as well as Iowa. New Hampshire is rebuilding a racetrack through Industrial Revenue Bonds ($20-30 million) and the legislature has set the state tax at 2% on multiple wagers and 1% on straight wagers. The state of New Jersey taxes the Meadowlands Racetrack in that new all-sports complex at the rate of 1/2%. The Penn. House and Senate have passed a bill and sent it to the Governor authorizing a reduction in pari-mutuel tax from 4.5% to 1.5%, and that state already has existing tracks in operation.

Since only 30 to 40% of the wagering on horses is multiple wagering and the capital investment is 4-5 times greater for horse racing than dog racing, a reduction in tax is absolutely necessary for horse racing in Iowa. A further increase in the total take-out would be counter-productive, taking too much money out of the bettor's pocket.

One of the main purposes for passing a pari-mutuel law in Iowa was to create a new industry. Due to the cost and labor involved in stabling, caring, feeding, training and breeding horses, the spin-off employment is much greater than surrounds dog racing. By directing the money from the tax credit to retirement of the debt for existing and new costs of construction of the racing facility, you are insuring and investing in a continuing growth of employment and industry in the state.

In conclusion, dog racing, due to low start-up costs and less money paid out for purses, can exist with a 6% pari-mutuel tax. If it is deemed necessary, the Commission may raise the takeout on multiple wagers. Horse racing cannot exist with a 6% pari-mutuel tax, but could create a much greater spin-off industry and greater impact on the economy.

It is apparent from reviewing the memorandum that it is facially consistent with the scope of the tax credit language of Senate File 2328. Therefore, since the commission's report

and the legislative action in §17 appear to be consistent, it can be presumed that the legislative intent in enacting §17 comports with the racing commission's report.

Because the extra costs associated with a horse track would be associated with the construction of a joint horse/dog track, and this credit is expressly tied to construction expenses, we believe that it would be applicable to any wager made pursuant to Iowa Code Supp. Ch. 99D (1983) at a track under the control of a non-profit corporation licensed to run horse races. However, the tax credit would not accrue to a different licensee authorized to run dog races only at a joint horse/dog facility.

Because we have concluded that the tax credit at issue would apply to receipts from wagering on both horse and dog racing conducted by a pari-mutuel licensee authorized by the racing commission to run both sorts of racing, we need not address the constitutionality of a statute limiting the credit to money received from wagering on horse races. However, we would note that both the United States Supreme Court and the Iowa Supreme Court have ruled that the legislature of a state has very broad discretion in creating classifications within a tax program. Therefore, as long as a classification is based on a rational basis and does not involve a suspect classification (race, religion, national origin), it will be upheld as constitutional. Moreover, any reasonable distinction the government makes for the classification will be deemed sufficient, Kahn v. Shevin, 416 U.S. 351, 355, 94 S.Ct. 1734, 1737, 40 L.Ed.2d 189 (1974); Motor Club of Iowa v. Dept. of Transportation, 265 N.W.2d 151, 154 (Iowa 1978). For these purposes, the equal protection clause of Iowa Constitution, art. I, §6, is to be construed to have identical scope and meaning as the Fourteenth Amendment to the United States Constitution. Dickinson v. Porter, 240 Iowa 393, 35 N.W.2d 66 (1948). The inherent differences between the costs of financing and operating a horse track and those costs applicable to a dog track would be sufficient to meet the minimal rational basis test. The tax credit at issue is clearly constitutional.

Because your first two questions have been answered in the affirmative, there is no reason to address your third question.

In summary, the tax credit created by Acts of the 70th General Assembly, 1984 Session, Senate File 2328, Section 17, would be applicable to the tax on all wagers made under the auspices of a license granted a single licensee for dog and horse races at the same facility. Any distinction between dog and horse racing in tax provisions arguably based upon policy or practical distinctions between such racing would be constitutional.

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:mjs

IOWA CONSUMER CREDIT CODE: Exemptions for charges authorized by the Iowa Higher Education Loan Authority. Iowa Code §§ 261A.23, .24, 537.2401, .2509, and .2510 (1983). I.H.E.L.A. loans to participating educational institutions are not subject to the consumer credit code because they do not meet the definition of a consumer loan. Assuming that loans made by participating institutions to their students are subject to the consumer credit code, said institution may nevertheless charge and receive any amount or rate of interest or compensation for these loans provided that said charges are pursuant to reasonable rules adopted by the I.H.E.L.A. (Brammer to Williams, 12/5/84) #84-12-1(L)

December 5, 1984

Robert Williams, Chair
Iowa Higher Education Loan Authority
Office of the Governor
State Capitol
L O C A L

Dear Mr. Williams:

You have requested an opinion from this office in regard to the relationship between Iowa Code chapters 261A and 537 (1983). Specifically you have asked whether I.H.E.L.A. loans and student loans made pursuant to chapter 261A are exempt from the interest rate and prepayment penalty restrictions of the Iowa Consumer Credit Code, Iowa Code chapter 537.

Pursuant to Iowa Code chapter 261A, the Iowa Higher Education Loan Authority has been created and is authorized to issue revenue bonds for the purpose of making loans to certain educational institutions who, in turn, make "education loans" to their students. It is questionable whether I.H.E.L.A. loans to educational institutions are subject to the Iowa Consumer Credit Code in the first instance because they do not meet the definition of a "consumer loan." Section 537.1301(14)(a)(2) provides that a "consumer loan is a loan in which all of the following are applicable:...the debtor is a person other than an organization." (Emphasis added.) An "organization" means "a corporation, government or governmental subdivision or agency, trust, estate, co-operative, or association." Iowa Code § 537.1301(29).

Assuming for the sake of this discussion, that education loans made by an institution to its students pursuant to an education loan program financed by I.H.E.L.A. are "consumer loans" as defined in the Consumer Credit Code, the question remains as to whether said loans are exempt from the interest rate and prepayment penalty restrictions of sections 537.2401, .2509 and .2510. The determination of this issue depends on the meaning and import of Iowa Code §§ 261A.23 and .24. The primary task involved in statutory construction is to determine the legislature's intent, and in doing so, one must give the language

used by the legislature its usual and ordinary meaning unless a contrary intent is evident. E.g., Mississippi Valley Savings and Loan Association v. L.A.D., Inc., 316 N.W.2d 673, 674 (Iowa 1982).

The pertinent statutes provide as follows:

> Institutions may borrow money from the authority, make education loans and take all other actions and do things necessary or convenient to consummate the transactions contemplated under this Chapter. It is lawful for the authority to establish, charge, contract for, and receive any amount or rate of interest or compensation with respect to authority loans and, subject to rules adopted by the authority, for participating institutions to charge, contract for, and receive any amount or rate of interest or compensation with respect to education loans.
>
> Sections 261A.1 to 261A.23 provide a complete, additional, and alternative method for the doing of the things authorized by the Chapter and the limitations imposed by this Chapter do not affect powers or rights conferred by other laws...

Iowa Code §§ 261A.23, .24. Under the plain meaning of section 261A.23, a participating institution may charge, contract for and receive any rate of interest with respect to education loans, provided it does so pursuant to rules adopted by the I.H.E.L.A. Said institution, therefore, would not be subject to the maximum finance charge limitations imposed by section 537.2401. The latter statute itself states that it does not prohibit a lender from charging a finance charge in excess of the stated amount "if authorized by other provisions of the law." It seems apparent to us that section 261A.23 is such an authorization.

In regard to prepayment penalties, your letter correctly acknowledges that these expenses are not permissable charges under sections 537.2509 and .2510. You suggest, however, that said penalties should be considered "compensation" within the meaning of section 261A.23 which would thereby allow institutions to contract for and receive prepayment charges notwithstanding the restrictions in the consumer credit code. Unfortunately, the legislature did not define the term "compensation" in chapter 261A. "The general rule of statutory construction in Iowa is that a statute must be construed in such a fashion that no part of it is rendered superfluous and it will not be presumed that a statute contains useless or meaningless words." Triplett v. Azordegan, 421 F.Supp. 998, 1002 (N.D. Iowa 1976). Pursuant to

this rule, the word "compensation" as used in section 261A.23, must be presumed to mean something other than "interest."

The American Heritage Dictionary defines "compensation" as including "something given or received as an equivalent or as reparation for a loss, service, or debt." As previously noted, section 261A.23 allows a participating institution to charge any amount or rate of compensation subject to rules adopted by the I.H.E.L.A. The authority might reasonably conclude that prepayment penalities are a form of compensation which may be charged by participating institutions but this decision must be effectuated through the rule-making process of Iowa Code chapter 17A. If such rules are promulgated, the I.H.E.L.A. must define prepayment penalties in such a way that they may reasonably be considered as compensation, i.e., charges for loss incurred by reason of repayment prior to maturity. The question of whether prepayment penalties fit the definition of "compensation," therefore, cannot be answered in the abstract but will depend on how the amount of the penalty relates to the loss incurred.

In summary, I.H.E.L.A. loans to educational institutions are not subject to the Iowa Consumer Credit Code. Assuming that loans made by such institutions to their students are subject to the I.C.C.C., these institutions may charge and receive any amount or rate of interest or compensation provided that these charges are pursuant to reasonable rules adopted by the Authority.

Sincerely,

Susan Barnes Brammer

SUSAN BARNES BRAMMER,
Assistant Attorney General

SB:jb

TAXATION: Property Tax; Property Acquisition By Farmer's Home Administration. 42 U.S.C. § 1490h, 7 C.F.R. §§ 1955.63, 1955.107, Iowa Code §§ 427.1(1), 445.37 (1983). The interaction of Iowa Code § 427.1(1) and 42 U.S.C. § 1490h requires Farmer's Home Administration to pay current taxes on property acquired by it through foreclosure proceedings. These provisions also require Farmer's Home Administration to satisfy any delinquent property tax liens that are outstanding against the property when it is acquired by foreclosure. If such current and delinquent taxes are not paid, they continue to constitute liens upon the property and the taxes are collectible by the tax sale procedure in Iowa Code ch. 446 (1983). (Nelson to Wibe, Cherokee County Attorney, 12/26/84) #84-12-12(L)

December 26, 1984

Mr. John A. Wibe
Cherokee County Attorney
P. O. Box 100
Cherokee, IA 51012

Dear Mr. Wibe:

You have requested an opinion of this office concerning the application of Iowa Code § 427.1(1983). The question posed is whether Iowa Code § 427.1 requires the abatement of property taxes on all real estate repossessed and acquired by Farmer's Home Administration (FmHA) including property taxes due and payable for any period prior to the actual repossession date.

The answer to your question is no. Section 427.1 would not mandate an abatement of delinquent taxes since FmHA must pay any delinquent property tax liens that are prior and superior to their liens in order to obtain clear title to the property.

There are various sections of the Iowa and United States Codes that affect the answer to this question. Iowa Code § 427.1 provides:

> 427.1 Exemptions
> The following classes of property shall not be taxed:
> 1. Federal and state property. The property of the United States and this state, including state university, university of science, and technology, and school lands. The exemption herein provided shall not include any real property subject to taxation under any federal statute applicable thereto, but such exemption shall extend to and

include all machinery and equipment owned exclusively by the United States or any corporate agency or instrumentality thereof without regard to the manner of the affixation of such machinery and equipment to the land or building upon or in which such property is located, until such time as the Congress of the United States shall expressly authorize the taxation of such machinery and equipment.

Congress has expressly permitted property subject to a lien and held by the FmHA to be subject to taxation:

1490h. Taxation of Farmers Home Administration-held property

All property subject to a lien held by the United States or the title to which is acquired or held by the Secretary under this subchapter other than property used for administrative purposes shall be subject to taxation by a State, Commonwealth, territory, possession, district, and local political subdivisions in the same manner and to the same extent as other property is taxed. Provided, that no tax shall be imposed or collected on or with respect to any instrument if the tax is based on-

(1) the value of any notes or mortgages or other lien instruments held by or transferred to the Secretary:

(2) any notes or lien instruments administered under this subchapter which are made, assigned, or held by a person otherwise liable for such tax: or

(3) the value of any property conveyed or transferred to the Secretary, whether as a tax on the instrument, the privilege of conveying or transferring, or the recordation thereof; nor shall the failure to pay or collect any such tax be a ground for refusal to record or file such instruments, or for failure to impart notice, or prevent the enforcement of its provisions in any State or Federal Court.

42 USC § 1940h.

The regulations that accompany this section of the U.S. Code are instructive. The regulations provide at 7 C.F.R. § 1955.63 e - f and § 1955.107:

§ 1955.63 * * *

(e) Payment of liens. (1) if real estate is acquired subject to a lien, the State Director will authorize the County Supervisor to pay installments that may include

advances made by the prior lienholder for taxes, if the property is taxable (see § 1955.63(f)), and insurance premiums.

(2) If the State Director determines that paying the lien in full would be in the best interest of the Government, he will obtain the advice of OGC with respect to the procedures for paying the lien in full and getting the mortgage released or assigned to the Government. The County Supervisor will obtain a receipt for payment of such items from the lienholder and send it to the Finance Office with the voucher.

(f) Taxes (1) Property acquired by FmHA is subject to taxation by State, Commonwealth, territory, district, and local political subdivisions in the same manner and to the same extent as other property, unless State law specifically exempts taxation of real estate owned by the Federal Government. However, taxes and assessments on RH inventory property may not be paid for any time prior to January 1, 1977. For taxes levied on such property prior to January 1, 1977, FmHA may pay such tax prorated from January 1, 1977, for the time the property was owned by FmHA.

(2) The county supervisor will notify the appropriate taxing authority in writing when title to real estate has been acquired by the Government, and that claims for taxes during the Government's ownership will be billed to FmHA at the county office address. If taxes become due and payable while the Government owns the property, and are not paid by a prior lienholder, the County Supervisor will pay taxes by using Standard Form 1034 in accordance with FmHA instruction 2024-P (available in any FmHA office).

(3) If both paragraphs (f)(1) and (f)(2) of this section apply (e.g., if the acquired property had secured both FO and RH loans) pay taxes as indicated in paragraph (f)(1) of this section.

§ 1955.107 Taxes

1955.107 Taxes

For property that is taxble while owned by FmHA (See §1955.63(f)), the County Supervisor will process Standard Form 1034 in accordance with FmHA Instruction 2024-P (available in any FmHA office) to pay such taxes as they become due and payable. Taxes will be prorated between the Government and the purchaser as of the date the title is conveyed in accordance with the general conditions of Form FmHA 465.10, "Invitation, Bid and Acceptance; Sale of Real

> Property by the United States." The purchaser will be responsible for paying all taxes due and payable after the title is conveyed. The County Supervisor will advise the taxing authority of the sale and the purchaser's name, and describe the property sold. Taxes will not be paid on property that is not taxable while owned by FmHA. Only assessments for property improvements due and payable as of the date property is sold will be paid for all types of inventory property.

The FmHA procedure manual directs payment of any delinquent tax liens on property acquired by the FmHA through foreclosure. The delinquencies are paid so that clear title can be obtained by the FmHa. See attached, FmHA Instruction 425.1, Real Estate Tax Servicing, IV, Sheet I, (7-18-73).

Unless there is statutory authority to the contrary, when a federal, state, local, county or municipal governmental entity acquires property, tax liens are merged into the tax exempt status of the governmental entity and extinguished. Op. Att'y Gen. #84-10-3; 1964 Op. Att'y. Gen. 766; 1972 Op. Att'y. Gen. 36; 1980 Op. Att'y. Gen. 579; State ex. rel. Peterson v. Maricopa County, 38 Ariz. 347, 300 P. 175 1931); Hoover v. Minidoka County, 50 Idaho 419, 298 P. 366, (1931); 85 CJS Taxation § 833 (1954).

The exemption contained in Iowa Code § 427.1(1983) is not unlimited. If a federal statute permits another governmental entity to levy and assess a tax, then the exempt status does not extend to the particular parcel of real property held by the federal government. The doctrine of merger is therefore not applicable to extinguish the current tax liability encumbering property acquired by a federal agency. See, 1982 Op. Att'y. Gen. 351.

The FmHA is subject to such a statute. 42 USC § 1490h. Section 1490h provides that while property is held by the FmHA, the property shall be subject to taxation.1 Section 1490h makes no distinction between the payment of current property taxes and delinquent property taxes. There is no question that while the FmHA holds the property in its inventory it is liable for current property taxes. The language of § 1490h is also clear in that the FmHA must also satisfy any tax delinquencies outstanding at the time the property is acquired by foreclosure.

While the regulations are silent as to the treatment of delinquent taxes, the FmHA procedure manual is not. The manual

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1 The property is subject to taxation if the taxes became due and owing after January 1, 1977. Prior to that time, property owned by the FmHA was exempt from taxation. See, Dawson v. Childs, 665 F.2d 705, 711 (5th Cir. 1982)

requires that the FmHA must have clear title to any property it holds in inventory. In order to have clear title, any property tax delinquencies must be satisifed before the cloud on the title is removed.

Property taxes become a lien upon real estate against all persons except the state. Iowa Code § 445.28 (1983). Real property taxes:

> become delinquent where the half of any taxes have not been paid before October 1 succeeding the levy, the amount thereof shall become delinquent from October 1 after due; and in case the second installment is not paid before April 1 succeeding its maturity, it shall become delinquent from April 1 after due. Iowa Code § 445.37 (1983).

In order to collect delinquent property taxes, the county treasurer offers for sale all lands on which taxes of any description for the preceding fiscal year or years are delinquent on the third Monday in June each year. Iowa Code § 446.7 (1983).

Since 42 USC § 1490h provides that all property, the title to which is acquired by the Secretary shall be subject to taxation in the same manner and to the same extent as other property is taxed, the FmHA cannot avoid payment of the delinquent tax liens because it is a tax exempt agency of the federal government.2 The doctrine of merger is equally inapplicable in this instance.

Cherokee County should expect payment from the FmHA for current taxes the FmHA owes on property held in its inventory and for any delinquent tax liens that are due against property held in FmHA's inventory. If the taxes are not paid, they remain liens upon the property subject to tax sale under Iowa Code Ch. 446.

Sincerely,

Elizabeth A. Nelson

Elizabeth A. Nelson
Assistant Attorney General

WP6

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2. This conclusion is consistent with the general procedure the FmHa has adopted in dealing with its Iowa customers. The confusion as to whether the FmHA owed delinquent property taxes to the various counties where it owns property stems in part from a memorandum issued by the Iowa Department of Revenue on December 15, 1983. The Department advised that property held by the FmHA was exempt. That memorandum has been replaced by another memorandum dated October 29, 1984 that is consistent with the conclusion reached by this opinion.

MUNICIPALITIES: Utility Boards. Authority. Iowa Code Chapter 388 (1983); Iowa Code §§ 28.25-.29, 384.80(6), 384.84, 384.89, 388.1(2), 388.4, and 388.5 (1983); 250 I.A.C. § 16.2(8). A utility board may participate in activities of a local non-profit development corporation but cannot provide financial contributions to the local development corporation. (Walding to Van Gerpen, State Representative, 12/20/84) #84-12-11(L)

December 20, 1984

The Honorable Harlan W. Van Gerpen
State Representative
1502 Grand Blvd.
Cedar Falls, Iowa 50613

Dear Representative Van Gerpen:

We are responding to your request for an opinion of the Attorney General regarding the authority of a municipal utility board. Specifically, you have asked:

1. Is it legal for a Board of Trustees of a municipal utility to participate in a non-profit corporation?

2. Is it legal for a Board of Trustees of a municipal utility to expend utility funds to support the non-profit corporation?

The issues presented concern whether the Cedar Falls Municipal Utilities Board of Trustees can participate in the Black Hawk County Economic Development Committee, a non-profit corporation sponsored by the local chambers of commerce which seeks to promote the economic health and growth of the region.

The operation of a city utility is governed by Iowa Code Chapter 388 (1983). A "utility board" is the board of trustees established to operate a city utility. Iowa Code § 388.1(2) (1983). In the operation of a city utility, a utility board "may exercise all powers of a city in relation to the city utility, city utilities, or combined utility system it administers. . . ." [Emphasis added] Iowa Code § 388.4 (1984). Thus, the authority of a utility board, while the board does possess the powers of a city, is limited to matters related to the operation of a city utility. Alternatively stated, a utility board is not free to venture into areas not germane to utility operations. Accordingly, the authority of a utility board to participate in a non-profit development corporation depends on whether the participation serves a public purpose which relates to the operation of a city utility. The legislature has specifically recognized local development corporations. See Iowa Code §§ 28.25 - 28.29. We believe that sufficient relationship between economic growth and utility operation could be shown to exist to justify non-financial participation by the utility in the programs of a local development corporation.

While the same demonstration must be made in the case of a contribution, an additional requirement must be satisfied for a utility board to contribute to a non-profit development corporation. All city utility monies are controlled by the utility board in a separate utility fund. Iowa Code § 388.5 (1983). The city utility fund consists of all utility-allocated tax revenues, operational income, revenues from the sale of utility property, investment income, and funds from other related sources. Id. Operational income, of course, would include all income derived from users of the system (i.e., ratepayers). A utility board is authorized to provide for the collection of rates to produce gross revenues sufficient to meet, at a minimum, the expenses of operation and maintenance of the city utility. Iowa Code § 384.84, as amended by 1983 Iowa Acts, Chapter 90, § 27. Rates are basically defined as ". . . charges for the use of or service provided by a city utility." § 384.80(6).

The argument presented in favor of contributing to the local development corporation is that, in the end, rates will be reduced because increased economic activity will mean a greater number of consumers and industries sharing in the costs of the system. For guidance on whether costs may be considered to be valid expenses of operation and maintenance, the utility could consider somewhat analagous rules of the Commerce Commission. Generally, the agency's rules permit a private utility to pass on to consumers the costs of services which are beneficial to the ratepayers (e.g., consumer protection and safety advertisement expenses). 250 I.A.C. § 16.2(8). Similarly, expenses incurred in advertising activities designed to improve load factor so that

consumers more efficiently use the system are permitted to be transferred to the consumers under the rules. Id. Conversely, the rules generally do not permit the transfer of expenses which do not serve the consumers' interests (e.g., good will, institutional advantage, or promotional advertising expenses). Id. We regard it as doubtful that expenditures to a local development corporation can be shown to be a cost of operation and maintenance of the utility system or that consumers can be required to pay for such expenditures as a charge for utility service.

This conclusion is further supported by the fact that the legislature has specifically provided that surplus funds beyond those needed to meet the municipal utility's obligations can be transferred to any other fund of the city under certain conditions, Iowa Code § 384.89 (1983), but has not authorized the use of surplus utility funds for other purposes. This express provision for the use of utility funds precludes implying authority for contributions of utility funds to other entities.

In summary, it is our opinion that a utility board may participate in activities of a local non-profit development corporation but cannot provide financial contributions to the local development corporation.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW/cjc

COUNTIES--PRISONERS: Board and Care Costs. Iowa Code §§ 356.30 as amended by S.F. 2269, Acts of the 70th G.A. 1983, 331.322(10), 331.658(2), 356.26, and 356.31 (1983). The statutory authorization in § 356.30 (1983) for a sheriff to charge a prisoner released on work release under § 356.26 (1983) for the cost of "board" allows the sheriff to charge the prisoner for lodging and other expenses. Such charges are subject to the restrictions imposed by §§ 356.30 and 356.31. (Hansen to Zenor, Clay County Attorney, 12/20/84) #84-12-10(L)

December 20, 1984

Michael L. Zenor
Clay County Attorney
201 East 5th Street
Spencer, Iowa 51301

Dear Mr. Zenor:

You have requested an opinion of the Attorney General concerning the costs for which a sheriff may charge a county jail prisoner under Iowa Code § 356.30 (1983). You pose the following question for our consideration:

> Whether the sheriff may, under § 356.30, Iowa Code, charge a prisoner released on work release under § 356.26 for any cost other than food such as lodging and laundry?

The answer to this question is that the term "board" in § 356.30 includes a reasonable charge for lodging.

Section 356.30 as amended by S.F. 2269, Acts of the 70th G.A. 1984 provides in relevant part:

> "Every prisoner gainfully employed and released pursuant to § 356.26 is liable for the cost of the prisoner's board in the jail as fixed by the County Board of Supervisors. The Sheriff shall charge the prisoner's account for the board and any meals provided in § 356.31 . . . . However, the charges for board and meals under this Section shall not exceed 50 percent of the wages or salaries of the prisoner, after deductions required by law . . . ." (emphasis supplied).

Section 356.30 is an exception to the general rule that the county shall pay for the cost of the board and care of the prisoners of the county jail. See Iowa Code §§ 331.322(10) and 331.658(2); Op.AttyGen. #83-11-7.

In the general rules governing payment of costs for board and care of prisoners, the term "board" in §§ 331.322(10) and 331.658(2) obviously refers to the costs incurred by the county in feeding, lodging, and clothing prisoners. This definition is supported by the common meaning given the term. Webster's Ninth New Collegiate Dictionary (1983) defines "board" as "to provide with regular meals and often also lodging." Therefore, the statutory authorization in § 356.30 to charge employed prisoners the cost of their "board" allows the sheriff to charge employed prisoners for the cost of their food, lodging, and clothing, subject to the limitations of §§ 356.30 and 356.31.

The distinction between "board" and "meals" that is made in § 356.30 merely reflects the legislative intent to prioritize charges incurred by prisoners. Section 356.31 provides that by court order wages of employed prisoners shall be disbursed, in the following order, for (1) the meals of the prisoner; (2) necessary travel expenses and other incidental expenses; (3) support of the prisoner's dependents; (4) payment of the prisoner's acknowledged obligations or judgments; and (5) the balance to the prisoner. For example, since under § 356.30 the charges for board and meals may not exceed fifty percent of the prisoner's net income, if the cost of meals amounted to fifty percent of the prisoner's net income, the prisoner could not be charged for lodging or any other cost of board and care.

Sincerely,

Steve Hansen

STEVEN K. HANSEN
Assistant Attorney General

SKH/cla

Department of Human Services; Custodians; Foster Care: Iowa Code Supplement Sections 232.2(10), 232.2(18), 600A.2(7), 600A.2(8) (1983). The Department of Human Services, as custodians for a child, has the authority to sign the consent forms necessary for the child to take part in school activities, get a drivers license and obtain certain types of medical care. (Phillips to Mayer, Assistant Clinton County Attorney, 12/20/84) #84-12-9(L)

December 20, 1984

Thomas R. Mayer
Assistant Clinton County Attorney
103 Courthouse
Clinton, IA 52732

Dear Mr. Mayer:

You have requested an opinion of the Attorney General concerning children in long term foster care whose parents are deceased. Specifically, you have requested an opinion concerning "who may sign documents for medical care, authorization for a learner's permit or driver's license and such other documents as are necessary for school" for a child who is without parent or guardian and in the custody of the Department of Human Services. You ask whether either a representative of the Department of Human Services, or the child's foster parents should sign such documents and authorizations. The answer to this query is that, generally, such documents and authorizations should be signed by the Commissioner of the Iowa Department of Human Services, or his or her designee. The appropriate party to sign a specific document or authorization will be dealt with in the remainder of this opinion.

In this opinion, it will be assumed that a guardian for the child has not been appointed under Iowa Code Ch. 633 (1983). It will also be assumed that the child in question is in the custody of the Department of Human Services pursuant to a court order

under Iowa Code Ch. 232 (1983), said order not having placed guardianship in that agency or its commissioner.

Under Iowa Code supplement § 232.2(10) (1983) the rights and duties of a custodian are:

a. To maintain or transfer to another the physical possession of that child.

b. To protect, train, and discipline that child.

c. To provide food, clothing, housing and medical care for that child.

d. To consent to emergency medical care, including surgery.

e. To sign a release of medical information to a health professional.

Under Iowa Code supplement § 232.2(18) (1983) the rights and duties of a guardian are:

a. To consent to marriage, enlistment in the armed forces of the United States, or medical, psychiatric, or surgical treatment.

b. To serve as a guardian ad litem . . .

c. To serve as custodian unless another person has been appointed as custodian.

d. To make periodic visitations . . .

e. To consent to adoption and make any other decision that the parents could have made when the parent child relationship existed.

That section defines a guardian to be:

> . . . a person who is not the parent of a child, but who has been appointed by a court or juvenile court having jurisdiction over the child, to make important decisions which have a permanent effect on the life and development of that child. A guardian may be a court or a juvenile court.

These sections, when read in conjunction with one another, suggest the following answers to your specific inquiries:

The Commissioner of the Department of Human Services, or the Commissioner's designee, should sign such documents as are necessary for the placement and maintenance of the child in school. Iowa Code supplement § 232.2(10)(b) (1983) states the custodian is responsible for the training of the child. This language has been construed by our office to grant the Department of Human Services, as custodian of a child, the authority to consent to the child's participation in school and extracurricular activities. 1978 Op.Att'yGen. 855 (construing Iowa Code § 600A.2 (8) (1977)). We have also construed this language to grant the Department, as custodian, the authority to consent to the placing of a child in a special education program. 1978 Op.Att'yGen. 634. In the situation described in your letter, where there are no parents or guardian, the Commissioner of the Department, or his or her designee, should sign all important school documents.

The language placing the custodian in charge of a child's "training" has also been interpreted by this office to grant the custodian the authority to consent to the child's obtaining an operator's license or instructor's permit. 1978 Op.Att'yGen. 855, 856 (interpreting § 600A.2(8) (1977)). Therefore, in the situation described by you, the Commissioner or the Commissioner's designee should sign the license or permit documents.

The Code delineates fairly explicitly the responsibilities of the custodian and guardian with regard to obtaining medical care for the child. The custodian is charged with "providing medical care". Iowa Code supplement § 232.2(10)(C) (1983). However, where some form of consent is required, he or she may consent only to the release of the child's records and to emergency medical care. Iowa Code supplement §§ 232.2(10)(d) and (g) (1983). Iowa Code supplement §§ 232.2(10)(d) & (g) (1983). The guardian must consent to all medical and psychiatric treatment. Iowa Code Supplement § 232.2(18)(a) (1983). The guardian is also responsible for assuring that the child has had the immunizations necessary for school. Iowa Code § 139.9(1) (1983).

The statutes described above indicate the following with regard to the situation described by you:

The Department of Human Services is charged with providing medical care for a child in its custody. It may therefore arrange for the child to be regularly examined and treated by the appropriate health care professionals. It may also administer any health care that is normally administered by the parents. This latter duty may be delegated to the foster parents.

A court order must be obtained prior to the child undergoing any form of psychiatric, medical or surgical treatment, and prior to the child receiving his or her immunizations[1]. The Department may forego such an order only in emergency situations. Where an emergency situation arises, and a representative of the Department may not timely be contacted, the situation must be treated as one where the custodian is unavailable.

Sincerely,

Charles K. Phillips

Charles K. Phillips
Assistant Attorney General

CKP/kap20

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[1]Several options are available with regard to expediting the obtainment of such an order. Department officials may in conjunction with the local county attorney's office, develop a form for applying for such orders. Such a standardized application form could be developed by the Department for statewide use. In addition, when the Department initially takes custody of a child who does not have a guardian, it could obtain from the juvenile court a general order allowing it to obtain regular medical care for the child without further recourse to the Court.

SCHOOLS: Merged Area Schools: Transfer of Funds. Iowa Code Chs. 24 and 280A, Iowa Code § 291.13 (1983). An area school may set aside funds for a particular purpose to the extent allowed by the local budget law. Funds may not be transferred from the general fund to the schoolhouse fund by the area school board of directors or the electorate. (Fleming to Johnson, Auditor of State, 12/1/83) #83-12-1(L)

December 1, 1983

Richard D. Johnson, CPA
Auditor of State
L O C A L

Dear Mr. Johnson:

You have asked for our opinion on issues concerning merged area schools as follows:

1. May the board of directors of a merged area school include within the school's general fund budget for each year an amount which is intended to be set aside for the purchase of equipment in order to avoid a large budget asking in any one year in the future when expensive equipment must be purchased?

2. May the board of directors or the electorate of a merged area school authorize a transfer of funds raised as indicated in (1) above, or surplus funds, from the general fund to the schoolhouse fund to set aside amounts for the purchase of equipment in a future year?

In our view, the board may set aside funds for a particular purpose to the extent allowed by the accounting system established pursuant to Iowa Code § 280A.25(10). (The state

board of public instruction is authorized to prescribe a uniform system of accounting for area schools.) In response to the second question, it is our opinion that funds may not be transferred from the general fund to the schoolhouse fund.

The General Assembly authorized the creation of the area vocational schools and community colleges by enacting 1965 Iowa Acts Ch. 247, codified as Iowa Code Ch. 280A (1983). Area schools are governed by elected boards of directors, Iowa Code § 280A.11, but are supervised to some extent by the State Board of Public Instruction, Iowa Code § 280A.25. State appropriations for the area schools are channeled through the state board, but the area school is a school corporation. Iowa Code § 280A.16. An area school is authorized to impose local property taxes under Iowa Code § 280A.7. In addition, the voters of the merged area may authorize an additional property levy for capital purposes, called the "voted tax." Iowa Code § 280A.22.1(b). The electors of the district may also authorize the issuance of bonds to finance acquisition of sites and the construction and equipping of buildings. Iowa Code §§ 280A.19, 20 and 21. Other funds are received by area schools from sources listed in Iowa Code § 280A.18. For a discussion of the organization and operation of area schools see Stanley v. Southwestern Com. Col. Merged Area, 184 N.W.2d 29 (Iowa 1971).

Under the accounting procedures prescribed by the State Board, area schools may allocate funds for a particular purpose. Area school boards, by statute, are vested with broad power to operate area schools, but those powers are subject to limitations including the local budget law. Iowa Code Ch. 24. In short, within the parameters of the operation of the budget law, an area school may set aside funds for the purchase of equipment.

The second question presents a different problem. The funds of area schools are dispersed under the provision of Iowa Code § 291.13. That section provides that schoolhouse funds and general funds must be separate. The electors of a local school district may vote to direct the transfer of any surplus in the schoolhouse fund to the general fund, Iowa Code § 278.1(5) (1983), but do not have power to direct the transfer of general funds to the schoolhouse fund. See 1980 Op.Att'yGen. 867. In contrast, the electors of a merged area do not have power under Ch. 280A to direct the transfer of funds. In our opinion neither the board of directors or the electorate of a merged area school may authorize a transfer of funds to the schoolhouse fund from the general fund.

We note that the question was raised in connection with the concern for accumulating funds to purchase computer equipment. The area school Financial Accounting Manual provides that furniture, machinery and equipment (account number 710) may be financed from the general fund, the schoolhouse fund, the voted tax

fund, or auxiliary fund. Thus, there seems to be no need to transfer funds inasmuch as funds from any of the sources could be used to pay for computer equipment.

In summary, within the limits of the budget law, an area school may set aside funds for a particular purpose. Funds may not be transferred from the general fund to the schoolhouse fund.

Sincerely,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

GENERAL SERVICES: Revolving Fund; Authority of Department of General Services. Iowa Code § 18.3(5); Iowa Code § 18.132; Iowa Code § 18.8; Iowa Code § 18.135(2); Iowa Code § 18.9(1). It cannot be concluded as a matter of law that the department of general services may not bill state agency users of telephone communications for an expenditure for a communications system study without the consent of the user agencies if the amount of the expenditure itself is reasonable. (Nassif to Gallagher, State Senator, 12/8/83) #83-12-4(L)

December 8, 1983

James J. Gallagher
State Senator
4710 Spring Creek
Jesup, Iowa 50648

Dear Mr. Gallagher:

You have requested the opinion of the attorney general as to whether the Department of General Services (Department) has statutory authority to bill other state agencies for a study of the state telephone communications system without the agreement or approval of such agencies. It is our opinion that, as a matter of law, the Department is not constrained in the abstract from billing state agency users of telephone communications for expenditures for a study of the state and capitol complex telephone system. However, we also conclude that there is a substantive limit with respect to the reasonableness of such an expenditure. Thus, the Department has authority to make such an expenditure and bill it to user agencies only so long as the amount of the expenditure itself is not unreasonable.

"Reasonableness" is the test for deferral to formal agency rulemaking. Hiserote Homes, Inc. v. Riedemann, 277 N.W.2d 911 (Iowa 1979). A "reasonableness" standard is also appropriate in the analagous circumstances of the question you pose. This "reasonableness" test is whether "a rational agency could

conclude that the agency action is within its delegated authority." Id. at 913.

To determine if the Department has authority to bill a communications study, it must first have been delegated the authority to conduct such a study. There are several statutory provisions which authorize the director of general services (director) to conduct such a study. First, Iowa Code § 18.3(5) (1983) states that the duties of the director shall include "administering sections 18.132 to 18.143." Sections 132 to 143 establish a state communications system. Section 18.132 states that "It is the intent of the general assembly in providing for state communications that communications of state government be coordinated to effect maximum practical consolidation and joint use of communication services." The director thus has a broad statutory mandate to administer the state communication system within the context of the intent of the legislature. The legislature's emphasis on coordination, consolidation, and joint use suggests legislative recognition of the need for planning and study and generally supports the authority of the director to make administrative expenditures for communication studies. Second, Under Iowa Code § 18.12(6), the director has the duty to make periodic verified reports which "show in detail: . . . .

. . .

> d. Any recommendations as to methods which would tend to render the public service more efficient and economical."

This statutory mandate supports the director's authority to make a communications system study if a study could provide the basis for a recommendation of more efficient and economical public service. Third, Iowa Code § 18.8 provides that "the director shall provide necessary telephone . . . services for the state buildings and grounds located at the seat of government." A communications system study could provide the director with information as to what telephone services are necessary. Fourth, Iowa Code § 18.135(2) provides that:

> Communication activities of state agencies that affect the overall operation of state communications fall within the administrative jurisdiction of the director for review and action upon request from a state agency.

Under § 18.135(2) the director has authority to review and take action regarding communication activities that have a broad impact on overall operations when so requested by a state agency. Such authority may provide a basis for the director to conduct a

communications study. However, such authority would be contingent upon a state agency's request for review and action. If review and action were not requested by a state agency, then the study would not be authorized under § 18.135(2). This is not to say that a study would not be alternatively authorized under one or all of the other statutes discussed above.

Each of these statutory provisions extend to the director of general services certain duties, responsibilities and powers to administer the state capitol complex and State of Iowa communication systems. Each provides a basis for a reasonable person to accept that the director of general services has been delegated authority to expend monies for a communications study. Thus, as a matter of law, we cannot conclude that the director did not have authority to make an expenditure for a study. However, the authority to make an expenditure may not encompass the authority to make any expenditure. That is, the amount of the expenditure must also be reasonable. Thus, we conclude that a rational agency could conclude that the Department has statutory authority to expend monies on a communications study, but only so long as the expenditure itself is reasonable in amount.

The next consideration is whether the Department may bill the costs of a reasonable expenditure for such study to all user state agencies without their consent or agreement. Iowa Code § 18.9(1) provides:

> "the director shall render a statement to each state agency for the actual cost of items purchased through the department . . . The monthly statement shall also include a fair proportion of the cost of administration of the department of general services during the month. (Emphasis supplied)

If an expenditure for a state communications system study is a cost of administration, then the director may bill a fair proportion of the cost for such study to each state agency. It is our opinion that a communications study would be a cost of administration. Since as a matter of law we cannot say that the director does not have authority to conduct a study, the costs of such a study would necessarily be costs of administration. That is, since by conducting the study the director discharges the duties of his office, then the costs of the study would be costs of administration.

Note that this opinion only addresses the question of the statutory authority to proportionally bill a telephone study to

user agencies. It does not address other possible issues including the fairness of the proportional assessments. In this regard, Section 18.9(1) further provides that: "the portion of administrative costs shall be determined by the director subject to review by the executive council upon complaint from any state agency adversely affected."

Sincerely,

William T. Nassif

WILLIAM T. NASSIF
Assistant Attorney General

WTN/cjc